



THE LAW OF ARMED CONFLICT: PROBLEMS AND PROSPECTS

Chatham House, 18-19 April 2005

Transcripts and summaries of presentations and discussions

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April 18

Opening Remarks: Elizabeth Wilmshurst, International Law Programme at Chatham House

Dr François Bugnion, Director for International Law and Cooperation within the Movement, ICRC

Elizabeth Wilmshurst

The conference was sponsored by the British Red Cross, the ICRC and the Lauterpacht Research Centre for International Law.

The purpose of the conference could be formulated in either of two ways: to launch the ICRC study on Customary International Humanitarian Law and thereby to discuss topical issues of international humanitarian law; or to discuss issues of international humanitarian law and thereby launch the ICRC study.

The Chatham House Rule would apply only to the sessions following each of the speakers' presentations; the speakers' presentations themselves were not subject to the Rule and remarks were therefore attributable to the speakers.

Dr Francois Bugnion

The study reaches back to the very roots of international humanitarian law: customary international law. Indeed, international humanitarian law started as a body of customary rules and remained for centuries essentially a set of customary rules which armies respected on the field of battle.

All civilizations have developed rules limiting violence in war since limiting violence is the very essence of civilization, and we can trace such rules as far back as we can go in human history. Up till the middle of the nineteenth century, these rules were based exclusively on tradition and custom.

- They were respected because they reflected the requirements of military honour, embodied in chivalry codes which existed in various parts of the world;
- they were respected because they had been recognized for generations;
- they were respected because they were deemed necessary to prevent a drift towards unlimited violence in war; and
- they were respected because it was considered that they were based on religious tenets and reflected the orders of the divinity.

Such customary rules have existed for centuries. By comparison, the codification of the law of armed conflict is a fairly recent process, which started in the middle of the nineteenth century.

While international humanitarian law is now largely codified, the relevance of custom should not be overlooked.

Two main reasons may be cited:

- ❖ First, codification often means agreeing on a minimum common denominator, so that the actual content of treaty-based rules often lags behind the needs for protection generated by armed conflicts; this is particularly the case of the treaty-based rules applicable to non-international armed conflicts.
- ❖ Secondly, while all States today are bound by the 1949 Geneva Conventions, this is not yet the case for other treaties, starting with the 1977 Additional Protocols to the Geneva Conventions. While treaties, as a rule, only create obligations for the States that have acceded to them, custom, by definition, applies to all States.

Why did the ICRC undertake this study ?

Article 5 of the Statutes of the International Red Cross and Red Crescent Movement requests the ICRC "to work for the understanding and dissemination of international humanitarian law applicable in armed conflicts..."

Obviously, this study is intended to contribute to the understanding, clarification and dissemination of international humanitarian law.

Furthermore, the 26th International Conference of the Red Cross and Red Crescent, held in Geneva in December 1995, entrusted the ICRC with a specific mandate:

"(...) prepare, with the assistance of experts in international humanitarian law representing various geographical regions and different legal systems, and in consultation with experts from governments and international organizations, a report on customary rules of international humanitarian law applicable in international and non-international armed conflicts, and to circulate the report to States and competent international bodies."

How has the study been undertaken? Prior to answering this question, it may be necessary to recall what is international customary law.

Article 38 of the Statute of the International Court of Justice provides that

"The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
- (b) international custom, as evidence of a general practice accepted as law;
- (c) [...]."

Customary law therefore results from the convergence of two elements:

- a general practice : that States generally adopt the same attitude when they are confronted with similar situations; according to the International Court of Justice, this practice must be "extensive" and "virtually uniform";
- a legal opinion : it is not enough for States to behave in a generally uniform pattern; it must be demonstrated that they do so because they consider that they are bound to do so :
 "Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule requiring it. [...] The States concerned must therefore feel that they are conforming to what amounts to a legal obligation" declared the International Court of Justice in its judgment of 20 February 1969 in the North Sea Continental Shelf Cases.

How to determine that a given rule is customary? What evidence leads to the conclusion that a given rule is customary? All manifestations of State practice and legal opinion are relevant for the formation and determination of International Custom, in particular:

- military manuals,

- national legislation,
- official statements (protests, declarations, "*prises de position*"),
- positions adopted by States in international conferences, e. g. unanimity in adopting some provisions, or the prohibition of reservations,
- official reports on battlefield behaviour,
- case law : decisions of national courts
- case law : decisions of international courts

Gathering this practice from all over the world was a major challenge and a huge research undertaking for which the ICRC benefited from the contributions of more than 100 academic and government experts.

The authors relied on forty-seven country reports, reflecting and analyzing the practice of as many States, including the five permanent members of the Security Council and other countries involved in armed conflicts.

The practice of some forty recent armed conflicts was examined on the basis of ICRC archives.

The military manuals and national legislation of countries not covered by country reports on State practice were also collected and analyzed.

Six thematic groups of experts focused on essential issues:

- the principle of distinction,
- specifically protected persons and objects,
- methods of warfare,
- weapons,
- treatment of civilians and persons *hors de combat*, and
- implementation.

In their assessment, the authors of the study were assisted by a Steering Committee of 12 eminent law professors of international repute.

They consulted at the outset and before finalizing the study with an additional 35 governmental and academic experts from all parts of the world.

This complex process explains why the study has taken almost ten years to complete.

The result is in front of you [*Customary International Humanitarian Law (CUP, 2005)* by Jean-Marie Henckaerts and Louise Doswald-Beck]: it consists of two volumes:

- ❖ volume I : some 650 pages, indicating the methodology used and 161 rules with commentaries; explaining the content and scope of the rules and why they are considered customary;
- ❖ volume II : more than 4400 pages of documents presenting the evidence of State practice from all geographic regions of the world.

The footnotes of volume I guide the user of the study to the documents quoted in volume II.

What is the position of the ICRC concerning this study?

Obviously, this study is first and foremost an academic work carried out according to the principles of scientific research; it reflects the authors' view of the present state of customary international humanitarian law, and not what they would like or what the ICRC would like this the law to be; in other words, the authors refrained from wishful thinking and the ICRC respected the academic freedom of the authors and experts.

We believe that this report is an accurate photograph of contemporary customary international humanitarian law. Therefore, the ICRC will definitely refer to it and use it as guidance in its future work to provide protection and assistance to victims of armed conflicts.

We also believe that this study should form the basis for a rich discussion on the implementation, clarification and possible development of the law.

The ICRC's position was summarized in Dr Kellenberger's foreword:

"The ICRC believes that the study does indeed present an accurate assessment of the current state of customary international humanitarian law.

It will therefore duly take the outcome of this study into account in its daily work, while being aware that the formation of customary international law is an ongoing process.

The study should also serve as a basis for discussion with respect to the implementation, clarification and development of humanitarian law."

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Session 1: The ICRC Customary Law Study: An Assessment

Chairman: **Elizabeth Wilmshurst**, Chatham House

Speakers: **Jean-Marie Henckaerts**, Legal Adviser, ICRC

Daniel Bethlehem QC, Director, Lauterpacht Research Centre for International Law

Professor Maurice Mendelson QC, Blackstone Chambers

Jean-Marie Henckaerts

The purpose of the study on customary international humanitarian law was to overcome some of the problems related to the application of international humanitarian treaty law. Treaty law is well developed and covers many aspects of warfare, affording protection to a range of persons during wartime and limiting permissible means and methods of warfare. The Geneva Conventions and their Additional Protocols provide an extensive regime for the protection of persons not or no longer participating directly in hostilities. The regulation of means and methods of warfare in treaty law goes back to the 1868 St. Petersburg Declaration, the 1899 and 1907 Hague Regulations and the 1925 Geneva Gas Protocol and has most recently been addressed in the 1972 Biological Weapons Convention, the 1977 Additional Protocols, the 1980 Convention on Certain Conventional Weapons and its five Protocols, the 1993 Chemical Weapons Convention and the 1997 Ottawa Convention on the Prohibition of Anti-personnel Mines. The protection of cultural property in the event of armed conflict is regulated in detail in the 1954 Hague Convention and its two Protocols. The 1998 Statute of the International Criminal Court contains, *inter alia*, a list of war crimes subject to the jurisdiction of the Court. There are, however, two serious impediments to the application of these treaties in current armed conflicts which explain why a study on customary international humanitarian law is necessary and useful. *First*, treaties apply only to the States that have ratified them. This means that different treaties of international humanitarian law apply in different armed conflicts depending on which treaties the States involved have ratified. While the four Geneva Conventions of 1949 have been universally ratified, the same is not true for other treaties of humanitarian law, for example the Additional Protocols. Even though Additional Protocol I has been ratified by more than 160 States, its efficacy today is limited because several States that have been involved in international armed conflicts are not party to it. Similarly, while nearly 160 States have ratified Additional Protocol II, several States in which non-international armed conflicts are taking place have not done so. In these non-international armed conflicts, common Article 3 of the four Geneva Conventions often remains the only applicable humanitarian treaty provision. The first purpose of the study was therefore to determine which rules of international humanitarian law are part of customary international law and therefore applicable to all parties to a conflict, regardless of whether or not they have ratified the treaties containing the same or similar rules.

Second, humanitarian treaty law does not regulate in sufficient detail a large proportion of today's armed conflicts, that is non-international armed conflicts, because these conflicts are subject to far fewer treaty rules than are international conflicts. Only a limited number of treaties apply to non-

international armed conflicts. The second purpose of the study was therefore to determine whether customary international law regulates non-international armed conflict in more detail than does treaty law and if so, to what extent.

Summary of Findings

The great majority of the provisions of the Geneva Conventions, including common Article 3, are considered to be part of customary international law. Furthermore, given that there are now 192 parties to the Geneva Conventions, they are binding on nearly all States as a matter of treaty law. Therefore, the customary nature of the provisions of the Conventions was not the subject as such of the study. Rather, the study focused on issues regulated by treaties that have not been universally ratified, in particular the Additional Protocols, the Hague Convention for the Protection of Cultural Property and a number of specific conventions regulating the use of weapons.

The description of rules of customary international law does not seek to explain why these rules were found to be customary, nor does it present the practice on the basis of which this conclusion was reached. The explanation of why a rule is considered customary can be found in Volume I of the study, while the corresponding practice can be found in Volume II.

International armed conflicts Additional Protocol I codified pre-existing rules of customary international law but also laid the foundation for the formation of new customary rules. The practice collected in the framework of the study bears witness to the profound impact of Additional Protocol I on the practice of States, not only in international but also in non-international armed conflicts. In particular, the study found that the basic principles of Additional Protocol I have been very widely accepted, more widely than the ratification record of Additional Protocol I would suggest.

Even though the study did not seek to determine the customary nature of specific treaty provisions, in the end it became clear that there are many customary rules which are identical or similar to those found in treaty law. Examples of rules found to be customary and which have corresponding provisions in Additional Protocol I include: the principle of distinction between civilians and combatants and between civilian objects and military objectives; the prohibition of indiscriminate attacks; the principle of proportionality in attack; the obligation to take feasible precautions in attack and against the effects of attack; the obligation to respect and protect medical and religious personnel, medical units and transports, humanitarian relief personnel and objects, and civilian journalists; the obligation to protect medical duties; the prohibition of attacks on non-defended localities and demilitarized zones; the obligation to provide quarter and to safeguard an enemy hors de combat; the prohibition of starvation; the prohibition of attacks on objects indispensable to the survival of the civilian population; the prohibition of improper use of emblems and perfidy; the obligation to respect the fundamental guarantees of civilians and persons hors de combat; the obligation to account for missing persons; and the specific protections afforded to women and children.

Non-international armed conflicts

Over the last few decades, there has been a considerable amount of practice insisting on the protection of international humanitarian law in this type of conflicts. This body of practice has had a significant influence on the formation of customary law applicable in non-international armed conflicts. Like Additional Protocol I, Additional Protocol II has had a far-reaching effect on this practice and, as a result, many of its provisions are now considered to be part of customary international law. Examples of rules found to be customary and which have corresponding provisions in Additional Protocol II include: the prohibition of attacks on civilians; the obligation to respect and protect medical and religious personnel, medical units and transports; the obligation to protect medical duties; the prohibition

of starvation; the prohibition of attacks on objects indispensable to the survival of the civilian population; the obligation to respect the fundamental guarantees of civilians and persons hors de combat; the obligation to search for and respect and protect the wounded, sick and shipwrecked; the obligation to search for and protect the dead; the obligation to protect persons deprived of their liberty; the prohibition of forced movement of civilians; and the specific protections afforded to women and children. However, the most significant contribution of customary international humanitarian law to the regulation of internal armed conflicts is that it goes beyond the provisions of Additional Protocol II. Indeed, practice has created a substantial number of customary rules that are more detailed than the often rudimentary provisions in Additional Protocol II and has thus filled important gaps in the regulation of internal conflicts.

For example, Additional Protocol II contains only a rudimentary regulation of the conduct of hostilities. Article 13 provides that “the civilian population as such, as well as individual civilians, shall not be the object of attack ... unless and for such time as they take a direct part in hostilities”. Unlike Additional Protocol I, Additional Protocol II does not contain specific rules and definitions with respect to the principles of distinction and proportionality.

The gaps in the regulation of the conduct of hostilities in Additional Protocol II have, however, largely been filled through State practice, which has led to the creation of rules parallel to those in Additional Protocol I, but applicable as customary law to non-international armed conflicts. This covers the basic principles on the conduct of hostilities and includes rules on specifically protected persons and objects and specific methods of warfare.

Similarly, Additional Protocol II contains only a very general provision on humanitarian relief for civilian populations in need. Article 18(2) provides that “if the civilian population is suffering undue hardship owing to a lack of the supplies essential for its survival ... relief actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken”. Unlike Additional Protocol I, Additional Protocol II does not contain specific provisions requiring respect for and protection of humanitarian relief personnel and objects and obliging parties to the conflict to allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need and to ensure the freedom of movement of authorized humanitarian relief personnel, although it can be argued that such requirements are implicit in Article 18(2) of the Protocol. These requirements have crystallized, however, into customary international law applicable in both international and non-international armed conflicts as a result of widespread, representative and virtually uniform practice to that effect. In this respect it should be noted that while both Additional Protocols I and II require the consent of the parties concerned for relief actions to take place, most of the practice collected does not mention this requirement. It is nonetheless self-evident that a humanitarian organization cannot operate without the consent of the party concerned. However, such consent must not be refused on arbitrary grounds. If it is established that a civilian population is threatened with starvation and a humanitarian organization which provides relief on an impartial and non-discriminatory basis is able to remedy the situation, a party is obliged to give consent. While consent may not be withheld for arbitrary reasons, practice recognizes that the party concerned may exercise control over the relief action and that humanitarian relief personnel must respect domestic law on access to territory and security requirements in force.

Issues requiring further clarification

The study also revealed a number of areas where practice is not clear. For example, while the terms “combatants” and “civilians” are clearly defined in international armed conflicts, in non-international armed conflicts practice is

ambiguous as to whether, for purposes of the conduct of hostilities, members of armed opposition groups are considered members of armed forces or civilians. In particular, it is not clear whether members of armed opposition groups are civilians who lose their protection from attack when directly participating in hostilities or whether members of such groups are liable to attack as such. This lack of clarity is also reflected in treaty law. Additional Protocol II, for example, does not contain a definition of civilians or of the civilian population even though these terms are used in several provisions. Subsequent treaties, applicable in non-international armed conflicts, similarly use the terms civilians and civilian population without defining them.

A related area of uncertainty affecting the regulation of both international and non-international armed conflicts is the absence of a precise definition of the term "direct participation in hostilities". Loss of protection against attack is clear and uncontested when a civilian uses weapons or other means to commit acts of violence against human or material enemy forces. But there is also considerable practice which gives little or no guidance on the interpretation of the term "direct participation", stating, for example, that an assessment has to be made on a case-by-case basis or simply repeating the general rule that direct participation in hostilities causes civilians to lose protection against attack. Related to this issue is the question of how to qualify a person in case of doubt. Because of these uncertainties, the ICRC is seeking to clarify the notion of direct participation by means of a series of expert meetings that began in 2003.

Another issue still open to question is the exact scope and application of the principle of proportionality in attack. While the study revealed widespread support for this principle, it does not provide more clarification than that contained in treaty law as to how to balance military advantage against incidental civilian losses.

Selected issues on the conduct of hostilities

Additional Protocols I and II introduced a new rule prohibiting attacks on works and installations containing dangerous forces, even where these objects are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population.⁶⁸ While it is not clear whether these specific rules have become part of customary law, practice shows that States are conscious of the high risk of severe incidental losses which can result from attacks against such works and installations when they constitute military objectives. Consequently, they recognize that in any armed conflict particular care must be taken in case of attack in order to avoid the release of dangerous forces and consequent severe losses among the civilian population, and this requirement was found to be part of customary international law applicable in any armed conflict.

Another new rule introduced in Additional Protocol I is the prohibition of the use of methods or means of warfare that are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment. Since the adoption of Additional Protocol I, this prohibition has received such extensive support in State practice that it has crystallized into customary law, even though some States have persistently maintained that the rule does not apply to nuclear weapons and that they may, therefore, not be bound by it in respect of nuclear weapons. There are also issues that are not as such addressed in the Additional Protocols. For example, the Additional Protocols do not contain any specific provision concerning the protection of personnel and objects involved in a peacekeeping mission. In practice, however, such personnel and objects were given protection against attack equivalent to that of civilians and civilian objects respectively. As a result, a rule prohibiting attacks against personnel and objects involved in a peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians and civilian objects under international humanitarian law, developed in State practice and was included in the Statute of the International Criminal Court. It is now part of customary

international law applicable in any type of armed conflict. A number of issues related to the conduct of hostilities are regulated by the Hague Regulations. These regulations have long been considered customary in international armed conflict. Some of their rules, however, are now also accepted as customary in non-international armed conflict. For example, the long-standing rules of customary international law that prohibit (1) destruction or seizure of the property of an adversary, unless required by imperative military necessity, and (2) pillage apply equally in non-international armed conflicts. Pillage is the forcible taking of private property from the enemy's subjects for private or personal use. Both prohibitions do not affect the customary practice of seizing as war booty military equipment belonging to an adverse party.

Practice reveals two strains of law that protect cultural property. A first strain dates back to the Hague Regulations and requires that special care be taken in military operations to avoid damage to buildings dedicated to religion, art, science, education or charitable purposes and historic monuments, unless they are military objectives. It also prohibits seizure of or destruction or wilful damage to such buildings and monuments. While these rules have long been considered customary in international armed conflicts, they are now also accepted as customary in non-international armed conflicts.

A second strain is based on the specific provisions of the 1954 Hague Convention for the Protection of Cultural Property, which protects "property of great importance to the cultural heritage of every people" and introduces a specific distinctive sign to identify such property. Customary law today requires that such objects not be attacked nor used for purposes which are likely to expose them to destruction or damage, unless imperatively required by military necessity. It also prohibits any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, such property. These prohibitions correspond to provisions set forth in the Hague Convention and are evidence of the influence the Convention has had on State practice concerning the protection of important cultural property.

Weapons

The general principles prohibiting the use of weapons that cause superfluous injury or unnecessary suffering and weapons that are by nature indiscriminate were found to be customary in any armed conflict. In addition, and largely on the basis of these principles, State practice has prohibited the use (or certain types of use) of a number of specific weapons under customary international law: poison or poisoned weapons; biological weapons; chemical weapons; riot control agents as a method of warfare; herbicides as a method of warfare; bullets which expand or flatten easily in the human body; anti-personnel use of bullets which explode within the human body; weapons the primary effect of which is to injure by fragments which are not detectable by X-rays in the human body; booby-traps which are in any way attached to or associated with objects or persons entitled to special protection under international humanitarian law or objects that are likely to attract civilians; and laser weapons that are specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision. Some weapons which are not prohibited as such by customary law are nevertheless subject to restrictions. This is the case, for example, for landmines and incendiary weapons.

Particular care must be taken to minimize the indiscriminate effects of landmines. This includes, for example, the principle that a party to the conflict using landmines must record their placement, as far as possible. Also, at the end of active hostilities, a party to the conflict which has used landmines must remove or otherwise render them harmless to civilians, or facilitate their removal. With over 140 ratifications of the Ottawa Convention, and others on the way, the majority of States are treaty-bound no longer to use, produce, stockpile and transfer anti-personnel

landmines. While this prohibition is not currently part of customary international law because of significant contrary practice of States not party to the Convention, almost all States, including those that are not party to the Ottawa Convention and are not in favour of their immediate ban, have recognized the need to work towards the eventual elimination of antipersonnel landmines.

The anti-personnel use of incendiary weapons is prohibited, unless it is not feasible to use a less harmful weapon to render a person hors de combat. In addition, if they are used, particular care must be taken to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects.

Most of these rules correspond to treaty provisions that originally applied only to international armed conflicts. That trend has gradually been reversed, for example by the amendment of Protocol II to the Convention on Certain Conventional Weapons in 1996, which also applies to non-international armed conflicts and, most recently, by the amendment of the Convention on Certain Conventional Weapons in 2001 to extend the scope of application of Protocols I–IV to non-international armed conflicts. The customary prohibitions and restrictions referred to above apply in any armed conflict.

Conclusion

A brief overview of some of the findings of the study shows that the principles and rules contained in treaty law have received widespread acceptance in practice and have greatly influenced the formation of customary international law. Many of these principles and rules are now part of customary international law. As such, they are binding on all States regardless of ratification of treaties and also on armed opposition groups in case of rules applicable to all parties to a non-international armed conflict.

The study also indicates that many rules of customary international law apply in both international and non-international armed conflicts and shows the extent to which State practice has gone beyond existing treaty law and expanded the rules applicable to non-international armed conflicts. The regulation of the conduct of hostilities and the treatment of persons in internal armed conflicts is thus more detailed and complete than that which exists under treaty law.

In the light of the achievements to date and the work that remains to be done, the study should not be seen as the end but rather as the beginning of a new process aimed at improving understanding of and agreement on the principles and rules of international humanitarian law. In this process, the study can form the basis of a rich discussion and dialogue on the implementation, clarification and possible development of the law.

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

Daniel Bethlehem

The publication of the ICRC study has taken a decade to complete. By any standards, it is a significant contribution to the learning on, and the development of, international humanitarian law. Three volumes, 5,000 pages, 161 rules and commentaries and supporting materials. It is a remarkable feat. Jean-Marie, Louise Doswald-Beck and all the other many people, both within the ICRC and outside it, who have contributed to the exercise are warmly to be congratulated. They have brought us closer to the heart of international humanitarian law – the actual practice of states.

In his Foreword to the Study, Yves Sandoz observed as follows:

“The Study is a still photograph of reality, taken with great concern for absolute honesty, that is, without trying to make the law say what one wishes it would say. I am convinced that this is what lends the study international credibility. But though it represents the truest possible

reflection of reality, the study makes no claim to be the final word. It is not all-encompassing – choices had to be made – and no-one is infallible. In the introduction to *De jure belli ac pacis*, Grotius says this to his readers: ‘I beg and adjure all those into whose hands this work shall come, that they assume towards me the same liberty that I have assumed in passing upon the opinions and writings of others.’ What better way to express the objectives of those who have carried out this study? May it be read, discussed and commented on. May it prompt renewed examination of international humanitarian law and the means of bringing about greater compliance and of developing the law. Perhaps it could even go beyond the subject of war and spur us to think about the value of the principles on which the law is based in order to build universal peace – the utopian imperative – in the century on which we have now embarked.”¹

As will become apparent shortly from my remarks, I have some misgivings about the Study – in general terms and as regards certain specific rules. My role here is to be the alternative voice! I will get to these in a moment. Although they are misgivings, I must make it abundantly clear that their intent – my intent – is not for a moment to chip away at the edifice of international humanitarian law or to undermine the Study. As I have said, it is a remarkable endeavour and one of which its authors and contributors should be justly proud.

Let me say a word about the perspective from which my remarks are made. I am not here as a military lawyer or a serviceman. At the recent annual meeting of the American Society of International Law there was a panel, on which Jean-Marie spoke, which addressed the Study. Hays Parks, of the US Department of Defence, challenged aspects of the Study, notably relating to its formulation of the rules on weapons in Part IV. The discussion was about serrated bayonets and other weaponry and whether the Study was accurate in its formulation of the rules relating to such weapons. This is not the perspective from which I come. There will, no doubt, be many concerns expressed by military lawyers in the service of governments about this or that formulation of a rule. Where they are voiced seriously they will have to be taken seriously as customary international law is above all the practice of states and if a state turns around and challenges the assessment of practice that informs these volumes, that is a significant matter which will have to be met at the level of substance.

My focus is different. It is that of a general international lawyer – engaged daily as a practitioner in cases before domestic and international tribunals which raise issues ranging from international humanitarian law and human rights law to state responsibility, treaty interpretation and the effect of treaty-based and customary international law rules within the municipal sphere. My interest here today is in legal method and the formulation of customary law rules – especially those which parallel equivalent rules found in treaties – and in the risks and advantages which are both inherent in any such exercise and are also evident specifically in this particular exercise.

I should make a caveat before I continue further and also draw your attention to a similar initiative – although on a much smaller scale – in which I had a hand and the experience from which underpins my remarks. The caveat is that this is a big study, recently published. Jean-Marie has been living with it for 10 years. In contrast, I cannot claim to have gone through it all with the kind of close attention it deserves in the few weeks since its publication. I will address one or two of the rules shortly by way of generalised comment but my remarks should be treated as preliminary.

¹ At pp.xvii-xviii.

The similar initiative was an exercise undertaken by the UNHCR four years ago in respect of certain core principles of international refugee law. In that exercise, in an Opinion (now public) prepared jointly with Sir Eli Lauterpacht,² he and I were asked to consider whether the principle of *non-refoulement*, found in Article 33 of the 1951 Refugee Convention and, in similar terms, in a host of other treaties and international instruments, was a principle of customary international law and, if so, what was the scope and content of the customary rule. This exercise addressed one principle, deeply embedded in general international law, in respect of which there was extensive state practice. The analysis ran to 100 pages. There was annexed supporting material. We concluded that the principle was indeed a principle of customary international law. The analysis and conclusion were the subject of detailed consideration by governmental and non-governmental experts. While the conclusion of customary status was generally endorsed, a number of states balked at the exercise and one or two notable scholars and others expressed private hesitation about coming to such a conclusion in the abstract, detached from a concrete case.

I make the point because, having seen that process in respect of one largely uncontroversial principle, I have a nagging hesitation in my mind as I go through the Study that there are too many steps in the process of the crystallisation – of the formulation – of the black letter customary rules that are insufficiently clear – even by reference to the two accompanying volumes of practice – and too much certainty in the affirmation of the customary status of the rules as formulated. The formulation of each rule is followed by a “summary” which, almost without exception, asserts “State practice establishes this rule as a norm of customary international law ...” There are occasions in which this affirmation is followed by a statement noting ambiguity or controversy in respect of some element of the rule, but the affirmation of customary status stands fast. Francois Bugnion referred to the early development of customary international humanitarian law as “reflecting the requirements of the divinity”. As I go through the Study, and focus on the methodology of divining and formulating the individual rules, I cannot help but feel that the exercise has something of an encyclical about it. Above all in the context of the identification of customary international law, the credibility of the law dictates that we must be able to see inside the black box.

I will come back shortly to illustrate what I mean by these comments by reference to one or two of the rules. Let me first, though, stand back from this element and take a broader look at the exercise of divining custom.

International humanitarian law, perhaps more than any other area of international law, is heavily regulated by treaty. In his Foreword to the Study, ICRC President Jakob Kellenberger, refers to the Geneva Convention for the amelioration of the wounded and sick of 1864, which was revised in 1906, 1929 and 1949. There are the Hague Conventions of 1899 and 1907, the latter containing the Regulations respecting the laws and customs of war on land. There is the subsequent body of Hague law concerning weaponry and methods and means of warfare. There are the two 1977 Protocols additional to the 1949 Geneva Conventions. There is the Convention on Certain Conventional Weapons and its various protocols. There is the Ottawa anti-personnel mines convention. And the list goes on.

The question, in these circumstances of heavy regulation by treaty, is why is it useful and important to identify rules of customary international law and what are the dangers of doing so.

² Lauterpacht and Bethlehem, “The scope and content of the principle of *non-refoulement*: Opinion”, reproduced in Feller, Türk and Nicholson (eds.), *Refugee Protection in International Law* (CUP, 2003), pp.87 *et seq.*

Kellenberger notes three reasons why customary international law remains an important body of law despite the extensive reach of the treaties. First, he notes that, while the 1949 Geneva Conventions enjoy universal adherence today, the same is not yet the case for the other major treaties in this field, notably the Additional Protocols of 1977. While treaties bind only their parties, rules of customary international law bind all states. Customary international law is therefore – this is my interpolation of Kellenberger's statement – a mechanism of achieving the universal application of principles of international humanitarian law, and notably of those enshrined in the Additional Protocols.

It is useful to focus here for a moment on the states that are not party to the Additional Protocols as they are the ones whose interests will be especially affected by the crystallisation of custom. Just focusing on states that are not party to Additional Protocol I, we find: Iran and Iraq, Pakistan and India, Myanmar and Nepal, most of the south-east Asian States – Philippines, Indonesia, Thailand, Malaysia – the United States is not a party, nor are Israel, Somalia, Sudan, Sri Lanka, Eritrea and Morocco. It is a who's who of many of the states that have been engaged in conflicts over the past 30 years.

The second reason for the importance of custom noted by Kellenberger is that international humanitarian law applicable to non-international armed conflicts falls short of meeting the protection needs arising from those conflicts. State practice, though, he suggests, affirms that customary rules apply to all conflicts, whether international or non-international.

Third, Kellenberger notes that customary international law can help in the interpretation of treaty law.

Elements of these observations by Kellenberger are echoed in the Foreword by Judge Koroma, of the International Court of Justice, and also in the Introduction by the authors.

To be sure, these are all very important reasons in favour of identifying custom – although they carry with them a cautionary injunction as well, namely, that we must be cautious about engaging in the crystallisation of custom simply with the object of remedying the defect of the non-participation by States in a treaty regime. If states have objections to particular treaty-based rules, those objections will subsist as regards the formulation of the rules in a customary format.

To Kellenberger's three reasons pointing to the importance of custom, I would add a number of others:

- (a) customary international law may be self-executing and apply directly in the municipal sphere, whereas treaties may not;
- (b) customary international law may be supervening and prevail over an inconsistent rule in a treaty. There is no hierarchy of sources of international law and, in principle, a recently formed rule of custom may prevail over an older, inconsistent treaty rule; and
- (c) custom may be opposable beyond states, not only to armed opposition groups but also to other non-state actors and individuals.

So, there are good reasons for engaging in the Study the publication of which we are marking today. But there are also dangers in doing so – and broader methodological concerns – and these also need to be weighed in the balance. Let me mention six:

- (a) at the methodological end, there is the view expressed by Judge Sir Robert Jennings, dissenting in the *Nicaragua* case, that it is difficult, if not impossible, to identify state practice relative to a rule of customary international law by a state party to a treaty of parallel application as all the relevant practice is in reality practice in the exercise of the treaty, not the customary rule;

- (b) this leads to a wider issue, that of the greying of – the propensity towards fuzziness in – the process of rule formulation in international law. Traditionally, there were treaties and there was custom. Some interaction between the two is evident – as the Study points out – but traditionally the areas of this interaction have been limited and usually achieved through the imprimatur of courts, as in the *North Sea Continental Shelf* cases and the *Nicaragua* case. This inclination towards deriving custom in an area heavily regulated by treaties – and by heavy reliance on these treaties – runs certain risks, for example, for legal certainty, as regards the likely acceptance by states that stood outside the treaty regime, as regards compliance and enforcement by those states, as regards individual criminal responsibility, etc;
- (c) particularly when heavy reliance is placed on particular treaties of which a number of states are not party, initiatives to derive customary rules may be seen as an attempt to circumvent the requirement of express consent necessary for the state to be bound by the treaty-based rule;
- (d) this may raise wider questions about treaty ratification in the future. Why should a state that is not now a party to the 1977 Additional Protocols ratify these conventions if the relevant principles therein operate at the level of customary international law. Perversely, the articulation of customary rules which parallel those set out in a treaty may weaken rather than strengthen the potential for the universal application of the treaty;
- (e) as customary international law is, in Judge Koroma's words (in his Foreword to the Study), "notoriously imprecise", we may find, particularly in the area of complex rules such as these, that the content of a customary rule may turn on the treaty-based formulation of the rule. This may be all well and good when the articulation of the customary rule mirrors the treaty-based formulation. If it does not, however, this may give rise to difficulties as regards interpretation and application; and
- (f) the interpretation and application of customary law rules, because of its imprecise nature, may be ill-suited to application by municipal courts and as a foundation for individual criminal responsibility. This is one of the reasons why the establishment of the *ad hoc* international criminal tribunals and the ICC was accompanied by a detailed articulation of written rules rather than simply by a *renvoi* to customary international law. It is the reason, too, why the United Kingdom legislated for the prosecution of those accused of war crimes during the Second World War. Customary international law will not always be a sufficiently steady foundation from which to address individual criminal responsibility.

I do not want to over-state these points. The issue is essentially simple. There are both advantages and disadvantages to the derivation of customary rules in an area which is heavily regulated by treaty. While, in the main, I am content that the exercise in which the ICRC was engaged maximises the advantages and minimises the risks associated with such an exercise, there are a number of elements of the Study which do give rise to concerns. Let me list them briefly and then turn to illustrate one or two of the points by specific examples drawn from the rules.

The first concern is that, in key areas, the Study – in the formulation of the black-letter customary rules – is heavily contingent on the parallel treaty-based rules and notably on the provisions of Additional Protocol I. Now I know that the ICRC has looked at wider sources – and the breadth of the exercise in which it engaged was both impressive and commendable – but there is no escaping the fact that, in very many critical areas, the customary formulation follows or draws heavily on the formulation in the Additional Protocol.

There are potential problems with this approach. In cases in which the customary formulation is simply that of the Additional Protocol – particularly when there are also questions about the weight of the other source material relied upon – the risk is that the Study will be seen simply as an attempt to get around the non-application of the treaty to certain states. Difficulty is not avoided, however, if the customary formulation diverges from the treaty language without any apparent reason. In such cases, questions may arise as to which formulation reflects the normative content of the rule. This carries risks of uncertainty and perhaps even of a lowering of standards of protection.

Returning to remarks that I made at the outset, a second concern is that, although the statement of methodology set out in the introduction to the Study is generally sound, the rigorous approach described therein is not always evident in the discussion and evaluation of state practice and *opinion juris*. So, for example, notwithstanding the reference in the Introduction to the importance of assessing the “density”, ie, the weight, of relevant items of practice, there is often little or no evidence that this is done. For example, resolutions of the Commission for Human Rights seem to attract the same weight as the legislation or policy statements of specially affected states. Virtually no account is taken of persistent objection, on grounds that some doubt is said to exist about the validity of the doctrine. But custom, as in the case of treaties, requires the consent of states. It is just that consent in the case of custom is assessed differently – through practice or acquiescence. Objections cannot simply be ignored.

A third concern is that, in some cases, the evidential source material relied upon is either equivocal on its face as regards the rule in question or the quoted extracts are insufficient to allow weight to be placed upon it reliably.

Fourth, following on from these comments, given the gaps in methodological rigour and the equivocal nature of some of the source material, it is sometimes unclear why the black-letter expression of the customary rule is formulated in the way that it is. In some cases, the customary formulation is identical to the treaty formulation. In other cases, there are what appear to be minor deviations in formulation, although the reasons for, and import of, the deviations are not explained. In yet other cases, the customary formulation departs significantly from the treaty formulation. Again, however, the reason for, and import of, the departure is not clear. In still other cases, there is a propensity for the Study to parse up different elements of single treaty-based formulation and spread these across a number of customary rules and commentaries. The attendant uncertainty about how one should read both the customary rule and the “supplanted” treaty rule is sometimes considerable raising wider questions about standards of protection.

Let me try to illustrate some of these points by reference to a number of tangible examples – picking some prosaic ones and one or two that may be more important. Rules 23 and 24 address elements of the principle of distinction. Rule 23 states: “Each party to the conflict must, to the extent feasible, avoid locating military objectives within or near densely populated areas.”³ Rule 24 then states: “Each party to the conflict must, to the extent feasible, remove civilian persons and objects under its control from the vicinity of military objectives.”⁴ In support of these rules, reference is made in the commentary to Article 58(b) and 58(a), respectively, of Additional Protocol I as well as to provisions in Additional Protocol II, a large number of military manuals and official statements and reported

³ Emphasis added.

⁴ Emphasis added.

practice. Reference to the national practice shows that different formulations are used, some of which track the language of Additional Protocol I and some of which does not.

Reference to Article 58(a) and (b) of Additional Protocol I shows that the language of the customary formulation draws directly from the Additional Protocol language, although with one small difference. Article 58 of the Protocol requires the parties to a conflict to take precautions against the effects of attacks “to the maximum extent feasible”.⁵

The reason for the omission of the word *maximum* from the customary formulation is unclear – as also is the significance, if any, of the omission. The omission might reflect the fact that some of the military manuals referred to also omit the word. And the omission may not be significant. It is a relatively minor point. But, at least at first glance, it would seem that the customary formulation is weaker than the treaty formulation. Why? What are the implications for civilian protection? Which formulation is to be preferred?

Potentially more significant omissions are found in Rules 4 and 5, both also addressing the distinction between civilians and combatants.

Rule 4 states: “The armed forces of a party to the conflict consist of all organised armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates.” The commentary refers notably to Article 43(1) of Additional Protocol I, as well as to military manuals and official statements and practice.

Reference to the national practice shows a range of different formulations. Reference to Article 43(1) of Additional Protocol I shows the antecedent of the customary rule formulation. It reads:

“The armed forces of a Party to a conflict consist of all organised armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognised by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.”⁶

As will be apparent, the second part of the Protocol I formulation is missing from the customary formulation. The commentary explains this by indicating that the customary formulation builds on earlier definitions of armed forces contained in the Hague Regulations and the Third Geneva Convention and further explains the omission of certain of the elements of the Hague Regulations, Third Geneva Convention and Additional Protocol I definitions as being either addressed elsewhere in the Study or as being unnecessary. But, from a review of the other parts of the Study referred to, it is not at all clear that the omitted elements are either adequately addressed elsewhere or are unnecessary. Once again, one is left with a degree of uncertainty about the normative centre of gravity of the particular rule.

The uncertainty is potentially more serious in the case of Rule 5. This states: “Civilians are persons who are not members of the armed forces. The civilian population comprises all persons who are civilians.”

The commentary refers to Article 50 of Additional Protocol I as well as to military manuals and reported practice. Reference to this national material again shows different formulations. Reference to Article 50 of Additional Protocol I, which is headed “Definition of civilian and civilian population”, reads as follows:

1. A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 A 1), 2), 3) and 6) of the

⁵ Emphasis added.

⁶ Emphasis added.

Third Convention [detailing the principal categories of Prisoners of War] and in Article 43 of this Protocol [defining armed forces]. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.

2. The civilian population comprises all persons who are civilians.

3. The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character.”⁷

As will be evident, the definition of civilians and civilian population in Additional Protocol I is more elaborate than in the customary formulation, and in material respects. Although the elements of doubt about a person’s civilian character and the presence of persons who are not civilians within the civilian population are addressed elsewhere in the Study, they do not feature in the definition and are dealt with far more equivocally in other sections. So, for example, reference is made to persons within the civilian population who do not come within the definition of civilians only in the commentary to Rule 6, which deals with the more problematical principle concerning civilians who take a direct part in hostilities.

I do not propose here to dwell on the substantive issues raised by these divergent formulations, although they are of considerable importance. The significant points that I would make for present purposes are simply that (a) the reason for the omission from the customary law formulation of certain key elements of the Protocol I formulation are unclear, (b) the omissions are likely to give rise to considerable normative uncertainty, and (c) the omissions may undermine civilian protection rather than advance it.

I could go on at length by reference to other rules, including those which address more controversial topics. For example, from a review of the supporting material contained in Volume II of the Study, I am not at all clear that the state practice and *opinion juris* cited can sustain the formulation of Rule 6, which concerns the limits on the protection of civilians who take a direct part in hostilities. This is an example of a customary law formulation which mirrors exactly the parallel treaty-based formulations but in circumstances in which the national materials referred to are equivocal in their support of the customary law formulation. As is well known, the scope, interpretation and application of this principle has attracted particular controversy in recent years.⁸ Rule 6 will, I understand, be addressed in other sessions in this conference, as also will be a number of other rules the formulation of which also raises normative and methodological questions. In deference to the discussion to come and also to the limitations of time, I will forebear from further elaboration.

I emphasised at the outset of my remarks that my intention in raising these issues is not to undermine the edifice of the Study or to detract in any way from its importance. It is a remarkable endeavour and one that will greatly advance scholarship and debate, and ultimately compliance with, international humanitarian law. The essence of my assessment today can be summed up simply.

First, as a general matter, we should approach exercises of distilling customary international law in areas that are heavily regulated by treaty with caution. There are

⁷ Emphasis added.

⁸ See, for example, Annex I to the September 2003 Report of the ICRC on *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*.

difficult methodological problems and questions of normative integrity to surmount. In some cases, we risk, inadvertently, diminishing rather than enhancing protection through such exercises.

Second, the Study has the benefit of momentum that derives from the name, stature and authority of the ICRC. There will no doubt be many who would see it as the Pictet equivalent for customary international law. I believe that it would be a mistake to do so. Crystallising custom is not the same as interpreting a treaty. The exercise needs to be approached with considerably more circumspection

Third, the pitfalls of the present exercise would be much reduced by a more deliberative approach to the formulation of the black-letter rules and a less affirmative approach to the underscoring of their customary status. As I indicated at the outset, I am cautious about encyclical or black-box approaches to the crystallisation of custom. Rather than *Customary International Humanitarian Law*, I wonder whether the Study might not have been better described as *State Practice and Opinion Juris in the Interpretation and Application of International Humanitarian Law*. This would have signalled that, in any concrete case, the Study would be the appropriate starting point for a review of state practice and *opinion juris* relevant to the crystallisation and application of a rule of custom rather than the last word on the content of the customary rule. That the Study is and should be the appropriate starting point in any such review I have no doubt. I am less persuaded that it is the last word on the subject.

Professor Maurice Mendelson

The International Law Association's London Principles on the Formation of Customary International Law was relied on in several places in the introductory chapter to the study. The original idea behind these principles was to summarize the relevant rules in an accessible form, for the benefit of courts, students, practitioners and others. It is gratifying to note that the authors of the present very useful study found our document useful. But I should also make it clear that, although consulted, I was not involved in writing the final version of the introductory chapter to these volumes, and so cannot claim any of the considerable credit due for compiling this work - or conversely any responsibility for it.

I am not therefore here either to defend or to attack this publication. Rather, I have been asked to give a very brief, and consequently rough, guide to what customary law is, and to some of the problem areas; to its relationship to treaty law – which is clearly very pertinent in the context of international humanitarian law; and then to highlight some methodological issues that arise in the specific context of IHL.

1. What is customary international law?

Though customary law was once an important part of the domestic law of all countries, it has now pretty much disappeared from the domestic law, not only of Western countries, but of all States whose laws follow that model – in other words, most of the rest of the world. It is only in some aspects of the law of some African countries (and a few others) that it has any significance. Consequently, for most lawyers, when international lawyers speak of customary international law, we are referring to an unfamiliar concept.

A working definition of customary international law is that it is the law that emerges from the constant, uniform and widespread practice of States (and other subjects of international law).

It is a relatively informal process. Whereas we know exactly what procedures (formalities) are required for making legislation or treaties, the customary process is rather more unstructured. Hence to ask questions like "Exactly how many States

does it need to make a new customary rule” rather misses the point: it is a characteristic of informal systems that there are rarely precise numerical criteria.

There are, however, rules, and quite a lot of the time it is possible for impartial commentators to agree on whether a customary rule has come into being. It is a bit like saying “I cannot precisely define an elephant, but I know one when I see it.” But in this particular corner of the jungle, things are a bit more complicated: as well as the undoubted elephants, there are things that are quite like elephants, but are difficult to classify; things that might or might not develop into elephants; things that masquerade as elephants; and things that might have been elephants once, but are now either defunct or have metamorphosed into something else.

Customary law is the result of a process of claim and response, whether express or implied. A simple example is the emergence of coastal States’ sovereign rights over the resources of the continental shelf adjacent to their territorial sea. President Truman of the USA first claimed this right in 1945. Other States both acquiesced in this claim and imitated it, and so a customary rule emerged. If they had objected, they could have prevented its emergence.

What do we mean by State practice? All sorts of actions count. Making claims through the diplomatic channel; legislating; issuing instructions to armed forces; making formal public statements as to the State’s position; protesting; taking physical action such as bombardment, arresting ships, treating POWs in a certain way; and so on.

There is no specified time-element: some time will inevitably elapse, because there has to be a certain quantity or density of practice on the part of a sufficiency of States, but not a prescribed amount of time. And it can in fact be quite short.

The practice has to be uniform and constant. That is to say, if a State sometimes does one thing, and sometimes another, that cannot contribute to the formation of a customary rule. And likewise, inconsistencies between different States’ conduct. Substantial uniformity suffices, however.

If a State or States do something inconsistent with a rule and claim the right to do so, this will prevent the rule being formed because there will not be sufficient uniformity. Likewise, if the rule already exists and they diverge from it, even in the face of possible protest, this can undermine the rule. But simply straying from the straight and narrow, whilst denying that one is doing it, or relying on some exception or other excuse, will not undermine the rule or stop its being formed. See e.g. the exposition by the International Court of Justice of the rule prohibiting armed intervention in the Nicaragua case. All law sets standards that we do not all of us always meet, but that does not stop its being law.

The practice has to be *widespread*. (We are concerned here with general custom, not regional or other forms of “particular” custom.) As in other forms of customary law, to ask precisely how many States must participate is to misunderstand the nature of customary law. There is no magic number.

But what is clear is that all important actors or groups of actors must participate in the practice. If there are persistent objectors, one of two things will normally happen.

- i. If the objectors are sufficiently important players in the particular area of activity concerned, and they dissent, then they prevent a general rule coming into existence. This is

what I might term the strong, or “preventive” form of the rule.

- ii. If, on the other hand, the objector or objectors are not major players in the area of activity (say, land-locked Afghanistan in the context of the law of the sea), then their dissent cannot prevent a rule of general customary law coming into being; but that particular objector or objectors will not be bound by the new rule. This we might call the weak, or “insulating” form of the persistent dissenter rule.

There are different stages in the life of a customary rule. The first stage is when it is beginning to emerge, as in the early days of continental shelf claims and responses. At a later stage, the rule may have fully matured, in which case a State cannot opt out of it simply by saying that it is new to that area of activity, or even because it is a new State that played no part in the rule’s formation. But the evolution of a customary rule does not stop when it has matured: every act that violates it undermines it, unless it is protested, in which case the protest may strengthen it. Likewise, every time it is followed, it is strengthened.

It has traditionally been said that the State practice needs to be accompanied by a subjective element: the so-called *opinio juris sive necessitatis*. This phrase, which is spurious and incoherent even in Latin, can be roughly translated as “a belief in the legally permissible or obligatory character (as the case may be) of the conduct in question”. This is not the place to go into my own reservations about the concept in any detail. Suffice it to say that it is not clear how those who initiate a new practice can really think that they are already under an obligation or have a right; and if – as some therefore do – we say that the subjective element is not belief, but the will that something should be law, this neither explains why new States are bound willy-nilly, nor does it correctly account for why States obey a law that is already a law. In my view, the subjective element is rarely a necessary ingredient, though it can be useful in exceptional cases, such as in evaluating conduct that is ambiguous. (Cf. the *Lotus* case in the Permanent Court of International Justice.) However, I do not think that we need to dwell on my dissent from the prevailing orthodoxy, because, in practical terms, it will be rare for anything to turn on the difference.

Before I leave this general introduction to customary law, I must deal with one other important point. As a general rule, resolutions of international organizations or of international conferences are not a sort of “instant customary law”. This is not because they are merely “verbal acts”: many forms of State practice, such as the making of a diplomatic claim or a protest, are also verbal acts. Rather, it is because the context is such that the assumption is that these resolutions are not binding. In the case of the UN General Assembly, this is clear from the language and the drafting history of the Charter, for instance. That is not to say that a General Assembly resolution cannot be evidence that something is already a rule of customary law. But it is only rebuttable evidence, and in the words of the song from “Porgy and Bess”, “It ain’t necessarily so”. Likewise, although a resolution can provide the impetus for the development of State practice which in turn gives rise to a customary rule, it is not the resolution but the subsequent practice which makes the rule. And once again, we cannot assume that practice will in fact develop along the lines envisaged in the non-binding resolution.

2. *The relationship between customary law and treaty law*

The relationship between treaty law and customary law is an important one, both generally and in the specific context of international humanitarian law, where a lot of the ground is covered by treaty. Indeed, if all States were parties to all of the treaties

on this subject, there would be relatively little scope for a discussion of the role of customary law, for normally treaties prevail over custom. But there is room for a customary IHL, both because there is not 100 per cent participation in the treaties, and because there is some ground that the treaties do not – or arguably do not – cover.

Of course, as with the resolutions of international organizations and conferences, it is always possible that a treaty will reiterate something that is already a customary rule. It is possible, but it would be a gross error to assume that this is usually the case. For if you think about it, if something is already indisputably customary law, why should States take the trouble to convene a diplomatic conference just to codify it in writing?

To turn, now, to another possibility, it can happen that the provisions of a treaty give rise to State practice which matures into a rule of customary law. But we have to be careful here. The conduct of States parties to the treaty amongst themselves does not, strictly, count towards the formation of customary law. What they are doing is referable to their treaty obligation, not to customary law (cf. North Sea Continental Shelf cases). It is only if the treaty rule is imitated in the relations between parties to the treaty and non-parties, or between non-parties, that a customary rule can emerge. The process by which a treaty can inspire the formation of a customary rule in this way is not unknown: the abolition of privateering following the Declaration of Paris of 1856 is an example of this process. But there is far from being any guarantee that this will happen: once again, “It ain’t necessarily so”, and we have to look at the actual evidence.

Sometimes, when a customary rule is emerging, the conclusion of a treaty along the same lines can, it is said, help “crystallize” that process. I am a little suspicious of this metaphor, and I am not at all sure that, in the final analysis, it is not reducible to one or both of the other two processes, but I do not propose to go into this further now, nor some other of the more *recherché* aspects of the relation between treaty and custom.

3. *Particular issues relating to customary ihl.*

This discussion of the relation between custom and treaty leads me neatly into some particular problems we have to watch out for in trying to identify the rules of customary IHL.

(a) The first one is relatively straightforward. If a State is not a party to a given Convention, it cannot be safely assumed that it is bound by it. It is not bound *qua* treaty, because such treaties bind only those who ratify or adhere to them. Nor can it be assumed that a rule contained in the treaty obliges that State as a matter of customary law. Even if the great majority of States are parties to the treaty, that is still the position. For the reasons I have just explained in my account of the general rules, we have to look for evidence that, in the relations between the parties and non-parties, or between non-parties, the same or a similar rule has been regarded as binding.

Indeed, we can go further. If the State which has failed to become a party to the treaty has also consistently manifested its opposition to the creation of a customary rule of like content, then the “persistent objector” rule will come into play. So, if it is not a major actor in this area (say, Liechtenstein), it can at least exclude itself

from the operation of any customary rule that may come into existence. And if it is a major player – say, a permanent member of the Security Council – then its persistent objection can prevent any rule of general customary law coming into being. This may not prevent there being a particular rule binding on those States that do subscribe to the customary rule – but there is no general rule and no presumption that all States are bound by it unless the specifically opt out.

There is a possible qualification which I should mention here. Many take the view that the persistent objector rule does not apply if this would be contrary to a rule of *ius cogens*, which means a fundamental rule of international public policy from which no derogation is permissible. This is potentially particularly relevant to IHL, as p. xxxix of the Introduction to the study notes. However, I would make two points here:

- iii. first, not all rules of IHL can be characterized, probably, as *ius cogens*;
- iv. secondly, it is questionable how far this alleged exception can apply to the first, strong form of the persistent objector rule. Because if it is a question of the formation of a new rule, and sufficiently important actors refuse to accept it as a rule, logically it never gets to be any kind of rule, let alone one of *ius cogens*.

(b) Staying with the relations between treaty and custom in the specific context of IHL, the next issue is perhaps more of a theoretical than a practical one. Some Conventions – for instance, those of Geneva of 1949, have achieved almost world-wide coverage. Strictly speaking, this means that there is very little opportunity for non-treaty interaction between the parties and non-parties, or between non-parties, and thus very little opportunity for new customary law to arise in imitation of the new treaty rule. It is therefore, I suggest, only if the treaty is declaratory of existing customary law, or – perhaps – if the parties have clearly recognized that the rules in question are also to be regarded as binding in customary law, that we can talk of non-treaty law in these cases. Of course, it is always possible, and does happen, that there are customary rules which the treaties in question do not cover.

(c) What about declarations made at diplomatic conferences about the content of international humanitarian law? For instance, there may not be sufficient agreement to incorporate a proposal into a treaty, or there may be disagreement as to its meaning; and so one or more delegations make statements of their understanding of the customary law position. There may even be a resolution of the conference, passed by the requisite majority. What value should we attach to such declarations?

Well, in the case of declarations by just one or some delegations, they clearly do not bind other States. Those other States do not have expressly to object – the context is such that they can just sit back and let the words drift over them, if they choose. The State making the declaration may be in a different position. Depending

on the status in the delegation of the person making it, and the general context, this kind of unilateral prise de position by a State can be binding on it.

If there is a resolution passed by the Conference itself, then, in accordance with general principles, this is not binding on States. It would require express rules of procedure to make them binding, and such rules are not normally to be found. States who vote against are certainly not bound. And even those who vote in favour might not be, because the general expectation is that such resolutions – like those of the General Assembly – are not binding, so you can safely vote for them without undertaking a legal obligation.

There is, however, a possible exception – though here we are on contentious ground. If an international humanitarian conference were to adopt a unanimous (or perhaps even a nearly unanimous) resolution, and it was clear from the content and context that those voting for it did not regard this as the mere expression of a pious hope, but a formal expression of their position as to the customary law in question, there is no reason of principle or theory why that should not count. Ideally, it should be backed up by more concrete action, but I am not sure that this is indispensable. I might perhaps add, on the one hand, that the International Law Association was persuaded, though not without controversy, to endorse such an approach to the resolutions of international organizations and conferences; and, on the other hand, that such a combination of unanimity and a clear intention to make new customary law is likely to be a very rare occurrence indeed.

(d) Finally, I should mention the problem of how to interpret abstentions. There may be particular types of violence or weaponry that States simply have not resorted to, even if there is no treaty prohibition. Abstaining from using nuclear weapons is one example. Can we deduce from this widespread practice of abstention the existence of a customary prohibition? In the Nuclear Weapons advisory opinion, a majority of the International Court said “no”. But it was not because it is inherently impossible to for a customary rule to grow out of abstentions. It is just that they are, on their face, ambiguous: a State might fail to use a weapon or means of warfare because it fears reciprocation, or unforeseen effects on its own forces, or political revulsion from the public, etc. – not necessarily for legal reasons. It is here that the subjective element can have a useful part to play. For only if there is evidence that the States concerned refrained from the conduct out of some sense of legal obligation, or at any rate out of a sense that they were setting a legal precedent, can we say that the conduct counts towards the creation or identification of a customary rule. On the facts of the Nuclear Weapons case, it was clear that several important nuclear weapon States did not consider that they were under an obligation to abstain – in fact they had, to coin a phrase, an *opinio non juris*: they made it clear that they did not accept that they were under a legal obligation to abstain from using them, even in self-defence. In the case of other topics, again one would have to examine the evidence and it

would be unsafe without more to assume that a failure to use a weapon or to engage in a particular type of conduct not specifically prohibited could ipso facto give rise to a customary law obligation to abstain.

These, then, are some of the methodological considerations which I hope might be helpful in considering, for the remainder of this conference, the substantive rules discussed in these very significant volumes.

Questions & Answers/ Discussion

Professor Louise Doswald-Beck as co-editor of the Study confirmed that the authors had not approached the project with any *a priori* ideas or preconceptions on whether a certain provision was regarded as customary law or not. It was a question of collecting the material, looking at it – whether it was treaties, practice or legislation – and considering “what you end up with” in terms of the essence of the rules around the world. That was how the final ‘rule’ in each case in the Study was formulated; in other words, it was an “inductive exercise”. Responding to questions regarding the choice of language, terminology, phrases used, it was conceded that the sheer number of states consulted and the different wording used in the military manuals proved to be challenging. However, where a ‘common denominator’ was identified, it generally replicated the treaty formulation. It was acknowledged that some ‘anxiety’ had been expressed by all involved in the Study where there was a departure from the treaty language. One speaker had expressed the concern or risk that by identifying the customary rule, standards might diminish or protection be lowered. This was rejected on the grounds that member states continued to be bound by their obligations under treaty law; it was hoped that the study was to provide a useful tool in cases where states are not party to the relevant treaties. As for ‘objector’ states, huge weight was given to their concerns; a similar approach had been adopted in relation to reservations.

One participant drew attention to Rules 150 and 151 and questioned the practical consequences that would be faced by national courts particularly given the increasing numbers of civil claims being brought by victims of armed conflict. A further question raised concerned the different definitions of war crimes as provided under the rules compared with those provided under the ICC statute and how the two might be reconciled especially where states were party to the Rome Treaty.

One speaker, while recognizing the study’s remarkable achievements, continued to voice his misgivings over the process by which the authors had chosen the specific words that formed the rule. Reiterating the concerns already raised, the speaker pointed to the difficulties that would be faced by national courts (which were generally reticent about ‘finding’ customary law) when faced with different or conflicting formulations between treaty and customary rules.

In response, one of the authors emphasized the practical constraints that were faced in producing a study of such scope. Consequently, in order fully to understand why one formulation was chosen over another, reference would have to be made to Volume II of the study. The author refrained from commenting on the application of the law by municipal courts on the grounds that it was a matter of domestic law that differed from country to country.

A short discussion followed on the two principles of “specially affected States” and “persistent objector States” within the context of assessing State practice and IHL. In particular, precisely how the authors of the study had applied the principles to specific cases (including rules on the environment as well as Rule 42 governing ‘dangerous forces’) was raised. It was noted that the principle of “specially affected States” varies according to circumstances; moreover, the validity of the “persistent objector” rule was questioned as regards to rules of *jus cogens*.

What constitutes 'State practice' was another area that was discussed by the participants. It was agreed that difficulties are encountered when identifying evidence of State practice (although it was generally conceded that such evidence included verbal and physical acts, military manuals, domestic case law, official statements, reports on battlefield behaviour, among others); a further challenge, it was observed, also arises as to the proper weight that should be accorded to the material for the purpose of identifying 'State practice'.

The problem of determining whether a violation of a generally accepted rule should be better regarded as an 'aberration' or as evidence of an emerging new rule was identified.

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Session 2: Conduct of Hostilities: Old Law, New Challenges

Chair: **Sir Franklin Berman QC**, Essex Court Chambers; formerly Legal Adviser, Foreign and Commonwealth Office Speakers:

Speakers: **Dr. Knut Dörmann**, Deputy Head, Legal Division, ICRC
Group Captain William Boothby, UK Joint Doctrine and Concepts Centre

Professor Michael Schmitt, Director, Executive Programme in International & Security Affairs, George C. Marshall European Centre for Security Studies

Dr. Knut Dormann

The aim of this presentation is to assess, in very broad terms, existing treaty law and also to assess to what extent any gaps have been filled in the protection of civilians and civilian objects through the development of customary law. These two steps are important for the third part of the presentation – probably the most important part – which will be to try to identify contemporary challenges in the law relative to the conduct of hostilities in internal armed conflicts in order to assess the law applicable in these situations. Given the time constraints, the focus will be on rules relating to targeting.

One remark on terminology I should make in advance is that, when using the term 'combatants' in the context of a non-international armed conflict, it is to be interpreted in a generic way meaning persons who are not entitled to protection against direct attacks; I'm not referring to combatant status in the context of international armed conflicts.

1. Treaty law applicable to the conduct of hostilities in non-international armed conflicts

Very few treaty law provisions regulate the conduct of hostilities in non-international armed conflicts. Common Article 3 of the four Geneva Conventions essentially focuses on the humane treatment of persons not actively participating in hostilities, but is virtually silent on methods and means of warfare. Additional Protocol II to the Geneva Conventions contains some rules relating to the conduct of hostilities. Article 13, deals with the protection of the civilian population against the dangers of military operations, and in this context, it prohibits direct attacks against individual civilians and the civilian population as such. Other provisions lay down special protection for works and installations containing dangerous forces as well as for cultural objects and places of worship.

The rules of Additional Protocol II, however, remain rather rudimentary in this regard compared to treaty law in international armed conflicts. To mention only a few examples: this instrument does not mention *expressis verbis* the principle of distinction. Nevertheless, at least the obligation to distinguish between civilians and

combatants can be logically deduced from Article 13. However, the same cannot be said with regard to the application of the principle of distinction towards objects (i.e. there is no rule establishing an obligation to distinguish between civilian objects and military objectives). Moreover, we don't find any kind of definition of civilians and the civilian population which often renders the application of the general rules of Article 13 more difficult and more complex. Equally, no rules on the prohibition of indiscriminate attacks; on the principle of proportionality in attack; on precautions in attack; or against the effects of an attack have been codified in the protocol.

Interestingly, these normative 'gaps' exist only to a lesser extent in various treaties prohibiting or regulating the use of specific weapons. For example, Protocol II to the Convention on Certain Conventional Weapons – applicable in both international and non-international armed conflicts – contains very detailed rules on the protection of the civilian population against the effects of landmines, booby-traps and other devices such as prohibition against the use of these weapons against civilian objects, the prohibition of indiscriminate use, including use in violation of the principle of proportionality, and the obligation to take precautions. Such rules tend to demonstrate that many rules on the conduct of hostilities in international armed conflicts can be easily transposed to the law applicable to internal armed conflicts.

2. *Customary IHL relative to the conduct of hostilities in internal armed conflict*

This tendency in the development of weapons treaties, which relies on these general rules in all armed conflicts, has been accompanied by a development of customary international law applicable to the conduct of hostilities in general. The jurisprudence of international tribunals, namely of the ICTY, has noted that many of the general rules applicable in international armed conflicts also apply in non-international armed conflicts as a matter of customary law.

The ICRC Study on Customary International Humanitarian Law confirms these jurisprudential conclusions and complements them by providing more extensive elements of practice and *opinio iuris*. According to the Study, for example, the principle of distinction; the obligation to direct attacks only against combatants and military objectives; the immunity from attack of civilians unless and for such time as they participate in hostilities; the prohibition of indiscriminate attacks; the principle of proportionality; the obligation to take precautions; and the definition of military objectives are part of customary law applicable in non-international armed conflicts.

Except on very specific issues, the content of many norms regulating the conduct of hostilities is identical whatever the qualification of the conflict. This is obviously an important development, in particular for situations in which the legal qualification of the conflict is not clear, such as at certain moments during the conflict on the territory of the former Yugoslavia. In addition, this corresponds to a practical reality of many armed forces who receive the same training for situations of international and non-international armed conflicts.

However, the ICTY has also noted in the *Tadic* case that this normative translation presents some limits. Indeed, the materialisation of the aforementioned general rules in the law of internal armed conflicts does not necessarily imply that internal armed conflicts are regulated by a full and mechanical transplant of those rules pertaining to international armed conflicts. The Tribunal took the view that it is the general essence of those rules – rather than the detailed regulation they may contain – which has become applicable to internal conflicts. The ICRC customary law Study validates (but only partially) such a statement. For instance, all the very precise rules pertaining to the precautions required in attack and against the effects of an attack were identified as customary in international conflicts. But some of these important

norms were mentioned as being only 'arguably' customary in non-international armed conflicts. As has been said by Jean-Marie, the word 'arguably' indicates that practice generally pointed in that direction, but was less extensive.

So, what are some of the main challenges relating to the law on the conduct of hostilities in non-international armed conflicts today?

To start on a positive note; there is no doubt that today, due to the development of customary law, the rules applicable in armed conflicts are much less rudimentary than in 1977 when Additional Protocol II was negotiated. The legal framework is clearer and should, if properly applied, enhance the protection of the civilian population and civilian objects. However, many rules are formulated in rather general terms, thus sometimes casting doubts as to their concrete application in practice. The sometimes diverging interpretations of concepts such as military objectives and proportionality in attack that arise in international armed conflicts generate the same, if not more queries in non-international armed conflicts. There is definitely a need for clarification of the law. The customary law Study does not provide definitive answers in this regard, but the wealth of practice collected, from military manuals in particular, may contribute to such a clarification. Somewhat linked to the problem of clarification is another challenge, namely how the general rules on the conduct of hostilities have to be applied to specific weapons in the absence of special treaty law.

The application of the principle of distinction between the civilian population and persons taking a direct part in hostilities generates specific problems in situations of non-international armed conflicts. It often happens that persons who mostly lead normal lives may indulge in guerrilla activities from time to time. Can they be attacked in any place, at any time? We also find civilians armed and trained to fight, ostensibly for their own protection but also for the purpose of those who trained them. What is their situation? What of children who are asked to deliver messages to guerrilla groups, especially messages which would be important for intelligence purposes?

When looking at Additional Protocol II, it only determines those exceptional circumstances under which 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." Two questions arise: firstly, do members of armed opposition groups fall under this provision - which reflects customary international law - and are to be considered civilians or are they a separate category comparable to members of state armed forces? Secondly, what constitutes direct participation in hostilities and what are the temporal limitations of the protection?

Let me turn to the first question: The problem is that Additional Protocol II does not define the term "civilian". A provision to the effect that members of armed opposition groups, as well as members of state armed forces, would not be considered civilians was dropped in the final hours of the negotiations of the Protocol. While state armed forces may be considered to be 'combatants' for the purposes of the principle of distinction, practice as collected by the Study is definitely not clear as to whether members of armed opposition groups are to be considered as combatants.

If members of armed opposition groups are considered to be civilians, they would – as in the case of any other civilian – lose their immunity from attack when (and for so long as) they directly partake in hostilities. The temporal limitation in the loss of immunity has been criticised since it could generate an imbalance between such groups and government armed forces. Indeed, it could imply that an attack on

government armed forces would be lawful under International Humanitarian Law at any time while an attack on members of armed opposition groups would only be lawful for “such time as they take a direct part in hostilities”. Such an imbalance would not exist if members of armed opposition groups were, due to their membership, either considered to be continuously taking a direct part in hostilities or not considered to be civilians.

Let me now move to the second question. 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 range of behaviour as direct participation in order to be able to attack everybody showing the slightest enmity toward itself or the slightest sympathy to the opposing party. If such an interpretation were adopted, the principle of distinction becomes meaningless because, in practice, civilians would be presumed to participate directly in hostilities.

Practice as to the understanding of this definition is not absolutely clear. There is probably general agreement that the term “direct participation in hostilities” covers acts which cause actual harm to enemy personnel and materiel. At the other end of the spectrum, in several cases, practice has indicated that supplying food and shelter to combatants, and generally speaking ‘sympathising’ with them, is insufficient reason to deny civilians protection against attack. Between these extremes the situation is far less clear. Even if we manage to solve this problem, there remains the question of how to define the temporal limitations of protection.

Conscious that the law and practice in these areas is not clear, and that more research and thoughts were needed, the ICRC, in collaboration with the TMC Asser Institute in The Hague launched in 2003 a process of clarification of the notion of direct participation in hostilities and its legal consequences. The third meeting in this process will take place this autumn.

Another challenge may be identified with regard to the implementation of the principle of distinction. In international armed conflicts, the obligation for combatants to distinguish themselves from the civilian population while engaged in an attack or military operation preparatory to an attack is a long-standing rule under treaty and customary law. This obligation clearly aims at ensuring protection of the civilian population against the danger of military operations and consequently at facilitating compliance with the obligations to direct attacks only against military objectives, including combatants. However, treaty and customary law for non-international armed conflicts are silent in this regard. If there is no obligation for combatants to distinguish themselves by some kind of external marks, how can the principle of distinction be effectively implemented, and the protection of civilians ensured? If one accepts that membership of the state armed forces or of an armed opposition group in itself makes someone a legitimate target, such membership needs to be established by proper intelligence prior to an attack. Otherwise, it seems that only specific hostile behaviour by an individual would justify a direct attack against that person.

3. Concluding remarks

There is no doubt that the conclusions of the ICRC customary international law Study will clarify the content and facilitate the knowledge of the law relating to the conduct of hostilities in non-international armed conflicts.

However, based on the Study, work should be undertaken to identify areas in which no, or insufficient, rules regulate non-international armed conflicts. The Study could

therefore be a point of departure for further reflection on the need for further codification. If this need exists and a codification process seems feasible, the ICRC will be prepared to contribute. Conferences such as this are also good opportunities for such reflection.

In undertaking such an exercise, the causes of any shortcomings should be clearly identified. If atrocities have taken place, was it because the perpetrators could avail themselves of loopholes in the existing rules, or was it because existing rules have not been respected? If the law was not respected, the response may be more of a diplomatic or political nature, rather than a new codification.

In my view, the nature of non-international armed conflicts has not profoundly changed. Perhaps the reasons for not complying with existing rules and for repeated violations by all sides have changed. This problem is, however, beyond the topic of my presentation and could be addressed in a later panel.

Certainly many challenges are still ahead for us. But I would like to conclude my presentation with a brief reference to the title of the panel – the challenges with regard to the conduct of hostilities in internal armed conflicts are not new, and they by no means imply that International Humanitarian Law is old or outdated. This assessment is certainly on the fact that I took, as the basis for my analysis, the rules identified as customary international law in the Study. If the conclusion would be that certain rules would not be customary international law, then the analysis would certainly be different.

Group Captain Bill Boothby

Is the law really that old? I guess the older you get, the younger the law seems to be – in that respect it's a bit like policemen! Most of the relevant law certainly post-dates 1899, and the vast bulk is to be found in the Geneva Conventions of 1949, in their additional protocols of 1977, and in the weapons specific treaties agreed thereafter. So we are talking about a body of law much of which was put together in the span of one lifetime at a time when technical advance has been rapid.

The next part to examine is whether the challenges which confront us and the law really are that new. The challenge for us as military practitioners is to maintain our ability to operate effectively as the context of conflict and the nature of adversaries evolve. This is a large part of the work of the Joint Doctrine and Concepts Centre at Shrivenham, and my role in that centre is to ensure that our developing thinking, and the weapons that we procure to deliver it, take into account our legal obligations. So we in the UK legally assess new weapons plans and developing doctrine to ensure legal compliance. We also bring that understanding of the law of weaponry and the context in which weapons are used when, as member of the UK delegation, we negotiate new weapons treaties in Geneva. So our aim is to ensure that we maintain the ability of the UK armed forces to operate effectively while at the same time being actively engaged in the development of new law, for example in relation to explosive remnants of war and, perhaps, anti-vehicle mines.

The truth is that the old law, as it were, has in fact been developing rather rapidly of late. Whether it has been anti-personnel landmines or explosive remnants, the debate at the international level tends to focus on the identification of military behaviour, or consequences, which cause humanitarian concern whereupon an initiative is then developed to identify changes in the law to meet that concern. The requirement to maintain the ability to conduct military operations to meet the challenges of foreseeable adversaries is a very real one. Frequently, in the negotiating chamber in Geneva, one hears the representatives of states emphasising

the importance that future legal developments should not hinder the right to self defence. In this context, I, with others, have drafted a questionnaire to states in the context of the cluster bomb and explosive remnants debate at the UN in Geneva, the purpose of which is to identify what steps have been taken by states to implement relevant existing legal principles. One cannot help thinking that this sort of 'stock-taking' exercise is needed every so often to ensure that future changes in the law are necessary, relevant and indeed address the concern that has been raised.

Of course we are continually developing our approaches to military operations, but I am not always sure that we are coming up with new approaches, nor that they present new challenges for the law.

Let me take as an example the employment of civilians and contractors in armed conflict. As we all know from Additional Protocol 1, civilians lose their protected status if, and for such time as, they take a direct part in hostilities. There is much discussion about what the phrase 'taking a direct part in hostilities' means. Similarly, there is on-going debate about the time period during which such protected status is lost. But all of this is taking place at a time when numerous tasks hitherto undertaken by the military are being put out to contractors. This, at first glance, seems to be a novel development. Not so. P. W. Singer, in his book *'Corporate Warriors – The Rise of the Privatised Military Industry'*, cites the use of mercenary troops in the third millennium BC and charts the use of private companies and civilians in military roles since the Middle Ages. The decision to place a greater military reliance on the private sector is nothing new. Moreover, Article 4A of Geneva Convention III accords Prisoner of War status to a variety of persons who, as civilians, are engaged in supporting roles sometimes close to the fight. The new challenges here are, I think:

- To determine what 'direct participation' really means;
- To articulate how close civilians can really get to the fight while retaining their protected status;
- To work out what the time dimension to direct participation is, and how an adversary can know who is and who no longer is a 'direct participant'; and,
- To work out how we can maintain discipline of and control over such civilians and contractors to ensure their activities comply with the law.

The military need is for clarity because without it, misunderstanding and misidentification are inevitable.

A linked issue is the development of network-based approaches to military operations. In the UK, we refer to this as Network Enabled Capability. The US talks of Network Centric Warfare. The label does not matter for my purposes. The intent is to create a network in which sensors, intelligence, data fusion facilities, planners, commanders and operators are all inter-linked, with the latter three being increasingly reliably served with a real-time, or near-real-time visibility of what is going on in the battlespace. Such a development will mean that all those who are connected to the network have the ability to contribute to it, and thus to the state of knowledge of all. Inputs to the network will be used as the direct basis for targeting decisions and all involved in the network will be closely involved in informing and supporting the execution of the overall mission.

The question which arises is whether, by virtue of network connectivity, and the increased involvement that that involves, persons whose role would not previously have been considered as direct participation become direct participants. If so, how far does this go, and will it be possible to identify whether all those who are

connected are participating, or only some? Will an adversary be able to know this, and if not, how is an adversary's actions in targeting a civilian - whom he knows or believes to be 'connected' - to be judged? What implications does this have for the international law objective of protecting civilians and, for that matter, for the international law definition of civilians?

Effects based operations are not a new concept. Perhaps what is new is the desire to spell out what it means and what its philosophical implications are. The underlying thinking is that the desire to produce a particular impact on, or perhaps response by, an adversary may influence the target set, how that target set is engaged, and what weapons are used. The development of a rigorously logical approach to military operations which seeks to plot an audit trail linking the individual military action with the operational and thus the strategic objectives is, of course, nothing but good sense. Such a philosophy does not, in my view, require us to re-write the definition of military objective. It does not remove the existing requirements that proper precautions be undertaken before attacks are mounted. Neither does it imply the need to re-negotiate treaties addressing specific weapons technologies. It will, however, be important that all of these legal factors are borne in mind as effects based planning is undertaken.

Technology and its evolution will continue to have an impact on military operations and on the law relating to them. The trend in technological development is towards greater precision; the use of unmanned platforms to deliver and indeed to guide munitions; and, the ability to better protect the platform delivering the munition, whether by stealth technology, delivery at range, or other means. Warfare by the technologically most proficient will become an increasingly machine dependent activity with own casualties being kept to the minimum due to reduced exposure of own personnel to battlefield risk. The inaccurate public expectation that modern technology presupposes the accurate engagement of intended targets every time, and the related erroneous belief that all civilian casualties are a war crime, will clearly continue to be a challenge.

This level of technological development is, however, not universal and more traditional pitched battles, sometimes involving the use of sophisticated machinery, still occur. The question is whether existing law - particularly that relating to targeting and precautions - is challenged by these technological developments. It is, I think, instructive to examine carefully the terms in which the relevant targeting principles are expressed. I am sure that the authors of those principles understood that their product needed to withstand the test of time and expressed the fundamental rules of targeting accordingly. Discrimination is clearly a relative concept, so is proportionality. The precaution rules are written in terms of what is feasible, what can be expected, and the UK ratification statement famously talks about commanders and planners having to reach decisions on the basis of the information reasonably available to them at the relevant time. So while technology marches ever onwards, I feel that the law of targeting has the flexibility built into it which will enable it to endure, at least for the foreseeable future.

There are those who argue that certain existing treaties, for example the Chemical Weapons Convention and, perhaps, even the Geneva Gas Protocol, require updating to take account of modern day requirements. The argument goes that, in the modern 'war on terror', new substances are needed that may technically breach the letter of existing conventions but the use of which may enable the more precise application of force and which may thus save lives. Existing law is thus put forward as some sort of impediment to progress. I think we need to be rather more careful here. One must never forget the evocative images of World War One Gas victims, and for that matter,

those who have similarly suffered more recently. There is here a particularly nasty can of worms which we should be cautious not to release.

Perhaps the answer in the first instance is to see whether other, treaty compliant, methods can be developed to achieve the same desired military purposes. If they cannot, it seems to me that an approach based on consensus is the right one, as only in this way can one be reasonably sure that any change will not make matters worse in the long run, rather than better. Of course the use, for example, of calmatives to facilitate discriminating later use of lethal force may, depending on the circumstances, be lawful, controversial, or illegal. Any change in the law in this area would, I think, need to be carefully thought through.

People, their abilities, limitations, qualities and drawbacks will always be the common denominator in warfare, and will always be central to its conduct. The law will always seek to protect those who do not pose a threat, and I trust will always allow the attack of those who do. The challenge for the law, as matters evolve, is to express the distinction between the two in relevant and accurate terms. Its further vital challenge is to remain practical, both in the sense of being capable of practical application on the battlefield, and in the sense that military personnel can recognise it as being good law.

War is a fact of life. We are not going to abolish war by making it increasingly difficult to conduct through increasingly restrictive rules. Rather we risk creating a situation in which compliance with the applicable law becomes more and more difficult, with the consequent risk that those whom the law seeks to protect will be placed at increasing risk. It therefore seems clear that we must maintain our efforts to ensure that current law, future developments in the law, evolution of technology, and new ways of operating are all coherent. As I have indicated, that process should not presuppose that every response to a new challenge is the suggestion that new law is required. As I have observed in the past, the law we have is written in the blood of those who died in past conflicts. We should think very carefully before rejecting its current basic principles.

Professor Michael Schmitt

Future War and the Customary International Law Study

- I have been asked to comment briefly on the customary international law study and the conduct of hostilities in future armed conflicts.
 - For the sake of analysis, I first assume that the study accurately captures *present* customary international humanitarian law
 - Then I ask how various aspects of future war (out to roughly 2025) might, as State practice, affect this body of law. Will the nature of future war act to **reinforce** the principles OR will it **weaken** them? Most importantly, how will it affect likely **interpretations**?

I would like to address three key drivers in future conflict:

- Objectives of the conflict
- Prevailing military doctrine
- Technology

So let me turn to the foolhardy endeavour of peering into the crystal ball

1) Objectives of Conflict

- In interstate conflict – territorial conquest will seldom be an objective
- Rather, tend to be *limited*, *compellent*, or *shaping* operations (with bleed over between the categories)

- **Limited operations** - specific unitary objective. Evacuate nationals abroad, conduct counterterrorist strikes, remove a specific threat (e.g., nuclear capability), target a particular individual, or mount a humanitarian intervention
- **Compellance operations** - compel an opponent to either engage in a particular course of conduct (readmit weapons inspectors – Op. Desert Fox) **OR** desist from one (Operation Allied Force). *The target is the decision-maker.*
- **Shaping operations** – seek to shape security environment
 - E.g, Chapter VII operations designed to maintain/restore international peace and security, regime change, deterring a country from developing WMD, or denying terrorists a sanctuary.
- **IHL Implications** of such operations? In other words, to what extent will the principles set forth in the study be either reinforced or placed under stress?
 - **Limited operations**: Since objectives are limited, the domestic public generally will not accept heavy casualties, while international community (and perhaps domestic) will not tolerate heavy collateral damage/incidental injury
 - Such operations will **incentivize strict adherence** to principles contained in the study because the **negative fallout** of their violation may **exceed the benefits** of attaining the objective itself.
 - **Compellance Operations** – Don't fit within the classic IHL paradigm because humanitarian law developed based on assumption that the **enemy military is the objective** (despite Clausewitz); you attain objectives by destroying the enemy's war-making capacity
 - **But** in a compellance operation, trying to affect opponent's decision-making as to a particular course of action – and in order to do that you need to place at risk something he **values more than that course of action** – assumes a rational actor performing cost-benefit analysis.
 - That something may not be his **military**, *but rather*, for instance, his **power** base in society, finances, family, and so forth.
 - *When that is so*, **principle of distinction** can be placed at risk because the most effective strikes may be those directed at objects currently protected under customary IHL.
 - Recall **ill-advised comments** by the AIRSOUTH CC along these lines during Allied Force. Further, I know many of you are familiar with numerous journal articles urging a relaxation of IHL protections for civilian objects, so as to be better able to influence *malevolent enemy actors*.
- Customary rules that might be affected include prohibitions on targeting civilians (Rules 1, 6) and civilian objects (Rules 7, 10) and on terrorizing the civilian population (Rule 2)
- Those conducting compellance campaigns would also tend to support the broad interpretation of military objectives

advanced by the United States (*war sustaining*) (Rule 8) and favor a very liberal stance regarding what constitutes a concrete and direct **military** advantage in a *proportionality* analysis (Rule 14).

- **Shaping operations** – Cuts both ways
 - Key is to ask... 'shape' to what end?
 - If trying to deny a base of operations to terrorists who have mounted attacks against you **or** if conducting *preemptive* operations against WMD, the **stakes** are likely to be seen as **so high** that *customary law* may be *interpreted rather liberally*
 - Certainly see this in 2002 US National Security Strategy (albeit in the *ad bellum* context) and the controversial legal memos drafted with regard to Operations Enduring Freedom and Iraqi Freedom.
 - On the **other hand**, consider a *preventive* (vice *preemptive*) strike
 - Since it is *already at the edge* of the *jus ad bellum*, one certainly doesn't need to complicate domestic and international perceptions by conducting ops in a fashion that also stretches the *jus in bello*

So, with regard to objectives of conflict, the *greatest challenges* to *current customary IHL* are posed by *shaping* operations in which the threat is seen as high and *imminent and compellance* operations.

- Expect both will become increasingly prevalent in the next 20 years.

2) **Prevailing Military Doctrines**

- Military doctrine determines **how forces will fight** -- it is the game plan if you will
- First doctrinal vector = operations will be **joint and combined**. (joint – more than one service; combined, more than 1 country)
 - In normative terms – only the latter is relevant.
 - *Even though* customary law applies to all players in a multinational operation, **states will take differing approaches to interpretation** (e.g., meaning of the term "*military objectives*").
 - Two possibilities when this occurs – division of labor, in which country that may strike a target IAW its understanding of IHL, will conduct the attack **OR** the CJTF will be bound by most restrictive customary IHL interpretation.
 - We have seen (e.g., Operation Allied Force and the Red Card) that, whether for political or legal reasons, the most restrictive approach tends to bind entire multinational force.
 - Thus, combined operations will create pressure to conduct hostilities in a normatively strict manner
- **BUT, countervailing pressures** exist in doctrine

- Among advanced militaries, an increasingly prevalent doctrine, mentioned by Group Captain Boothby, is **Effects Based Operations**.
 - EBO has been made possible by a number of factors (particularly transparency of the battlespace to those equipped with advanced ISR, proliferation of precision capabilities, and networking of the battlefield)
 - EBO can be contrasted with **attrition warfare** in which you serially wear down an enemy force; denying him the means to resist
 - In **EBO**, you ask what the final objective is, and then you deconstruct the target system to find how best to accomplish that with the minimum expenditure of forces. E.g., go after a critical node in the electrical grid instead of the entire grid.
- **Normative significance** with regard to customary law?
 - Very significant because the ultimate objective in many conflicts (except perhaps shaping operations or wars of conquest) is affecting the decision-making of the enemy leadership. This is the effect sought.
 - As mentioned earlier with regard to compellance operations, this reality incentivises a permissive approach to the principle of distinction, particularly as to what constitutes a military objective and the concept of war-sustaining
 - Of course, it is but a tiny step to style civilian morale, political underpinning of a regime, or the enemy State's *economy* as included in the concept of war-sustaining.
- A third doctrinal trend is fighting **asymmetrically**.
 - Of course, the advantaged side fights asymmetrically by leveraging its technological wherewithal. This poses little challenge to customary international law
 - *On the contrary*, limiting attack to strictly military objectives favors the advantaged side by boxing its opponent into an operational paradigm within which failure is a near certainty.
- *But if we think* of asymmetry from the side of the **weaker** party, exactly the **opposite is true**.
 - Unable to prevail on the conventional battlefield, the weaker side must adopt strategies and tactics that either strike at enemy *vulnerabilities which they cannot defend* OR *threaten something of great value* OR both.
 - As to the former, **civilian objects** or those in the grey area are most lucrative because a society cannot hope to adequately defend its entire infrastructure.
 - And as to the latter, the **civilian population** is most appealing as a target set, because, at least in democracies, the population is arguably what the State holds most dear.
 - So, it is quite **logical** to *fight asymmetrically* by attacking civilians and civilian objects, or *at least* stretching application of the principle of distinction – for instance by targeting media or civilian contractors.
 - *Even on the traditional battlefield*, the disadvantaged Party has incentives to ignore tenets of customary IHL -- for instance by feigning protected

civilian status to ambush the enemy (as in Iraq) (Rule 65) or using marked medical transport to move troops and military supplies (Rule 59).

- *Another growing phenomenon* along these lines is the use of **human shields** (Rule 97) to deter attacks on military objectives because you can't otherwise effectively defend them against a dominant enemy.
 - And the recurring argument that **involuntary shields** should not be included in the proportionality calculation is indicative of how asymmetry erodes normative understanding.

3) **Finally, technology**

- Technology is what is capturing most public attention
 - *And with regard to the customary law study*, important to note that technological developments are not merely driven by nature of conflict, but actually pull conflicts in particular directions.
- Where are we seeing change significant enough to influence the development and application of customary international law?
 - Number of areas: command and control, ISR, precision, range, information warfare, man-out-of-the-loop systems, non-lethals, and dual use and off-the-shelf technology
 - **Advances are extraordinary.**
 - Today, operations centres can observe and direct a tactical engagement in real time hundreds/thousands of miles away – literally, they can tell a shooter, at night, that the bad guy is coming out the back door.
 - Today, operations centers are linked through secure chat rooms that facilitate deconfliction and leverage synergistic capabilities.
 - And today, time-sensitive-targeting (TST) techniques permit us to engage targets almost as quickly as we locate and identify them.
- In the **near future**, this technology will appear **ancient**.
 - ✓ Airborne servers will provide unimaginable computing capacity for fusion of multisource data from hyper spectral sensors and allow shared use by any friendly platform.
 - ✓ We will strike targets with a circular error probable measured in inches, not feet.
 - ✓ Weapons systems such as UAVs will seek out and destroy enemy targets with no involvement by humans. They will employ stealth technology and have loitering times measured in days.
 - ✓ Weapons and weapons system will shrink in size using micro and nano-technology.
 - ✓ Biometrics will enable precision targeting of specific individuals.
 - ✓ Laser communications will yield a thousand-fold increase in bandwidth for transmittal of information.
 - ✓ And non-kinetic attacks, particularly computer network attack, will be widespread.
- What are the **customary IHL implications**?

- First the **good**, if we define good as strict adherence to the standards set forth in the CLS.
- **Principle of distinction**, *especially* the requirements of precautions in attack (Rules 15-21) -- to some extent will be easier to comply with because you will have **greater capacity**:
 - to reliably identify targets
 - to assess potential collateral damage
 - to monitor the situation up to the moment of detonation to ensure nothing has changed that would create *excessive collateral damage* **or** call into question whether the *target is a military objective*
 - to strike the desired aim point with great accuracy
 - to limit the amount of explosive force used to achieve your objective (or even *avoid the use* of explosives *altogether* – non-lethal and non-kinetic weapons)
 - and to conduct more robust battle damage assessment, thereby limiting the need for restrike.
 - Moreover, will have a variety of systems available for attacking an objective **and** a better capacity to explore the target system to identify that component thereof that yields the least collateral damage while attaining a similar military advantage
- And these capabilities will **drive up global expectations** that modern warfare should be mistake-free, *collateral damage-free* **OR** both.
 - Thus, *like it or not*, those who wield such capabilities are certain to adjust their operations accordingly. Witness the demanding targeting processes in Operation Iraqi Freedom.
- Such expectations are moving beyond the practical to the normative – As evidence, read Human Rights Watch’s analysis of the air war in Iraq in its study, *Off Target*.
 - The organization took a *highly surgical operation* and then used the mere fact that some operations were unsuccessful or caused collateral damage to create a rebuttable presumption of Coalition lack of care.
- This trend is fostered by *real time global media and communications*, from CNN and al Jazeera to soldiers with cell phones and e-mail access
 - In an era where tactical decisions may have strategic impact **information exerts a powerful influence** on military forces to avoid conducting themselves in any manner deemed inappropriate.
 - So, quite aside from military hard power, have to consider the **soft power** implications of being viewed either as lawful or lawless.
- But there are **negative sides** to the technology
 - Can be (and often intentionally is) used to **blind** an opponent.
 - To the extent it does so, that opponent’s options for exercising precautions in attack diminish.
 - Moreover, some assert that the **speed** of operations will make it harder to distinguish military objectives from non-combatants and civilian objects. So as you increase your ability to operate within enemy’s OODA loop ... the quality of your decisions suffers.

- And many are also concerned about **man out of the loop** technology (no human interaction between identification of a target and the attack) -- there is an argument that this will also diminish the ability to discriminate. (I disagree)
- Finally, **technology may compensate** for military weakness in very nefarious ways, most notably with WMD technology ... which is becoming more accessible.
 - Unfortunately, this dynamic generally operates to the detriment of principle of distinction

So, what's the **overall conclusion?** **The Jury is out...**with **countervailing trends** in both directions

- I would close with **one final thought:**
- IHL developed in a period where actors, *states*, were relatively equal militarily – at least they could be by forming balance-of-power alliances.
 - So, *law benefited and limited both sides* in rather similar way.
 - **But in the future**, there will be ever growing dissimilarity and asymmetry between militaries.
 - **Law will not operate equally** on all sides.
 - And when it is seen as less than neutral – *States will act accordingly*, which in turn will **erode customary law, at least as we know it today.**

Questions and Answers/Discussion

Questioners raised the issue of whether we are pushing the development of the technology threshold to the extent that technologically disadvantaged parties cannot but violate international humanitarian law – such as by resort to ‘dirty weapons’. It was suggested that two standards of law may therefore emerge – one for the technologically more advantaged, and one for the technologically disadvantaged.

In response, although it was conceded that less advanced militaries may have to fight more ‘asymmetrically’, the panel suggested that states must maintain the highest standards of international humanitarian law. It was further suggested that when targets (such as a nominally civilian leader or ‘dual use’ facilities such as radio transmitters) are in the ‘grey area’ of the law, states – and especially those with the technological capability to be discerning in target selection – should not strike; they would otherwise needlessly expose themselves to arguments about illegality against them from the enemy.

Further responses from the floor on the issue of targeting ‘civilian dictators’ suggested that such targeting could undermine international humanitarian law as interpretations of the language of the law – which is reasonably clear on the issue of distinction – will end up distorting the understanding of the law. It was agreed by the panel that the determination of whether it would be legal to target such people would be the test of whether they were ‘taking a direct part in hostilities’.

Session 3: Detention: POWs and Security Detainees

Chair: **James Bergeron**, Political Adviser, NATO Striking Force South
 Speakers: **Major General David Howell OBE**, Director, UK Army Legal Services

Major General Michael J. Marchand, Assistant Judge Advocate
General, US Army
Jelena Pejic, Legal Adviser, ICRC

Major General Michael J. Marchand

(The views and opinions expressed by the speaker were noted to be his own personal views and were not in any way intended to bind the US Army or Government.)

The speaker wished to address what he perceived to be a lack in general understanding of what military lawyers do, and on this level, what their advice means. The role of the Judge Advocate General Corps ('JAG') in national policy is not necessarily what it might be thought to be. For instance, the speaker had been asked many times whether his office was responsible for the "torture memo" - to which his unequivocal answer was "no". He would, however, try to explain how JAG are involved in some developments of national procedure and policy.

Primarily, the US Army JAG is responsible for 'taking care of the force' - what is internally referred to as 'Title Ten' responsibility - that is, to teach, train, equip, supply. And from a military justice viewpoint, JAG is responsible to supervise, within JAG's congressional mandate, those activities that occur within the army (Abu Ghraib, for example) to make sure that they have both prosecutors, defence counsel and judges, and that upon review of those cases, that JAG are satisfied that appropriate action has been taken. Thus, he did not wish to indicate that there has not been any involvement at all at an army level.

Without committing the US Government as to whether the ICRC study should be accepted as a codification of customary international law ('CIL') or whether it is rather an academic opinion of, perhaps, what it would like CIL to be, the speaker noted that the study is important to his department. As Judge Advocates, it was important for them to take a hard look at what has been provided and to help: firstly, - at a broader level - to try to ensure that the US, as an entity, embraces and looks at those pieces of CIL which, as a state, they have an obligation to define and follow; and secondly, - at a lower level - from the Judge Advocate's perspective, to help those very Judge Advocates who are deployed and who have an obligation to interpret whether the law in any particular situation is grey or not grey. In this regard, oftentimes, a much more difficult response from a Judge Advocate to a Commander was not "it's grey, you can't do it", but rather "it's grey, and here are the risks of doing it, and perhaps we should talk about why you want to do it, and why you might not want to do it, and come to a consensus" and that this was very difficult.

As Judge Advocates, they are looking for (both from within and without), some definitions of terms, such as "humane treatment", or "coercion", etc., because taken literally, stating that "no coercion can be applied", would restrict some activities that might not otherwise be restricted. Indeed, one might argue that any sort of detainee status amounts to coercion by its very nature.

The Army JAG Corps has been at the forefront of that activity of definition and interpretation. Indeed, the speaker noted that JAG have been engaged in activities which they considered to be ahead of what other armies have done. One of these, was the fairly new Center for Law and Military Operations ('CLMO'), which was begun about 8 or 9 years by the then Judge Advocate General. This Center in Charlottesville, Virginia, is part of the JAG School, and looks at operational international law issues. It tries to capture what has been done, look at doctrine as it has been practised, and then put it in publication (in some cases on the web). It endeavours to prepare and supply DVDs, disks, other sorts of data, that compile the

law so that it can be downloaded on a computer and be taken in a disk and applied as a resource for the field.

Additionally, CLMO has embarked on supervising training at combat training centres. Whether it is the US's joint readiness training centre at Port Hope, or at the national training centre in the desert of California, or other centres for instance in Germany. CLMO send observers and instructors that try to take the rule of law (including the Geneva Conventions and the laws of war) to particular training exercises to make sure that what is happening meets the test of international rules in the law of armed conflict.

JAG has also been looking at the issues raised by, and lessons learned in, this process. For example, it is sometimes difficult in short training sessions to try to use realistic examples of what Judge Advocates and Commanders would follow. It is very easy to only look at examples of classic warfare ('steel on steel' as it is sometimes referred to), making it difficult to predict what circumstances will actually arise. The CLMO has looked at this, and sent delegates to every single 'after-action-review' carried out by military units when they have returned from their assignments - for example, in the Balkans, or Afghanistan or Iraq - to try and find those things which were good and those that were bad and how to improve practice, procedure, and doctrine, to make it more effective in future deployment. That is one unique feature of recent activities by JAG. Another feature is the development of a doctrinal division, again within the JAG School and CLMO, to look at doctrine, try to get ahead of the issues, and get it in publication. Furthermore, work has been done on 'mobile training teams'.

Currently, there are many Judge Advocates deployed. In terms of lawyers, 302 Army Judge Advocates have been deployed around the world: some with units, some with the [Iraq Central Court], some of independent position. Many serve with the CPA and provide additional services to that organisation. The total number of legal assets (including from the Marine Corps) is 735 (both lawyers and support personnel).

JAG look at incidents such as Abu Ghraib (which other than causing death, is the worst kind of treatment because it is tremendously dehumanising - absolutely horrendous from almost every way you look at treating a detainee - the pictures, the handcuffing, the nakedness, the humiliation), in JAG it is seen as something that has gone awry, whereas outsiders look at it perhaps as the tip of the iceberg. That is not to say, however, that there have not been other incidents which JAG are also investigating.

With regard to Abu Ghraib, the positive news is that it was an army specialist who brought the treatment to the attention of superiors who then investigated. It might be thought that it was investigative media reporting which broke the news, but from JAG's perspective the incident started being investigated at a fairly early stage.

Through this doctrine review, it was realised that a number of things needed to be changed. For example, the structure of how interrogations are carried out. We all assume that military units are established as such (that is, we assume that there is a Colonel of a Brigade, a Lieutenant-Colonel of a Battalion, a Captain of a Company, a Lieutenant of a Platoon, a Squad Leader, etc). But that simply was not the set-up for interrogations. Rather, units carrying out interrogations were made up of some enlisted soldiers, staff sergeants, sergeants, some warrant officers and perhaps a captain or a major somewhere in the area, and then it went to the higher levels. Therefore, perhaps another look was needed at that.

With regard to all the abuse that has gone on, reference is made to Army Pamphlet 3451, as a base line. And yet the US does not fight, just with the army. Accordingly,

there should be joint doctrine - a defence doctrine that is over-arching, which is either mirrored or complied with. There are other examples of army regulations which are often called a joint regulation: in fact, while the three services have adopted that same regulation, it is not a "joint" regulation.

This however leads to complex questions, such as whether it is appropriate within the national structure, that the department of the army should be able to dictate policy to others not necessarily within their chain command? Moreover, if some regulations are looked at and being made joint regulations, does it actually get to the point where it has to be considered whether or not that, in and of itself, amounts to a review of CIL? If it is taken as evidence or some evidence of what practice and policies have been, has it just been changed? If so, what about national policy? Should the army be the entity that determines national policy? Or should that happen at a different level? And if it happens at a different level, what role should JAG play in effecting that change?

Much has been made of whether the JAGs agree or disagree with Secretary Rumsfeld's position on interrogation techniques. Without getting into classified information, one can look at that and say that the service JAGs had an opportunity to comment. But, if one looks at that as an interagency process, perhaps it is not a bad thing. If one looks at the overall process of what was proposed and what ultimately was approved, there may be a process that (one might argue) was impacted by a variety of things. But at least there is a process where views of JAGs are considered.

Another thing JAG are trying to do and propose – is to use more precision in use of terms. Thus, there has been a lot of confusion over whether or not the US were trying to change the status of protected individuals, with terms such as unlawful combatants, or other terms used such as security detainees. Were those attempts to change or merely internal descriptions?

In the case of Iraq – this was originally a straightforward scenario: the Geneva Conventions applied, with protected persons, Article 5 etc. The US tried to review the status of detainees every 21 days, and later every 5 days. This was an attempt to follow the international rules in Iraq. The Judge Advocates were aiding in what was considered to be legal interrogation techniques. The case of Afghanistan is a little harder. Whether you go through that process, or do the Geneva Conventions not apply? Or if they do apply, do Al Qaida and Taliban meet the requirements to be protected persons? This was complex. Thus, it would be helpful to have more precision in future revisions.

Taken collectively, all of these efforts show the US Army's commitment to ensure compliance with customary international law. The efforts of the JAG corps contribute to that view and demonstrate what the Army JAG stands for. The army JAGs also felt that they have had a long history and good relationship with the ICRC.

Major General David Howell OBE

(The speaker noted that while he was responsible for military decisions on prosecutions, he was not a government spokesman regarding the issues which he was about to address.)

The issues to be addressed related to some of the questions that the UK authorities had asked themselves particularly in relation to post-occupation in Iraq:
First, what is the applicable law?

Most commentators accept the following legal analysis: Major combat operations began on 20 March 2003. On 5 April 2003, the British had captured Basra and by 9

April 2003, US forces took control of Baghdad. In the recent English High Court case of *Al Skeini*⁹, it was accepted that major combat operations in Iraq ceased on 1 May 2003, and between then and 30 June 2004, there is no issue of whether there was an occupation within the meaning of Article 42 of the Hague Regulations annexed to Hague Convention IV of 1907 ('Hague Regs.') and the 1949 Fourth Geneva Convention ('GC IV'), reinforced by Security Council Resolution 1483.

GC IV applies to the protection of those who find themselves in the hands of an occupying power of which they are not nationals. Additional Protocol I to the Geneva Conventions 1949 also applies to determining occupation. Article 78 of GC IV provides the criteria for justification for holding security detainees in times of occupation.

What about post-30 June 2004 to the end of the occupation? Security Council Resolution 1546 para.10 annexes two letters: one from the Prime Minister of the Interim Government of Iraq Dr. Ayad Allawi and the other from United States Secretary of State Colin Powell. These seem to incorporate, in effect, Article 78 of GC IV (which is the criteria and justification to hold security detainees). It actually lifts the provisions directly from Article 78. But there is nothing said about the rest?

Turning now to Article 78, it is simply a minimum standard. Article 78 provides: "If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment." How should the phrase "necessary, for imperative reasons of security" - be applied in practice?

Perhaps a reasonable interpretation in practice may be to see internment as a last resort. Thus, if there is any other lawful way of dealing with an individual, then internment should not be resorted to. Internment – a removal of liberty – was an ultimate measure and should only be a weapon of last resort.

In practice, other questions arise over Article 78, which (as noted) is a minimum standard: thus, What is the burden and standard of proof? What is the evidence? Who makes the decision? These are the sorts of issues that in practice were asked. For example, should the standard of proof be 'on the balance of probabilities' or 'beyond reasonable doubt'? The review of a decision to detain, according to Article 78, must be every 6 months. The speaker thought that, these days, to hold someone for that length of time without any formal review is questionable. Certainly, the UK have evolved various practices and they have evolved taking into account the state and so on, to ensure far more frequent review. For example, a battle group internment review officer will decide within 8 hours whether or not to hold someone apprehended as a security detainee. There is a review committee which has legal representation. And the decisions of that committee are reviewed – not every 6 months, but - every 10 days, 28 days, 2 months and 6 months, and also more frequently if new evidence arises. One thing quite clear both in law and military practice is that most military commanders do not want to hold someone longer than necessary. Frankly, it was a logistic burden.

In practice too, it has been found necessary to have two forms of committee. One is the actual committee which makes the decision in terms of grounds for detention. The other committee examines the health, welfare, etc. of the detainees while they are being held.

⁹ *R (Al-Skeini and others) v Secretary of State for Defence* [2004] EWHC 2911 (Admin)

Leaving aside Article 78 and turning to a more difficult issue, is the concern which has arisen from the *Al Skeini* decision. The case is subject to appeal at the moment, because it did decide that in certain respects and in certain situations, the European Convention on Human Rights was grafted on to UK forces overseas. While it is not known what will happen on appeal, one concern that has arisen relates to the potential effect of that decision on inter-operability issues between UK forces and other forces which may be non-European, with whom the UK works. The decision will obviously have an impact in ways that need to be worked through.

Jelena Pejic explained that she would speak about procedural principles and safeguards applicable to internment and administrative detention in armed conflict and in other situations of violence.

As an introduction, she would speak about what is known as detention for “security reasons”, whether within or outside of an armed conflict. She would not, however, be speaking about the internment of POWs or the deprivation of liberty of persons who are subject to the criminal process. Her subject would be – what are the procedural safeguards applicable to persons detained for “security reasons”.

As short-hand, the term “security detainees” would be referred to. This was not, however, intended to introduce any new category. The reference was to “internee” within the meaning of IHL applicable in international armed conflict (‘IAC’), and “internee” within the meaning of Additional Protocol II of 1977 (‘APII’), and then persons subject to administrative detention outside of any armed conflict at all.

The reason it was necessary to discuss this area was that if you take a look at existing treaty law (leaving the customary law study to one side for now), and as Major General David Howell had just outlined, the provisions of Article 78 of GC IV (which outline the procedural safeguards for security detainees in IACs), and likewise Articles 42 and 43 of GC IV (applicable to the internment of a person in the territory of a party to the conflict), or Art.75(3) of API, it is clear that these norms are very rudimentary. Essentially, the three articles from the Geneva Convention say that persons can be interned for security reasons - whether its “imperative reasons of security” (Art.78) or reasons that make it “absolutely necessary” to intern the person (Art.42) - and they outline a procedure which suggests that a person has the right to reconsideration (Art.42) or appeal (Art.78) of that initial decision. They talk about periodic review and they talk about a competent body to conduct that review. Essentially, that was it.

Article 75 of API, which is a safety-net applicable to persons who do not enjoy a more favourable status under the GC, is even more rudimentary. All it provides is: that a person interned “shall be informed” of the reasons for their internment, arrest or detention; that they should be released as soon as possible; and that they should be informed of the reasons in a language which they understand. Therefore, in terms of the treaty law, there was not much there with respect to persons subject to security detention.

The situation is even graver in the case of non-international armed conflicts (‘NIAC’), because common Article 3 of the Geneva Conventions says nothing about “internment”. The term is not even mentioned. APII mentions “internment” in Articles 5 and 6, but provides absolutely no guidance as to what the procedural safeguards for such persons would be.

There are two courses of actions in trying to bridge this gap as regards NIAC, and two tendencies: one is to say we are going to apply the rules of IAC by analogy.

However, that was dangerous because analogy in law leads to tremendous uncertainty and in terms of protection of people it does not work (since 'my' analogy is not necessarily 'your' analogy; and it is politically very sensitive, to try to tell governments involved in NIACs, that they should apply the rules of IACs.

This situation makes it necessary to supplement the rules applicable in NIAC with human rights law.

Then there is the situation outside any armed conflict. Until the so-called "global war on terrorism", the idea of administrative detention for security reasons, at least in a large number of countries, was unthinkable. As was known, human rights law (HRL) does not prevent administrative detention, but the idea of detaining someone without subjecting them to any criminal process, was unheard of. The ICRC have been aware over the last three years that this has changed. There have been countries, including the UK which have been 'struggling' with how to deal with this whole issue.

The problem is that the right to liberty of person (the main right involved in administrative detention) is unfortunately, derogable. In situations where state security is involved, or in situations where derogations have been proclaimed, the right to liberty of person (along with other rights), go out of the window.

Given this paucity of norms - whether regarding IAC where treaty provisions are rudimentary, or NIAC where it is completely absent, or human rights which may be derogable (under strict conditions, but we know the UK has derogated from Article 5 of the European Convention) - is it useful and possible to devise a set of basic principles and safeguards which would apply as a minimum to security detention in all three situations (both inside and outside of armed conflict), drawing on both bodies of law (meaning IHL and HRL)?

Clearly, if one was to do this exercise, whatever principles one came up with would, to some extent, also have to be advocated for as a matter of policy, because a considerable amount of human rights soft law would have to be used in elaborating the principles and safeguards.

It was necessary first to briefly discuss the *relationship between HRL and IHL*.

The idea of complementary application between these two bodies of law (IHL and HRL) has been gaining ground over many decades now. Most recently, the ICJ in its July 2004 Advisory Opinion stated that certain rights are a matter of IHL, certain rights are a matter of HRL, and then there are certain issues which are a matter for both branches of the law.

Procedural guarantees for persons deprived of liberty are definitely a concern of both IHL and IHR. To back this up, reference could be made to the text of Article 72 of API (often not mentioned) which talks about treatment of persons in the hands of the adversary, and says that the provisions of that section (which includes Article 75 on 'Fundamental guarantees') are additional to the other provisions of "fundamental human rights norms". Thus, API already talks about the need to incorporate human rights norms when dealing with guarantees of a person subject to the power of the adverse party. One must bear in mind that Article 75 on 'fundamental guarantees' is a 'bottom line' / safety net.

Similarly, Article 75 (fundamental guarantees) says itself that it is outline standards that are a "minimum"; therefore the fact that it says very little about "internment" (save for the need to know the reasons and that they need to exist) also clearly indicates that it can be supplemented (bearing in mind Article 72) by other bodies of law.

Article 75, para. 8, also notes that nothing in Article 75 (fundamental guarantees) would infringe or limit application of other more favourable rules of international law to persons affected by para.1.

A. General Principles Applicable to Internment/Administrative Detention

1. Internment/administrative detention is an exceptional measure

The first obvious and clearly enunciated principle of the commentary to the GC is that security detention / internment is an exceptional measure. It is the most severe measure of control which can be taken by a detaining authority or occupying power. The detainee is subjected to deprivation of liberty (a fundamental right) without criminal process, and in the context of an IAC, this could be done until the end of active hostilities for reasons of 'security'. The GCs or its commentary does not (unfortunately) define what are "reasons of security", etc. Clearly, states have discretion, but it is very clear that the reasons have to be serious: the person being detained, him/herself must represent a real security threat. In that context, it may be asked whether it is legitimate to detain a person for the sole purpose of 'intelligence gathering', without that person themselves presenting a security threat. Clearly, in terms of human rights, the idea of detaining a person for security reasons is even more antithetical to HRL than it is to IHL.

2. Internment/administrative detention is not an alternative to criminal proceedings

Security detention must not be used as an alternative to criminal proceedings. In practice, unfortunately, it is often used as exactly that. Persons subject to criminal process have the right to enjoy the benefits of the additional stringent guarantees that their trial rights provide. Therefore, there is a constant danger of letting the whole regime of internment for security reasons become a *de facto* sub-standard system of penal repression, which must be guarded against.

3. Internment/administrative detention may only be ordered on the basis of a decision taken in each individual case, without discrimination of any kind;

This does not mean that we cannot intern a fairly large number of persons. It just means that each and every one of them has to present a security threat.

4. Internment/administrative detention must cease as soon as the reasons for it cease to exist

Internment has to cease as soon the reasons for it cease to exist. This is a principle that is often not taken into account, even though it is very clear in IHL. It is provided for in Article 132 of GC IV and also Article 75 of API. The longer you keep someone, particularly in a situation of war, the more events move on, and the more likely that the reasons that you might have had for having detained a person in January 2004, no longer obtain in January 2005 or 2006 etc. This obligation even more so in HRL.

5. Internment/administrative detention must conform to the principle of legality

B. Procedural Safeguards:

1. Right to information about the reasons for internment/administrative detention

2. Right to be registered and held in a recognized place of internment/administrative detention

3. A person subject to internment/administrative detention has the right to challenge the lawfulness of his or her detention, with the least possible delay

4. Review of the lawfulness of internment/administrative detention must be carried out by an independent and impartial body

See Art. 43 of GC IV and Art. 78 of API: Right to have decision on internment reconsidered/lodge an appeal. A key factor here is that the reviewing body must be of a certain quality. It must be independent and impartial. In the context of IAC the reviewing body does not necessarily have to be a court/judicial body. This could sometimes be impracticable. In that context judicial review, although preferable, is

not mandatory. In all other circumstances (i.e. internal armed conflict, or situations not amounting to armed conflict) the reviewing body must be a judicial body.

5. An internee/administrative detainee has the right to periodical review of the lawfulness of continued detention

6. An internee/administrative detainee should be allowed to have legal assistance

The right to legal assistance is not expressly provided for in GC IV. Similarly, human rights treaty law does not provide for a right to legal assistance with respect to people subjected to administrative detention/security detainees. There is therefore a lack of hard (treaty) law in this respect.

7. An internee/administrative detainee and his or her legal representative should be able to attend the proceedings in person

The same considerations apply as those in respect of legal assistance (i.e. no treaty law with respect to security detainees)

8. An internee/administrative detainee must be allowed to have contacts - to correspond with and be visited by - members of his or her family

9. An internee/administrative detainee has the right to the medical care and attention required by his or her condition

10. An internee/administrative detainee must be allowed to make submissions relating to his or her treatment and conditions of detention

11. Access to persons interned/administratively detained

There is a right of access by ICRC or other mandated organisations.

Conclusion: in conclusion, it was noted that these are all minimum standards.

Questions and Answers/ Discussion

One participant questioned whether, with regard to combined or coalition operations, it was appropriate to insist that a capturing nation retains responsibility for treatment of POWs and the duty to report to the ICRC, particularly in the case of coalitions involving small states (where the resources of big states were absent). In response, it was asked how else it would be possible to meet the Geneva Convention obligation and the level of protection. If a state transfers detainees, the state still retains responsibility for their treatment. The transferring power, if it is not satisfied that detainees are treated in compliance with IHL standards has to make representations, and it can also take detainees back

Another participant asked if it was possible for an individual to go to British courts for judicial review of decisions taken by an Article 5 tribunal? In response it was stated that legally, judicial review applies to British forces throughout the world, although there had not been such a case yet. However, given the *Al Skeini* case, this may well happen in future.

A question was asked as to what constitutes a competent Tribunal, with respect to Article 5. In response, it was commented that not much can be gleaned from the Convention. Article 5 tribunals were designed for making quick decisions near the battlefield. So making them full judicial tribunals is contrary to logic. In addition, they 'only' decide on status under IHL. They were not designed to be criminal judicial tribunals. They are not called upon (and cannot) take decisions on issues of criminal responsibility. It is to be noted that Article 5 tribunals are envisaged only for POWs, and have nothing to do with security detainees. Standards of review for security detainees are different (as discussed above).

Another member of the audience questioned the basis on which the US was holding thousands of detainees. In Security Council resolution 1546, there may be a legal basis for custody, but not the legal regime by which they are to be held. In response, it was commented that it was not clear that the US Government has taken a position

on whether there had been an end of conflict or whether the Security Council resolution was applied; authority has not been turned over to the Iraqis.

A questioner raised the concern that IHL and international human rights law (and domestic law) are being fused in a way which is making IHL non-distinct and not useful for the military on the battlefield, since: firstly, the extraterritorial application of domestic human rights law has the effect of muddying the law on the battlefield, or in a peacekeeping operation, such as in the Balkans where you have 27 nations providing contingents, with the consequence that you end up bringing in the domestic law of those 27 different nations to that operation, rather than the international standard of IHL; secondly, we have a body of law applicable to security detainees (though sparse) – which should be a bedrock for the principles applicable to security detainees. Once we have those security detainees, and improve our individual positions, we can then build towards a higher human rights standard. That's the way it has been used in recent military operations. So that we build towards a higher standard. IHL and IHR are two separate things which should not be merged. Security detention is not the same thing as someone being charged with a crime. In response, another audience member disagreed, and supported the merging of IHL and IHR. Another participant responded that the ICRC wished to keep IHL and IHR separate. In any case, this muddying was not being proposed since everything that was mentioned during the presentation of Ms Peijic (other than the right to a lawyer) already existed in IHL. In the Balkans, it is surprising that within what is now a non-conflict situation, there appeared to be a challenge to the application of human rights law. In terms of the extraterritorial application of domestic human rights reference was made to General Comment 31 of the Human Rights Committee. It is clear that the trend is definitely in favour of extraterritorial application of HRL. It was not clear to the speaker how an international force could say that the standard should be lower outside of an armed conflict?

Another audience member noted that the law on the use of force had been stretched in the last three years. However, with respect to *jus in bello* it was asked whether, as part of their “war on terror” and in dealing with the new threats, the US and UK thought that they had been redefining or stretching what was acceptable in IHL, or whether they had been bolstering customary IHL? Furthermore, it was asked whether the last 3 years had complicated the analysis for the ICRC in terms of what is customary IHL? In response, it was countered that before we get to the implications of the “war on terror”, we would need to be clear about the extent to which the “war on terror” falls into the relevant categories of war. For instance, there were aspects of the “war on terror” which amount to IAC, other aspects that amount to NIAC, and still others which are not applicable to IHL at all. The conclusion that that the “war on terror” is a global IAC is not widely shared. Until it is, it will be difficult to talk about developments and implications for customary IHL.

A different question was raised with regard to the positive and negative implications of media coverage in the last 3 years. Thus on the one hand, it was surprising to see footage on CNN and BBC showing Iraqi POWs/internees, aired all around the world, and on the flip-side, with the media being used to expose scandals in prisons where Iraqis are being kept, and what was the position of international law regarding the globalization of the images of these people? In response it was agreed that standards in the media must be raised, while at the same time the importance of media was noted in enforcing greater standards. Another response noted the recent practice of embedding reporters in military units, but questioned whether the media had advanced anything for the military. There was often political bias in the media, although to the extent that alleged exposures of abuse scandals were partially correct they could still be useful to investigating military lawyers.

A separate point was made with respect to the often heard statement that in the last three years some things have been different with regard to the “war on terror”. However, it seemed to be forgotten that “internment” is not a new word and that there was quite a bit of state practice involving Ireland, Portugal, Spain, Germany, France, Italy and others in the 1970s and 1980s. We were either building on that experience or retreating from it. But there is certainly experience there. In response it was suggested that with respect to the UK many lessons learned in Northern Ireland had not been carried through to the present conflicts. However, it was clear that the law on POWs had not been stretched.

Returning to the point of judicial review, one statement from the floor reminded those present that in Israel there was constant judicial review by the highest court in the land of military action under the rules of IHL, and that this had not led to the falling apart of either the state or the army. On the contrary, it had had a positive effect on a number of levels, including forcing upon the state a need to develop a theory for detention, and has also had, generally, had a restraining influence on the army. Another person suggested that while judicial review was not inappropriate, the law of war was the important body of law to apply, not domestic laws, and that the ability to carry out security detentions should be preserved without being submitted to judicial review. Judicial review was not demanded by the Geneva Conventions, and to require it was mixing apples and oranges.

A question was asked from the floor regarding newspaper reports in recent times that security detainees were being sent by states to other states with less stringent restrictions on interrogation techniques; how did this fit in with IHL? To the extent that it did, was it not a sign that the extraterritorial application of human rights law was imperative? It was responded that to the extent that the global war on terror could be characterised as an IAC, then the rules on transfers would certainly apply.

19 April

Keynote Address

Chair: **Sir Elihu Lauterpacht QC**, Emeritus Director, Lauterpacht Centre for International Law

Speaker: **Judge Theodor Meron**, President, International Criminal Tribunal for the former Yugoslavia

The Revival of Customary International Humanitarian Law

Judge Theodor Meron

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

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

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

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

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

Session 4 Human Rights: Their place on the battlefield

Chair: **Dr. Steven Haines**, Royal Holloway College, London

Speakers: **Professor Louise Doswald-Beck**, University Centre for International Humanitarian Law

Professor David Kretzmer, Hebrew University of Jerusalem

Dr. Chaloka Beyani, London School of Economics

Prof. Louise Doswald Beck

What I will do is describe, briefly, why a certain amount of human rights law was introduced in the commentary to the study - how, and in what context - and make some comments on rules that have been found to be customary, especially with regards to persons in the power of the adversary that are not to be found in treaty law relating to non-international armed conflicts; the relevance of human rights law in such contexts; and the extent to which humanitarian law needs to be taken into account when interpreting human rights law.

So, why was some human rights law included? The background to this was that in the early stages of working out how to go about doing the study, the question I asked the experts – both the Steering Committee, and a much larger group of experts from around the world – was whether it would be a good idea to have a chapter in the study describing basic human rights law that applies at all times. Otherwise, even though the study is on international humanitarian law, it could give a slightly false impression as to what body of law actually applies to armed conflicts. The overwhelming sense of persons at those meetings was that this would be a good idea. There were two people who were not in favour, who were of the opinion that

there should be a very clear distinction between the two legal regimes, but who, at the same time, did admit that they knew nothing of human rights law.

The decision having very much been in favour, when we actually began the study however, we realised that we were going to end up with a chapter consisting of material that is largely covered also by international humanitarian law and therefore could have given a slightly strange impression as well. So, what we ended up doing was to introduce Chapter 32 on Fundamental Guarantees. There was a lot of discussion as to what title to give this chapter and was ultimately influenced by the title of Article 75 of Additional Protocol I. This was not because we were trying to make Additional Protocol I, Article 75 customary, but the point was to try to describe these kinds of rules. It is true, when referring to human rights law, that this is primarily in Part V of the Study relating to the treatment of civilians and combatants *hors de combat* – that is, persons in the power of the adversary.

I should also indicate the fact that this study took, as the cut off date for the material collected, the end of 2002 which means that the very important 'Palestinian Wall' case is not mentioned at all. This was simply a matter of time. Similarly, General Comment 31 of the Human Rights Committee, also very important, is not mentioned for exactly the same reason.

With those particular provisos, I wanted to indicate why the vast majority of experts thought it important to refer to basic human rights law in the context of armed conflicts. That was because both treaty law, and State practice, shows unequivocally that human rights law does apply to armed conflict – state practice in the form of decisions of the Security Council and in the General Assembly, and in other contexts, insisting that States and parties to an armed conflict respect not only humanitarian law, but also human rights law. So, for example, the Security Council and General Assembly, with the active support of all the major players, insisted on a study of how Iraq respected human rights in Kuwait and how Russia respected human rights in Afghanistan, during those armed conflicts, which shows that there is very clear State practice outside the treaties to this effect.

The treaties themselves also – and I refer in particular to the 'major treaties': the International Covenant on Civil and Political Rights which has something like 150 States Parties to it now; the European Convention on Human Rights; the African Charter on Human and Peoples' Rights; the Inter-American Convention on Human Rights – all very clearly do apply to armed conflict which is clear from the very terms of those treaties. In particular, the reference, in three of those treaties which allow derogations to the extent strictly required, so as to indicate that this applies in situations of war or other public emergency, and that certain of the rights cannot be derogated from. This is a very straight-forward indication that the treaties apply in times of war and armed conflict – there's no other possible interpretation.

Also the other point which will be looked at in more detail by my colleagues in the panel, is the fact that those derogation clauses are looked at far too simplistically by persons who are not familiar with the extensive case law of all those systems, namely that a derogation can *only* be to the degree *strictly required* by the exigencies of a situation. That means, in practice (and all the General Comments and Case Law, etc., state this), that no right can be entirely eliminated – it's only a question of limitations and restrictions to a more or lesser degree depending on the circumstances.

So, having made that kind of introduction, why have we concentrated reference to human rights law in Part V? The purpose was not to try and evaluate human rights

customary law. The point was rather, in looking at humanitarian law rules which apply to all persons in the power of the adversary and which are common to all cases – and there’s no point in repeating basic rules that apply to prisoners of war; that apply to civilians; that apply to the wounded and sick – and to look at the situation in non-international armed conflict where it is obvious that a lot of these rules are in Common Article 3, or Protocol II, or have been indicated as applicable both in resolutions, statements, rapporteur studies approved by States, and also in human rights case law. So the point of including this was to demonstrate that there are certain fundamental rules which, as a matter of international law, have to be applied in armed conflict, whatever the nature of the conflict, and whatever the nature of the violence. The advantage of this is that one does not have to worry about arguments of whether there is agreement on whether or not there is an ‘armed conflict’ even though there’s massive amounts of violence that anyone else would call an armed conflict. This seems to be the value of this.

Having said this, I could give the impression that human rights law never applies in the context of the conduct of hostilities. I’m not going to talk too much about this, but just to indicate very briefly that, theoretically, it does. I think that in virtually every instance when interpreting human rights law in the context of hostility situations, one needs to do so in the light of what humanitarian law has to say. I think the European Court of Human Rights did that extremely well in the *Ergi v. Turkey* case; I think it did it very badly – because it didn’t do it at all – in the *Ozkan v. Turkey* case relating to protection of homes during hostilities.

With regard to the kinds of sources we used, we looked very carefully at all systems – in other words, it was very important not to concentrate only on the European Convention. I went out of my way to make sure I looked for case law, general comments, etc., from all of the systems available to make sure that there was a *totality* of agreement in a certain regard. The other point is that there was a certain amount of discussion as to whether the actual formulation of the rules should always copy a treaty formulation that we find in humanitarian law. That was not always easy for two reasons. The first is that some of these overarching rules actually had the purpose of grouping together a whole range of detailed rules which all amount to something. For example, the prohibition of uncompensated or abusive forced labour actually has lots of bits and pieces of law all over the place which would not make a lot of sense unless looked at in the whole. So they provide a kind of distillation as a basic rule. The same thing applies for the arbitrary deprivation of liberty. Again, there’s a whole range of detailed rules in humanitarian law which you also find in human rights law, and although the rules vary depending on what situation you’re in or on what system you’re looking at, but which all end up distilling down to that rule; there has to be a ground that’s recognised; there has to be some sense to it; it has to be for security reasons; and there has to be a certain amount of procedures and supervision that’s required, and humanitarian law definitely requires all of the above, as explained in the commentary.

There are other areas where, I have to admit that, personally, I would have preferred that a humanitarian law rule can be more general in articulation than I think the law actually is. I’ll give one concrete example; Protocol II to the Geneva Conventions talks about respecting religious convictions and practices. The reality is that respect of religious convictions is absolute – you can’t persecute people for reasons of their religion, for example – it is an *absolute* duty. On the other hand, respect of practices is something that is subject to limitations which are reasonable in the circumstances. Personally, I would have liked to reflect that in the body of the rule. But the majority opinion of the outside experts who were consulted was that one ought rather go with the wording as it appears in the humanitarian law treaty, such that we have an

explanation of the differences in the commentary. It's important, therefore, if you see something a little bit different to the classical formulation, to consult the commentary fairly carefully in order to get the sense of what is actually being described.

I'll just give a few examples of some of the rules that are not in humanitarian treaty law that govern non-international armed conflict, but which are to be found in this chapter on essential guarantees, as well as in Part V:

- The prohibition of the use of 'human shields';
- The prohibition of sexual violence;
- The prohibition of enforced disappearance;
- Identification of the dead and the accounting for missing persons when the authorities know where these people are, which would amount to inhuman treatment;
- Making sure that detained persons are provided with adequate food, clothing and shelter because not doing so, again, amounts to inhuman treatment;
- Separation of children from adults;
- Recording the details of detained persons;
- Specific protections for children, the elderly and the disabled;
- Reparation in non-international armed conflict - partly based on the human rights obligation to provide a remedy for violations.

You will also find in the commentary to some of the rules which are to be found in the treaties, more details for which one actually has to look to human rights law. For example, the fact that persons cannot be convicted of a sentence unless they have had a 'fair trial'. Yet, how do we define what constitutes a 'fair trial'? There are some indications in Protocol II, but there are a lot more indications in human rights law. Again, what do we mean with regard to respect for personal convictions and religious practices – as mentioned above – there's a lot more material, in addition to classical humanitarian law, to be found in human rights law and which is considered to be non-derogable. When considering 'respect of family life as far as possible', what does this mean at the end of the day when we look at the totality of practice of the sort mentioned above? It means, to the degree possible in the circumstance (as there are exceptions), trying to maintain family unity; trying to enable contact between family members; if authorities know where family members are, they really must inform the family.

Professor David Kretzmer

The application of human rights standards in a situation of armed conflict has come up quite a few times during the discussions at this conference. Not surprisingly, we can discern three attitudes towards this question:

1. The first, which I call the classic, traditional or purist approach towards international humanitarian law, often adopted by government spokesmen and military personnel, which argues that it is difficult enough to ensure adherence to the standards of international humanitarian law and then to set down quite clear guidelines to military personnel and try to avoid complicating matters by introducing very 'wishy-washy' standards of human rights. Their fear is that, by introducing these standards, the whole attitude towards the protection of international human rights will be watered down.
2. The other, totally opposing standpoint – often the stand adopted by many human rights NGOs and, to a certain extent by the Human Rights Committee itself – is that human rights are universal and should therefore apply in all situations, at all times, and certainly on the battlefield. We would then have to

see how we combine these situations with the *lex specialis* of international humanitarian law, but that, basically, we are dealing with human rights.

3. Thirdly, there is the approach of distinguishing between different situations in armed conflict where, in certain situations, we would rely on international humanitarian law, and in other situations, we import supplementary human rights law.

I support the third approach and intend to show you how this works. In fact, I think it's implicit in the actual Study before us, as the chapter most influenced by the 'Fundamental Guarantees' refers to civilians in the power of a party to a conflict and to persons who are *hors de combat*. In other words, we have a situation which is somewhat removed from the battlefield and which, as I hope to demonstrate, those are the situations in which we should hope to combine international humanitarian law and human rights.

I am quite fortunate, in coming from Israel, that I often have to address issues of the Israel-Palestinian conflict which means I usually have to start by speaking about history. Although I do not have to address those types of issues today, I will still have to talk a little about history because I do not believe that we can understand the connection between international human rights and international humanitarian law without going into some of the history of both of these fields of international law.

Let us start with international armed conflict as it was historically regulated by the international laws of armed conflict aimed at regulating the conduct of states towards combatants or civilians of the enemy. Even in Geneva Convention IV dealing with the protection of civilians, the definition of a protected person excludes nationals of the party involved; if they are in the hands of their own country – whether in occupied territories, or the territory of the country involved – they do not enjoy the protection of the fourth Geneva Convention. This body of law does not relate to the relationship between a state and its nationals.

When the international community decided to apply some of the norms of international humanitarian law to non-international armed conflicts, there was an assumption that, unless these conflicts were regulated by international humanitarian law, they would not be subject to any rules of international law, but by domestic law alone. Take the following statement in the Pictet Commentary on Common Article 3 of the Geneva Conventions in which he argues for a very low threshold for the definition of a non-international armed conflict:

“What government would dare to claim before the world, in the case of civil disturbances which could justly be described as acts of mere banditry, that Article 3 not be applicable, it is entitled to leave the wounded un-cared for, to inflict torture and mutilations and to take hostages”

Obviously, we would say that no government could possibly argue those things because they would be bound by the norms of international human rights law, and in some cases such as the prohibition of torture, that we're talking about customary international law. This was a new development as international humanitarian law regulated not only the relationship between a state and those in its territory and subject to its jurisdiction, but also to non-state actors.

International human rights law started from a very different perspective. Here we were talking about the relationship of a state to its nationals – and if we look at two of the main treaties, the European Convention on Human Rights which refers to persons *within* the state's jurisdiction, and the International Covenant of Civil and

Political Rights which refers to persons in the territory of a state and *subject* to its jurisdiction. To comment on this, the Human Rights Committee in its recent General Comment 31 interpreted that term 'in its territory and subject to its jurisdiction' and stated that it's not conjunctive, but rather disjunctive in that it's in the territory *or* subject to its jurisdiction. Historically this interpretation does not have much support. As Michael Dennis has shown in a recent article in the American Journal of International Law, the original draft of the ICCPR also spoke only of persons within the jurisdiction of the state, and Eleanor Roosevelt, the chair of the Human Rights Commission, suggested adding the words 'in its territory' and her reason for doing so was very interesting; specifically that the American forces in Germany who are an occupying power would be subject to the treaty which would be unthinkable in that the law of war should apply and not the treaty – a reasoning which was accepted without any reservations. That is what the Human Rights Committee has consistently said, we have to recognise that international human rights law has no *direct* application to non-state actors.

So what are the assumptions of human rights law? The first assumption is that it is the duty of the state to 'secure' in the words of the European Convention, or to 'respect and ensure' in the words of the ICCPR, all of the rights in the Covenants. It can only be respected and required to do so when it has jurisdiction over the individuals concerned, and to a certain extent, I would say that we're dealing with a package here that when the convention applies, the state must secure *all* of the rights which are provided.

Now, let us see what the development of international human rights law meant for international humanitarian law. Firstly, to international armed conflicts. It would seem that we could have taken the approach that there's no need to have different spheres of application – international human rights applies to persons within a state and subject to its jurisdiction, and the international law or armed conflict applies to the state's conduct towards the enemy, in particular upon the battlefield. A lot has been mentioned about the notion of derogation, but I disagree with the extent to which this notion of derogation has been played upon both in the Study itself and, with respect, within the International Court of Justice. It is quite clear that when human rights apply, if a state wants to act in any way that is not consistent with its normal duties, it must see whether it is entitled to declare a state of emergency and derogate from certain of the rights. But the derogation only becomes necessary after assuming that the state is bound, in that situation, by the ICCPR or the European Convention, for example. A lot has been made of Article 15 of the European Convention - the article referring to the right of states to derogate from certain of their obligations, which mentions that there can be no derogation from the right to life save in respect of death resulting from lawful acts of war. It would appear, therefore, that this applies in times of war and I would not contest for one second that international human rights conventions should not apply in times of war, but *where* do they apply? Do they apply on the battlefield? Certainly they apply on internal fronts such as when a state wants to derogate from its obligations on its internal front such as for administrative detention, but I would like to know if there are any instances where a state which is a party to the European Convention and has been involved in an international armed conflict has thought that it has to derogate from the right to life in order to allow it to kill combatants on the battlefield.

Let us take the most recent example of a British derogation while involved in the war in Iraq; the UK submitted a derogation which allowed them to hold people in Britain in derogation of the right to liberty, but the UK did not think it was necessary to derogate in order to be able to shoot combatants in the war in Iraq. So, it's quite

clear that the derogation clause is relevant, but it is not necessarily relevant in all situations of armed conflict.

When we come to non-international armed conflict, the situation is far more complicated because both systems would seem to apply. When we are talking about a non-international conflict which is defined both by Common Article 3 and by Additional Protocol II as a conflict within the territory of a state – both systems would seem to apply concurrently. But, now we have a double-edged sword ; if our original assumption was that we want to apply the international humanitarian law to non-international armed conflict because if we don't apply it there will be no rules of international justice to be left with, this is no longer the case. If the international humanitarian law doesn't apply, we're still going to have a large body of human rights law which may be more protective in respects to the individual involved. This brings us to a very important point that although we use the term international humanitarian law, it doesn't hide the fact that we're talking about the law of armed conflict which suggests a mixed bag ; once we define a situation as an armed conflict, we're not only extending certain forms of protections, but we are also giving a state certain powers which it doesn't possess under the international human rights regime. Under human rights law, there is no way that a state can decide to shoot people because of their status – if they're combatants they can be shot, but if they're civilians they can't be shot – we have a situation in which states may be interested in saying that we're now in a non-international armed conflict. After the second *intifada* started in my part of the world in September 2000, the Israeli army legal adviser said, "we are now defining the situation here as armed conflict short of war". They were not doing it in order to extent further protection towards the Palestinians, but because they would have certain powers that they would not have in certain other situations.

So how do we combine these situations? My argument is that, when we look at the way in which human rights law has developed, we see an expanding interpretation of the term 'jurisdiction' which can be traced quite clearly. Firstly we are not only talking about a situation of the sovereign territory of the state involved. The Human Rights Committee in its concluding observations relating to Israel, an 'occupying power' with effective control, but it is a condition of occupation over the territory involved that the territory will be regarded as being in the jurisdiction of the state involved, and if it's a party to the International Covenant, or to the European Convention, it will be bound by its obligations. The Human Rights Committee suggested at one stage what I would consider another notion of jurisdiction which I will call the 'cause and effect' posture as opposed to the effective control position – if the state is capable of affecting the rights of individuals, then those individuals, for that purpose, would be under the jurisdiction of the state involved. That was rejected by the European Court of Human Rights in the *Bankovic* case. Clearly the Court was not prepared to extend the Convention by the mere fact that a state can affect a person's rights, even the right to life.

There are tests of effective control over persons even if they are in a territory that is not occupied. We have the case against Turkey in which the European Court of Human Rights found that Turkey in its military operation was not an occupying power but that it really had effective control over the persons involved and was therefore bound by its obligations under the European Convention, even though it was in territory in which the European Convention does not apply. We also have seen this in a similar case in the United Kingdom where at least persons held in detention by the United Kingdom forces will certainly enjoy the protection of the European Convention.

So, how do we merge the two systems? In some cases, we are talking about the same norms – the classic example is the prohibition on torture. Some non-lawyers here may ask what difference it makes if we are saying that it is a norm of international human rights law and a norm of international humanitarian law. Well, it can make quite a big difference, especially for the competence of judicial bodies involved such as criminal jurisdiction for grave violations of international humanitarian law, and on the other hand, where we are talking about human rights courts, in order to invoke the jurisdiction of that court, one has to show that there has been a violation of human rights norms protected by that treaty.

The question is what system should apply when we have different norms. Here, I suggest the following division: when we are talking about the battlefield ‘proper’ in the classic sense, there is no effective control and international humanitarian law rules prevail. As soon as we start removing ourselves from the battlefield, we are going to start having international humanitarian law supplemented by international human rights law ; where a situation of occupation is unclear, in this second situation civilians in the hands of the state and persons *hors de combat* are clearly covered by international humanitarian law supplemented by international human rights law.

Finally, what about non-international armed conflicts? My argument is that in these conflicts, the primary regime is international human right law as when we are talking about an internal conflict a state’s first and foremost values are its human rights obligations. Interestingly enough, it is only when a state starts losing part of its jurisdiction and cannot be expected to enforce or respect its obligations under international human rights law that it may be able to resort to the latitude granted to it under international humanitarian law. Additional Protocol II, in defining a non-international armed conflict demands as one of the conditions control of a part of the territory of the state party by insurgents; I would say that what is intimated here is that the state in this situation does not have all of the control necessary in order to require it to meet all of its international human rights obligations and therefore it must rely largely on international humanitarian law. What happens in between? My theory is that of ‘situational jurisdiction’ – when does international human rights law apply in the situation of armed conflict? As opposed to the ICJ in the *Wall* case, which said that some *rights* are a matter of international human rights law, and some a matter of international humanitarian law, I would say that in some *situations* you are going to have only international humanitarian law where the state involved has no effective control, and in other situations as we move closer to a situational control over individuals – not necessarily of territory –you are going to have a combination of international humanitarian law and international human rights law.

Dr. Chaloka Beyani

I will examine the complementarity underlying the interplay between international humanitarian law applicable in internal armed conflicts and the relevant accompanying aspects of international human rights law. The ambit of inquiry rests on Common Article 3 to the Geneva Conventions of 1949, the fundamental guarantees provided for under humane treatment in Additional Protocol II to the Geneva Conventions as they relate to the corpus of international human rights instruments and relevant jurisprudence.

It is helpful at the outset to elaborate on the use of the terms ‘international humanitarian law’ and ‘human rights law’ in so far as these represent the framework of the discussion. The paper then proceeds to denote the interplay between the scope of international humanitarian law applicable in armed conflicts and the international law of human rights.

Thereafter, substantive aspects of the complementarity between these two systems of law are considered by reference to derogation; the prohibition on adverse distinction and non-discrimination; the right to life; the prohibition on torture and inhuman and degrading treatment; fair trial; deprivation and restriction of personal liberty; displacement of civilians and economic, social and cultural rights.

Conceptual Aspects of the Interplay

International humanitarian law deals with the necessity to protect certain categories of persons and the civilian population during armed conflict. It belongs to the *ius in bello* part of international law that does not determine, or intrude upon, the lawfulness of the character of an armed conflict. Its function is to regulate the conduct of hostilities by parties to international and non-international armed conflicts, extending in this regard to the proportionality of attack, defence, and the means of warfare used.

Primary objectives of international humanitarian law are to protect those who are not, or who no longer, take a direct part in hostilities, including civilians, the captured, wounded and sick combatants, and to regulate the permissible means and methods of warfare. In pursuit of compliance with these objectives, international humanitarian law is unique in the sense that it directly binds states, individual soldiers and individual member of armed groups.

Put simply, international armed conflicts are those occurring between states while non-international armed conflicts occur within states and involve organised armed groups in the territories of such states. The Four Geneva Conventions and Additional Protocol I regulate international armed conflicts while Common Article 3 of the Geneva Conventions and Additional Protocol II regulate internal armed conflicts. In particular, Additional Protocol II is applicable to armed conflicts which take place in the territory of a state party between its armed forces and dissident armed forces or other organised military groups which, under responsible command, exercise such control over a part of its territory for the purpose of enabling them to carry out sustained and concerted military operations in accordance with Additional Protocol II. Despite this, the divide between the principles applicable in international and internal armed conflicts is not as simple as the treaty classification seems to indicate.

In *Nicaragua v. the United States*, the International Court of Justice found that the acts of armed groups against Nicaragua were governed by the law applicable in internal armed conflict, although the Court tellingly observed that minimum rules applicable to international and non-international armed conflicts are identical.

In addition, decisions of the International Criminal Tribunal for the Former Yugoslavia have blurred the distinction between classification of international and internal armed conflicts in so far as the applicable principles concerning war crimes are concerned, holding accused persons responsible for war crimes committed in an internal armed conflict. Prior to this decision [in the *Tadic* and *Blaskic* cases], the traditional view was that war crimes were only committed in international armed conflicts. The fact that this is no longer the case indicates that a higher level of responsibility now attaches to the conduct of the parties in internal armed conflicts and there is therefore a greater incentive on their part to comply with it if such parties were to avoid individual criminal liability.

Historically, international humanitarian law as a whole pre-dates the development of the modern body of human rights in the process and structure of international law. Both systems of law are highly specialised, with international humanitarian law being more densely codified in the Geneva Conventions of 1949 and the Additional

Protocols to those Conventions of 1977. A vast amount of commentary on the meaning of the provisions of these treaties is provided by the International Committee of the Red Cross.

By comparison, international human rights law is relatively recent in origin. International speaking the term 'human rights' is a post-second world war phenomenon in which the United Nations Charter (1945), the Universal Declaration of Human Rights (1948), and the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights (1966), as well as other treaties and instruments on human rights, have played the engineering role of developing and outlining the ambit of the concept and content of human rights.

By common definition, human rights are entitlements inherent in all human beings and protect the attributes, characteristics, and values of being human, based on respect for human dignity and the worthiness of being human. In the words of the International Court of Justice, human rights constitute elementary considerations of humanity and their protection is strictly a humanitarian objective which gives rise to generally binding obligations in international law.

Significant points of interplay are that human dignity in human rights corresponds to the standards of humane treatment in international humanitarian law and both systems of law are concerned with the protection of humanity in different and sometimes overlapping contexts. In this sense, both systems of law constitute yardsticks according to which the conduct of states and individual members of armed groups can be determined in the case of human rights. The sphere of overlap is more evident in the inclusion of certain human rights based concepts in the Additional Protocols of 1977, concluded as they were a year after the International Covenants entered into force in 1976.

Scope of application

The threshold of Additional Protocol II does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature that are not armed conflicts. Human rights apply to these situations on account of restrictive clauses to human rights that are qualified and subject to derogation in the interest of public order and public security. Derogation provides an important aspect of the complementarity between international humanitarian law and human rights as indicated below.

Crucial differences in the scope of application of international humanitarian law and human rights concern the methods and bodies of accountability. Accountability for breaches of international humanitarian law is personal and punitive by virtue of individual criminal responsibility on the part of individual members of the armed forces of a state as well as individual members of armed groups. The system of accountability has grown gradually from command structures within armed forces, the victorious powers under Nuremberg, the *ad hoc* tribunals for the former Yugoslavia and Rwanda, to a standing International Criminal Court by virtue of the Rome Statute of 1998.

Under human rights, accountability for violations of human rights attaches to the state, except where such violations are beyond the control of states. Human rights establish liability for states for failure to prevent violations of human rights by non-state actors when these are under their jurisdiction and control. In *Rodriguez v. Honduras*, the Inter-American Commission attached responsibility to the state of Honduras for the applicant's disappearance as a matter of liability.

There is also complementarity arising from the use of human rights bodies as fora for claims by individuals related to breaches of international humanitarian law by states. Both the Inter-American Commission and the European Court for Human Rights have entertained such claims and that opens up the possibility for states to use these as non-punitive systems of accountability where states are themselves in breach of international humanitarian law relating to internal armed conflicts. This possibility exists under the African Charter in relation to the provisions on maintaining a peaceful and safe environment as well as by expanding the jurisdiction of the African Court to include breaches of international humanitarian law in internal armed conflicts.

Substantive Aspects of the Interplay

For the purpose of the interplay of humanitarian law in internal armed conflict, it is clear that derogations provide a significant connection in the application of human rights in internal armed conflicts. Such derogations must result from the exigencies of an internal armed conflict rather than from internal disturbances as such. But it might be understood that the derogation of human rights during states of emergency and armed conflict does not grant unbridled disregard for human rights. Procedural safeguards underpin derogation from human rights strictly and proportionately to the exigencies of the situation for which derogation is called.

Therefore, a major first bridge in the interplay between international humanitarian law and human rights concerns the way in which human rights are not derogable, such as non-discrimination, the right to life, the prohibition on torture inhuman and degrading treatment, and the procedural guarantees of a fair trial apply during armed conflict. In the advisory opinion concerning the *Legality of Nuclear Weapons*, the International Court of Justice explained that human rights, such as the right to life, applied during armed conflict with international humanitarian law as the determining *lex specialis*.

Under this approach, non-discrimination as a principle of human rights underlies the holistic spectrum of the protection of human rights in times of peace and in times of internal armed conflict.

However, the application of non-discrimination in internal armed conflicts from the point of view of international humanitarian law as the *lex specialis* would, under Common Article 3 and Additional Protocol II, take the form of the requirement of the humane treatment, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria of persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds detention, or any other cause, in all circumstances.

The same approach underlies the protection of the right to life. Human rights provide protection against arbitrary deprivation of life and this protection requires compliance with such procedural guarantees as the right to a fair trial, in which the equality of arms and the presumption of innocence apply. However, what constitutes protection against arbitrary deprivation of life in international humanitarian law would rest on the application of the principle of distinction in relation to combatants, those taking direct participation in the hostilities, and those who do not, constitute the civilian population.

A further level of interplay is that international humanitarian law provides the bottom line for the application and protection of human rights that are derogable, e.g., restriction and deprivation of personal liberty by internment and detention

respectively, or the manifestation of religion, thought and consciousness, when such rights are expressed and protected in international humanitarian law.

Because detention is derogable, human rights protection to those whose personal liberty is restricted during internal armed conflict is weak. Requirements of *habeas corpus*, access to a lawyer, and periodic review of detention would be required by human rights. Human rights would also provide the content of detention as the deprivation of liberty and of internment as a restriction of liberty as the case of *Guzzardi v. Italy* shows. However, stronger guarantees on the conditions and legality of detention exist under international humanitarian law.

The third and more complicated area of interplay is that whereby human rights provide the substance of the content of those human rights principles contained in international humanitarian law. For example, the meaning of what constitutes a fair trial or the incidence of torture, inhuman and degrading treatment in times of armed conflict will be as likely as informed by the substantive content of human rights in times of peace as in times of armed conflict.

The prohibition on the displacement of the civilian population in internal armed conflict dovetails with the application of international humanitarian law and human rights in situations where the civilian population is internally displaced and with refugee protection and human rights when the civilian population is externally displaced. An area of attention is the application of military necessity as a ground for the displacement of the civilian population. This is because the traditional approach to the application of international humanitarian law saw as its major purposes the enabling of the prosecution of armed conflict to attain military objectives. In this approach, military necessity was seen as an overriding web throughout the laws of armed conflict. The modern approach however, balances between military necessity and humanity in the conduct of war. Thus, in the *Legality of Nuclear Weapons* case, the Court advised that human rights were applicable in armed conflict to the extent determined by international humanitarian law and, in the opinion of some of the Judges, a balance between military necessity and humanity was necessary.

Finally, international humanitarian law reinforces economic, social and cultural rights from the point of view of the requirement to grant humanitarian agencies access to the civilian population for the purpose of humanitarian assistance, relief, health, food and shelter.

Session 5: Preventing war crimes, enforcing the rules

Chair: **Judge Theodor Meron**, President, International Criminal Tribunal for the former Yugoslavia

Speakers: **Brigadier Titus Githiora**, Chief of Legal Services, Department of Defence, Kenya

Michelle L. Mack, Legal Adviser, ICRC

Lieutenant Colonel Nicholas Clapham, UK Army Legal Service

Brigadier Titus Githiora

The obligation of states to respect and to ensure respect for international humanitarian law is expressly stated in the Geneva Conventions, and it includes the duty to issue orders and instructions to state forces to ensure compliance with international humanitarian law. These orders and instructions may be contained in military manuals, regulations and rules of engagement, and they ensure that commanders and their subordinates know, at the very least, the essential IHL rules

relevant to their actual functions, and particularly in the conduct of hostilities, which I will be concentrating on. Effective training is encouraged to make proper responses to specific situations second nature among the rank and file. This is a very crucial consideration, during the heat of actual fighting.

Ensuring compliance with IHL by state forces in both international and non-international armed conflicts does not pose difficulties in the actual practice of the state obligation. It is more frequently among armed groups in non-international armed conflicts that the challenge to respect IHL tends to lie. There are issues here: what is the responsibility of the state on whose territory armed groups may operate in non-international armed conflict? How effective would the principle of individual criminal responsibility for war crimes in such situations be? In the study, Chapters 40-44 have provided a very rich source of evidence of practice to emphasize the relevance and applicability of customary international law rules during the conduct of hostilities in non-international armed conflicts. General principles of conduct which are in fact binding rules applicable to all military operations in both international and non-international armed conflict are restated. And where treaty law has left gaps in regulating non-international armed conflicts, customary international law has stepped in to ensure respect and protection under IHL "in all circumstances".

General principles applicable in the conduct of hostilities in non-international armed conflicts place a special emphasis on the rule of distinction. Under this rule, military operations must be conducted with a clear distinction being made between civilians who may not be attacked and combatants who may be attacked. A distinction is also made between military objectives (which may be attacked) and civilian objects (which may not). Closely related to the rule of distinction is the prohibition of indiscriminate attacks. This rule, which is codified in Additional Protocol II and other treaty law, has wide practice, as shown in military manuals and national legislation and is a norm of customary international law applicable to both international and non-international armed conflicts. But probably the most problematic aspect of the principle of distinction in non-international armed conflicts relates to the immunity of civilians from attack unless they take a direct part in hostilities. The meaning of "direct participation in hostilities" however remains as yet unclarified, and a uniform definition is not agreed on. Until this has been done only a careful assessment in a particular situation will justify an attack on civilians who take a direct part in hostilities. What is significant is that the level of doubt in non-international armed conflicts as to whether a person is taking a direct part in hostilities is very high indeed. There is a duty therefore to protect the civilian population in those situations and a need to develop a clear rule helpful to both state forces and armed groups on direct participation. The principle of distinction therefore obligates parties in conflict to exercise important levels of caution in order to spare the civilian population as much as possible. The study showed widespread recognition of this rule, and the effectiveness of the rule as a regulator of non-international armed conflicts.

Another rule identified and well analyzed in the study as an important norm of customary international law with special importance to non-international armed conflicts is Rule 17 on the obligation of parties to a conflict to take all feasible precautions in the choice of means and methods of warfare. Examples of the application of this rule would include the timing of attacks, the choice of targets, avoidance of combat in populated areas and the choice of weapons capable of minimizing incidental damage. But like several others applicable in the conduct of hostilities in international armed conflicts it is absent from Additional Protocol II with regard to non-international armed conflicts. I would suggest that the rule's effectiveness as demonstrated by the study can in fact be enhanced by adding, for instance, the following: emphasis that in non-international armed conflicts only attacks expected to cause minimum danger to civilians and civilian objects may be

committed; secondly, an express prohibition to be made with regard to the deliberate starvation of the civilian population, terrorizing the civilian population, reprisals against the civilian population and protected objects, attacks on cultural property, destruction of the natural environment and attacks on humanitarian providers.

Now Rule 71 of the study is also equally important to the conduct of military operations in non-international armed conflicts. It refers to the prohibition of indiscriminate weapons whose effects cannot distinguish between military objectives and civilians. The prohibition exists in weapons conventions (you will be familiar with the Ottawa Convention), and this particular rule has been cited in military manuals and official statements of the ICJ itself. The list of examples of prohibited weapons is interesting. You have the chemical weapons, biological, nuclear, anti-personnel, poison, booby-traps, environmental modification techniques, incendiary weapons and cluster bombs, though I think it should be said that there has not been consensus on the prohibited categories. Generally however there is agreement that a lot of those weapons violate the rule. A suitable approach in using this rule will be first of all to apply it in non-international armed conflicts, but to add, and specifically prohibit (I am suggesting) the use of booby-traps in connection with items intended for the relief of the civilian population such as food and medical items. There should also be clear restrictions and prohibitions with regard to mines including land mines, anti-personnel mines and anti-vehicle mines. I mention this because many of these make the return to normalcy after the cessation of hostilities very difficult for what are overwhelmingly rural peasant populations in non-international armed conflict situations; and in areas it's impossible to deal with issues of clearing, particularly mines. That's why I think some specific attention should be given to them.

The causes of non-international armed conflict are diverse, among them ethnic or clan hatreds, pursuit of political power, and the struggle for resources including land, minerals or fuel. But a major feature of most non-international armed conflict is the cruelty and brutality that characterizes hostilities, and many of the actors in these numerous conflicts are completely lawless. I think it has to be said that a criminal in the ranks remains every good commander's nightmare, particularly when you're dealing with non-professional forces and armed groups. Worse still, a lot of these conflicts tend to be ignored and they do not seem to receive attention until some serious atrocities happen, including sometimes genocide itself. Now Chapter 32 of the study addresses the fundamental guarantees, including the right to a fair trial and the prohibition of arbitrary deprivation of liberty, and protections for displaced persons, refugees, wounded and sick, the elderly and so on. The safeguards in this particular chapter are very important. They deserve determined effort to ensure that they are respected during non-international armed conflict situations. That is where summary executions, mutilations, sexual violence, the use of child soldiers and general destruction are the rule in everyday life.

States can be held responsible for organs, individuals, entities who are empowered to act on their behalf, even when such entities or persons exceed their authority. The duty to respect IHL additionally remains the individual's responsibility. Therefore states and state forces must be very clear about this. Armed groups in turn are expressly required to respect IHL rules applicable to non-international armed conflict situations as a minimum, and Common Article 3 bears this out. Since the 1990s there has been a continued growing significance of this particular obligation on the part of armed groups in non-international armed situations. National legislation which criminalizes certain activities and categorizes them as war crimes and the trial of actual war crimes have helped develop this particular practice, as have the decisions of international tribunals. Therefore there must be a continuing emphasis that commanders and their subordinates in state forces and in armed groups bear

criminal responsibility for any war crimes that they may commit or that their subordinates may commit in non-international armed conflicts. They have a duty to punish and impunity has to be controlled. So the regulation and control of non-international armed conflicts through the more elaborate customary law rules that we have seen must receive consistent and close attention.

The study has shown how customary law fills the gaps in the law. And we have been shown ample justification for the application of the rules in non-international armed conflicts. States and their armed forces have a clear duty to know the rules, the evidence of their practice and the general acceptance, and to include them, I would suggest, in their training manuals, orders and rules of engagement which I have already mentioned, and (very significantly) in national legislation. Operations by the military, the very discipline of the forces that they use, including armed groups themselves, will benefit from the IHL protections that arise from these rules and this customary practice, and so there will be general protection and probably a reduction of the brutality that we have seen in a lot of these non-international armed conflict situations.

Michelle Mack

In this presentation I'm going to address the very specific and problematic question of improving compliance with IHL by all parties to non-international armed conflict, including armed groups. I shall try to do so in a very practical way. First I shall discuss some of the obstacles that impede improved compliance with IHL by all parties, but with a particular focus on armed groups, and then also look at a number of tools or mechanisms that in practice have proved successful in encouraging better compliance with IHL by armed groups and states party to non-international armed conflict.

As was just pointed out by Brigadier Githiora, and as has been mentioned several times during the last few days, non-international armed conflicts are the most prevalent type of conflict. In them we witness great destruction, devastation and lawlessness, and this despite the provisions of IHL that exist, and do apply, in treaty law in a more rudimentary fashion, but in customary law more completely. The question is how to start from that basis to implement and to encourage compliance with those laws that exist. And indeed with the study being published and now with this greater resource of rules that we can articulate to armed groups and to states party to non-international armed conflict, we need to face this challenge anew. We have more tools - more ammunition - but we do need to face the very practical question of how to increase the knowledge and how to encourage compliance with the law.

We'll look first at a number of obstacles that prevent increased compliance, and the first is the lack of state ratification of the IHL treaties. With customary international humanitarian law this is less of an issue than it was prior to the identification, but it is still true that without a specific ratification it is often more difficult to articulate the rules that are applicable to a specific conflict.

The unique problem of impossibility of ratification by armed groups to the treaties is a second obstacle; although this of course does not affect the fact that armed groups are nonetheless bound by the provisions of IHL, in practice this may be difficult to ensure. Armed groups may be unwilling to consider themselves bound by the rules and the obligations that were agreed to by the very government against which they are fighting. Indeed the armed groups may not only disregard or dismiss those rules, but they may actively attempt to destroy or to thwart its application.

The question of threshold of application has also been discussed both yesterday and today, and in situations of non-international armed conflict this poses a unique challenge. States will often refuse to acknowledge that the armed violence within their boundaries has risen to the level of an armed conflict. Unwilling to grant a sense of legitimacy to the group by recognizing them as party to the conflict, they will instead argue that they will deal with these armed groups under domestic criminal law. This state denial of the applicability of IHL weakens the potential for appeals to all of the parties to comply with the law.

Furthermore, even where states have recognized that an armed conflict is ongoing within its borders, the fact is that IHL does not grant to the members of armed groups a specific status such as exists under international armed conflict. Thus, unlike during international armed conflict where captured members of the armed forces have a prisoner-of-war status, members of armed groups will face penal prosecution under the domestic law for attack against the state or for rising up in arms against the state. Thus they'll face domestic prosecution for their participation in the conflict. This leaves them little legal incentive to adhere to the rules of IHL. Rather, they'll more likely use whatever means possible to win the conflict, so that as the victorious party they will avoid punishment, both for participating in the conflict and also for any violations that they may have committed.

It's also important to note that despite the existence of provisions related to non-international armed conflict, the laws and the implementation mechanisms of IHL remain predominantly state-centred. Even where the rules apply to non-state actors or to armed groups, in most cases no international forum exists in which the responsibility of the armed group members can be invoked, and there is no opportunity for relief, such as reparations.

A number of other more practical obstacles also exist in non-international armed conflicts. The foremost of these, as we observe in our daily work in engaging with armed groups and states party to non-international armed conflicts, is that the characteristics of non-international armed conflicts vary widely, both as to the characteristics of the parties and as to the conflicts themselves. I'll be discussing in a moment some of the tools or the mechanisms that have been successful in conflicts, but it's important to note that what may be successful in one context may not be effective in another.

Armed groups vary widely in terms of the extent of control they have over the territory, in terms of the hierarchical command (how much command responsibility exists within an armed group) and their level of organization. They also vary widely in terms of the objectives or motivations for waging conflict in the first place, and any strategy or any attempt to address IHL obligations with armed groups in particular must take into account their objectives and their motivations in beginning the conflict. It could be that it's just a pursuit of power, related to territorial disputes, economic interests, ethnic or religious differences, denial of fundamental human rights or the rights of minorities, or simply driven by common criminality. It's especially problematic where the objective of the conflict is actually facilitated by violations, such as in the case of ethnic cleansing or a conflict for economic gain. In addition, within armed groups themselves there is often an insufficient knowledge of what the IHL obligations are or what responsibilities they hold under humanitarian law. And there is quite frequently a lack of hierarchical control or a lack of command structure to be able to implement those provisions. The cell structure of most modern armed groups, which removes this traditional hierarchical chain of command, also limits the possibilities for dissemination and for increased knowledge among the armed group members.

Quite frequently we observe an asymmetrical nature of the warfare in non-international armed conflict, where there's an imbalance in terms of the means and methods that are available to the parties of non-international armed conflict. In such warfare it's plausible that the armed groups will use whatever means they have at their disposal, whether permissible or not under IHL in an attempt to balance the playing field in order to defeat the state armed forces.

Within contemporary non-international armed conflicts there are a few other characteristics that make it difficult to articulate the IHL provisions within non-international armed conflict. The frequent internationalization of many of these contemporary conflicts creates confusion as to what is the qualification and also what body of rules applies. In addition, the increased prevalence of private security companies or private military companies involved in situations of armed conflict also complicates the issue of who is bound by the rules. And finally there are unique challenges posed in the context of failed states.

In our day-to-day practice as the ICRC and in our engagement with armed groups and states party to non-international armed conflict we observe these and other obstacles on a regular basis, and we recognize that they often make it extremely difficult to get in touch with the parties to an armed conflict, and very difficult to articulate to them what their obligations are and what steps can be taken to implement those obligations. For this reason, we have recently engaged in a process of identifying best practices in non-international armed conflict, studying where the ICRC has been successful in our engagement with armed groups and states. We have attempted to ascertain what tools or mechanisms have helped us in our efforts to improve compliance with IHL in non-international armed conflicts, and we have looked at practice of other organizations who have been in touch with armed groups and states. So we have identified a number of mechanisms or tools that have proven useful. I'm going to just take a few minutes to highlight some of those tools and mechanisms. They have been used in different types of contexts, for each of the tools that I'm listing we've found an extensive practice in which they've been successfully used.

The first place that we need to start is with dissemination. As Brigadier Githiora mentioned, we need to remind the parties of their obligations, not only the specific provisions of IHL both under treaty law and customary law, but also that they have the obligation to respect, and also to ensure respect for, IHL. As reflected in Rule 139 of the customary law study, *each party to the conflict must respect and ensure respect for IHL by its armed forces and other persons or groups acting in fact on its instructions, or under its direction or control*. There is a very clear responsibility - on the state side as well as the armed group side - for the party to respect itself the obligations as well as to ensure respect for IHL by those who are under its control or acting on its instructions. One of the most valuable efforts that can be made in peacetime, especially prior to the outbreak of hostilities, is increased efforts in dissemination and training, also as reflected in the customary law study, Rule 142.

Rule 142: *States and parties to the conflict must provide instruction in IHL to their armed forces.*

This statement makes an even stronger articulation that for armed groups as well they must be increasing in their dissemination efforts.

Dissemination before the outbreak of a hostility is essential, as in the heat of battle and heat of conflict it's obviously much more difficult to instil in the armed forces and the armed group members a basic understanding of what their obligations are, and what they are entitled to do. It will not only help to curb violations during the armed

conflict, but as dissemination is spread through the civilian population as well, it will also ideally create a spirit of humanitarianism that may mitigate the tensions or relieve some of the tensions prior to the outbreak of conflict.

Rule 143, which encourages the teaching of IHL to the civilian population, is also extremely important. In some cases of non-international armed conflict we may not have access to the armed groups in order to provide instruction and to provide training to armed group members in their obligations under IHL. So in such cases it is particularly important to pass messages through the civilian population in an attempt to reach the members of the armed groups through that means as well.

In addition to dissemination and training there are a number of different tools that are available that can all be categorized under the label of opportunities to make an express commitment or to express a consent to be bound under IHL. The first is special agreements that can be entered into by the state and by armed groups party to a non-international armed conflict, as provided for in Common Article 3. Through such agreements the parties to non-international armed conflict may make an explicit commitment to comply with the provisions of IHL beyond the obligations described in Common Article 3. It must be emphasized that the plain language of Common Article 3 indicates that the special agreement does not affect the legal status of the parties. In addition to bringing into force additional provisions of IHL, special agreements also provide parties to the conflict with the added incentive of complying based on mutual consent, making clear the equal IHL obligations on both parties: the state and the armed groups. Even in the attempts to negotiate or arrive at the conclusion of an agreement or some of the other tools, this has also helped in terms of sensitizing parties to non-international armed conflict to their obligations.

Where a special agreement cannot be achieved, a unilateral declaration by an armed group can also provide a valuable commitment to adhere to international humanitarian law. There is a long history of such declarations, and these have been useful not only as a means to discuss with armed groups what their obligations are under IHL, and in a process of negotiation to educate them about their obligations, but also once signed as a useful means to follow up or as a basis of reminding that armed group of their obligations, and a negotiating tool to improve compliance afterwards. The aim of this declaration is to provide a self-disciplining effect on the armed group - in particular where the group is concerned about its public image or its reputation. Although there is the risk that a unilateral declaration could be made for purely political motives, they do still serve a positive function as an additional tool of leverage to encourage compliance with IHL. For greater enforceability, a unilateral declaration could be combined with some sort of verification mechanism that could ensure supervision of compliance in the conflict.

Armed groups could also be encouraged to include IHL in an internal code of conduct or disciplinary code, and again this is something that is being attempted through our work with armed groups. Although this is less public than a special agreement or a unilateral declaration, this device can lead to a greater implementation of IHL by the armed group, and have a direct impact on their own training and dissemination within the group. The willingness of an armed group to include IHL provisions in a code of conduct can be made public, and has in certain instances been made public, thus providing even more of a tool of leverage.

In addition, IHL provisions can be included in memorandums of understanding. Through negotiating an MOU on a specific issue, perhaps humanitarian assistance or visit agreements, you can also include a commitment by a party to the conflict of their intent to comply with IHL. IHL provisions are routinely included in cease-fire agreements and peace agreements, and it's important to ensure that those inclusions are accurate as to the law, especially concerning the IHL obligations that follow post-

conflict, and the commitments that the parties to the conflict are making to fulfil those obligations after the conflict is over.

Earlier I was discussing the question of lack of status for armed group members, and it is particularly true that in non-international armed conflict, the armed group members have little legal incentive to comply with IHL, given the fact that they are likely to face severe penalty under the domestic law just for having participated in the conflict. In order to provide a greater incentive to the members of the armed groups, states might consider the possibility of a grant of amnesty or immunity for the act of mere participation in hostilities. IHL applicable in non-international armed conflict of course already encourages the state to grant the broadest possible amnesty in the Second Additional Protocol, Article 6. This amnesty is to be considered for persons who have taken part in the hostilities and granted at the end of the hostilities. And this is on the understanding that such amnesties are usually necessary to foster national reconciliation post-conflict. This suggestion, as formulated in Additional Protocol II, has been identified in the customary law study as the rule that *at the end of hostilities, the authorities in power must endeavour to grant the broadest possible amnesty to persons who have participated in a non-international armed conflict or those deprived of their liberty for reasons related to the armed conflict, with the exception of persons suspected of, accused of or sentenced for war crimes*. So it's clear that these amnesties would be only for participation in hostilities and cannot be granted for war crimes or other violations of the law. In addition to amnesties or immunities, the state might also consider a reduction of punishment in cases of compliance with IHL, so that during the domestic trial of a member of an armed group for taking part in hostilities the tribunal can take into account the level of their respect for IHL when deciding upon punishments or sentences

Finally, it's important also to look at the question of strategic incentives. And this is actually necessary when recognizing that these tools are not an answer in and of themselves. It's not enough to negotiate a unilateral declaration or a special agreement and leave it there. But each of these tools and mechanisms needs to be seen as part of an ongoing process of engagement with armed groups, a process that begins with educating armed group members about the fact that there are obligations and what those obligations might be, perhaps working with them to facilitate their capacity to implement those provisions, and to educate the members of the armed forces on what those provisions are. And when using any of these various tools it always has to be considered what strategic arguments there are that could be used, or what strategic incentives the armed group members and the state could have for wanting to comply with IHL. Armed group leadership could be counselled that compliance would lead to other related gains - reciprocal respect by the state actors, including proper treatment of detained members of the armed group, increased effectiveness and cohesion of the group itself, enhanced legitimacy as a political actor, very basically saved lives and the preservation of dignity of the civilians that are around them, and the greater probability of dialogue with the state. Besides these, there are many other different types of strategic incentives that we as the ICRC use in our daily negotiations, and that others use in their negotiations, that can be helpful in building awareness of IHL and ultimately in building compliance with IHL by armed group members.

Lt. Col. Nick Clapham

The ICRC study is going to be a research tool for me, particularly into the practice of states; as an adviser to an army whose government has ratified both additional protocols, it's probably of less significance for me as a tool of customary international law. But when I say that I ask you to bear in mind the level at which I operate. As my

Director, General Howell, pointed out yesterday, I'm offering advice to talking Scottish trees who are standing in a Northern Ireland forest: that's the level I'm operating at. I hope you can remember the analogy from yesterday. With that in mind, as the last speaker of the day, I can't offer the academic insight of others that have gone before me, but what I hope to do is offer a personal view from one who has on occasion visited close to the coalface at which those talking trees operate. I say of course "personal view" because I enter the same caveat as all the other military officers have: it's not an official view.

Now there is one thing that I do share with the other more learned speakers that have gone before me, and that is that there is almost unanimity on the fact that the forward to the study by Dr Yves Sandoz is a cracking good read. Because of that, I'd like to situate my presentation in a quotation from Dr Sandoz, because he asks himself the question whether actions such as the study are ever enough. And he answers this of course in the negative, and says that actions such as these will never be enough.

War will remain cruel and there will never be adequate compliance with rules aimed at curbing that cruelty.

I think it very important for those of us that sit and discuss international humanitarian law in these environments that we bear that in mind. I have to say of course, as many will know, even in an army such as mine where legal advice is readily available and the rules are quite well understood, recent breaches have occurred.

As with the point made by Brigadier Githiora I think I should say that the first stage in an army in securing compliance with the rules has to be education. Although most rules are obvious to us, to a serviceman not all will be. I do think in the British army this is something we do relatively well. All servicemen are subject to annual instruction on the laws of armed conflict, and, where necessary, that is reinforced prior to deployment and during deployment. Also like most armies we give our soldiers cards which contain a summary of the basic responsibilities of the soldiers under IHL. I'm currently serving at the Army Prosecuting Authority with a particular responsibility to look at allegations arising out of Iraq. In the cases that I have examined, while some soldiers suggested that they missed individual briefings, no soldier has suggested that he was not up-to-date in his annual training, or that he did not understand his basic responsibilities in the law of armed conflict situations. Now of course that's very easy for me to say, but again as the Brigadier identified, the difficulty in securing compliance comes not in barracks, but when the laws are exposed to the operational reality. I think Michelle and I are in agreement on this, because in order to ensure adherence to the rules it is of course the case that that adherence needs to become part of the conscience - part of the ethos - of the army, and it is impossible to achieve that ethos or to change an ethos once deployed. Therefore it has to be put in place in barracks and during peacetime.

One of the ways that this is done is of course having lawyers on the permanent staffs of military headquarters. This requirement is recognized in Article 82 of the Additional Protocol, but now contained in Rule 141 of the study. Again, in the British army we do relatively well on this and during the recent Gulf War we had lawyers at all levels of senior command within the army, and on occasion - for the first time in the British army at least, I believe - we had lawyers down at battlegroup level: a relatively low level of command for the receipt of legal advice.

Now given that, I would not expect within my army a disregard for the rules to ever become widespread or systemic. However I don't think it's realistic for me to say to

this audience, or any audience, that we would ever reach the point that it would be possible to say that on the basis of education and advice alone there would not be some rare breaches of those rules. In order to counter those breaches and to deal with them where necessary, there has to be an effective enforcement mechanism for reasons of punishment of the wrongdoer and for deterrence of others. In the military we would regard the first responsibility for policing as falling not with the military police but with those in the chain of command and in particular within a unit. It is for them to ensure that individuals are supervised and suspected breaches investigated. It's very easy for me to make that statement, but there are times during warfighting operations when it's easier to say than to do. The tempo of warfighting operations means that at times it will be difficult for a commander to devote his immediate attention to a problem such as that. It will also be difficult and at times impossible to halt his troops to hold the ground in order to enable an investigation to take place. The environment that he's dealing with may well be such that it's difficult to obtain evidence from civilian eyewitnesses or from a forensic examination of the scene, and we've seen in Iraq that often the security threat is such that it has not been possible for our military policemen to get into an area until some time after an incident by which time a lot of the evidence of course has disappeared. We also see in some cases that cultural differences can hinder an investigation. Again in Iraq, understandably the family of a deceased is very keen to bury the body as soon as possible, and this usually takes place without a post mortem examination. In some of the cases that we've had we have managed to arrange, with the consent of families, exhumation at a later date. But of course by that time, either the evidence has been lost or at least it has diminished in terms of its value as a prosecuting tool.

A pertinent question that we've found ourselves asking in the British army is: what type of incident demands an investigation? Is it every shooting incident in which we should have an investigation? Also, if there is to be an investigation, what form should it take, and who should undertake it? Clearly every army is limited in its number of military police, and often they have other roles when deployed, not just the investigation of war crimes. We are of course primarily concerned with the laws of armed conflict, but as was alluded to by General Howell yesterday, we also at times have one eye on the European Convention, and in particular the implied requirement under Article 2 for an independent and effective investigation into potential breaches of the right to life. The Al Skeini case was mentioned in that respect yesterday.

I have given you some thoughts on the difficulties a unit might have in terms of investigation, but whatever the stage or the status or the effectiveness of the investigation, there comes a time when it must be supported by prosecution where that be appropriate. Now in my opinion the most appropriate place for prosecution of breaches is within the domestic jurisdiction of the sending state, and this appears from Rule 158 of the study. Following on, I would also say that the appropriate place for prosecution is not just within the domestic jurisdiction, but if the person suspected is of military personnel then that jurisdiction should be exercised in a military court - in a court martial. And you will have seen that that's something that the British army has recently done in the court martial of Corporal Kenyon and others.

I was the lead prosecutor in the case of Corporal Kenyon, and having just set a little bit of general background, I'd like to say something specific about the case of Corporal Kenyon for you. The incidents involving Corporal Kenyon and the members of his section occurred in May 2003, only a couple of weeks after George Bush had famously declared an end to major combat operations. At this time in Iraq looting was rife, particularly in the United Kingdom area of operations. To some extent the key for us in gaining the support of the Shia population was to provide them with the essential elements of life support such as fuel and electricity, and looting was

affecting our ability to do that. One location where looting was a considerable problem was a place known as the Breadbasket Camp, which was a massive complex that had been used for the storage and distribution of items of humanitarian aid. The expectation from the Iraqi management of the camp was that the British soldiers there would shoot the looters on sight. Clearly we couldn't do that, but the effect of not doing so was not just that the food stocks were being diminished, but also that the British army was losing face as an occupying force in that area in the eyes of the civilian population.

The Breadbasket Camp was commanded by a Major Taylor, and he felt understandably compelled to act to try to defeat the looters. To this end, he devised an operation now famously now as Operation Ali Baba to detain and to deter looters - importantly the element of the operation that was to deter looters was to "make them work hard". I use quotation marks, because that was not just the major's intent, but actually his words at trial. Now as we all know, the 4th Geneva Convention does not allow looters to be worked hard in those circumstances. Protected persons can be compelled to work in certain circumstances (that's now reflected in Rule 95 of this study), but those circumstances did not apply in the situation faced by the British army. Therefore the prosecution of the trial by court martial had to accept from the outset that even though the initial detention was lawful, the order to work was not lawful - so we started from that position.

Operation Ali Baba itself entailed every military person who was in the camp parading in sports kit very early in the morning, and carrying sticks rather than rifles. These sticks were intended for self-defence purposes. It's important to put this in the context of Iraq, because these looters had quickly realized that the British army would not shoot them, and so carrying out a more serious weapon actually had no deterrent effect at all. That was the logic behind carrying sticks instead. By the time the operation was mounted, the looters had already been into the camp and were actually making their escape. They were pursued on foot and in vehicles, and approximately 25 were apprehended. They were made to carry back into camp some of the loot that they had taken, and it is the case that some of them were beaten with sticks on their way back in. Once back in the camp they were taken to a central location and told they would be made to work by Major Taylor. Following this they were formed into a group and made to run from one end of the camp to the other carrying the loot they had taken, the purpose being to put that back from where it had come. That particular aspect of the case wasn't apparent on the pre-trial papers. But what was known prior to trial, and of course gave rise to the allegation, was that after the run the looters were divided into small groups, a group of four was given to Corporal Kenyon and his section with the instruction that they be put to work.

Now whilst they were held by Corporal Kenyon and his section in the discrete location in the camp, two of those four men were bound, one was stood upon, and one was tied to - and lifted up on - a forklift truck. Some soldiers posed for photographs which simulated assaults upon the Iraqis, and also two of the Iraqis were made to simulate sexual activity. Now of four servicemen who were prosecuted, all four were convicted. They were convicted of assault and military offences. The severest penalty dished out was two years for the acts involved, but it wasn't possible for us to identify those who had been instrumental in the acts of indecency. Had we got that, sentences would have been greater.

As I conclude, I want to draw a couple of observations from that particular case. Firstly, the fact was that as with many aspects of the occupation phase, the looting problem had not been anticipated and planned for prior to deployment from these shores. There were actual limits to the effect the British army could have in relation to

that particular problem, and at the time our policy was to pass looters to the military police who immediately released them because we had no facility or little justification for continued detention. And therefore you can see that there was little deterrent for the looters involved. I would suggest that when there is an absence of planning combined with an unexpected event, particularly one that's difficult to control, decisions will be taken at a lower level of command and therefore subject to less scrutiny; so novel solutions of this kind are more likely and you will appreciate the risks inherent in that. Major Taylor was not prosecuted: he said he knew the basic rules of armed conflict (he clearly did); in fact, in police interview, he pulled out his soldier's card that told him what they were. But he did not know in his mind that there was anything wrong with the decision to work the looters, and I asked the question "Was it wrong to force them to carry back the loot that they had taken? Was it wrong to force them to clear up the mess that they had made in the camp? Was it wrong to force them then to do other work in the camp?" Technically of course it was, but you can understand that some persons might say that morally there's an element of justice at least in some aspects of that. Clearly there was no justification for what followed when the soldiers were received at Corporal Kenyon's section.

The soldiers in this case had been involved in the warfighting and they were to some extent battle hardened already. In this case and another that I am examining, the incidents occurred within a couple of days of those soldiers being due to leave theatre. I have a personal view (and it is only a personal view) that the rules are at their most vulnerable during this period. Moreover, it must be the case that the rules are at less risk when the peace is policed by soldiers who have not been involved in the war. That is generally well understood, but it is difficult to implement in places because there has to be a crossover time.

Clearly the British army would be in a better position today had those events of Breadbasket Camp not occurred. However, when it comes to my position as an adviser to commanders and to soldiers, I think it is a fact that any presentation to them that I make in the future will be strengthened by an example of where it went wrong. I personally think that the identification, the investigation and the prosecution of this case will have a positive effect in the future in so far as the prevention and enforcement of breaches within my own army is concerned.

Questions and answers/comments

In his address, Lt. Col. Clapham said that he was mindful of the implied requirement on the British army, under Article 2 of the European Convention, for an independent and effective investigation into fatalities and cases of use of lethal force. A speaker asked whether that requirement applied in the case of deaths of enemy combatants during the fighting stage of hostilities, or whether it came into effect only when the British army became an occupying force. In reply, another speaker said that the traditional view is that Article 2 does not apply while the warfighting is going on, but that in the light of the *Al Skeini* case, the relationship between international humanitarian law and human rights law is a matter for ongoing debate. Another speaker agreed that when the European Court of Human Rights spoke about cases of "suspicious deaths", that should be understood to exclude fatalities that occur in the middle of normal hostilities.

Several speakers returned to the topic of dissemination of the law. One raised the possibility of appealing to religious and traditional rules that are equivalent to IHL rules, particularly when working with armed opposition groups. Another confirmed that there have been occasions in non-international armed conflict when it has been possible to identify parallel obligations in IHL and in cultural and religious norms, and

where it has been possible to tie these together. A third speaker cited a specific example in Kenya where efforts are made to use cultural songs and plays to educate the population in IHL by framing the rules in terms of traditional practices. This is an effective way to disseminate information on IHL to armed groups that live among the civilian population, and can be effective even when a large proportion of the population is illiterate.

Another question on dissemination was on Rule 143 of the study, which requires that states encourage the teaching of international humanitarian law to the civilian population. The speaker expressed curiosity that this was considered a rule of customary law, given that there were, in his experience, few countries in which people receive knowledge of IHL through dissemination to the general population. It was observed that quite an extensive list appears in the commentary to Rule 143 in the study, citing military manuals, resolutions and statements of international conferences which call for wider dissemination of information about IHL to the civilian population. There are a number of active programmes that attempt to educate school and university students in IHL, including a programme called Exploring Humanitarian Law run by the ICRC in conjunction with education ministries. It was emphasized that the wording of the rule is that states should *encourage* the teaching of IHL to the civilian population, not that they have an *obligation* to do so, and that as such it is rather weaker than the treaty formulation that appears in the Geneva Conventions. This encouragement may take the form recognition of degrees which include humanitarian law, and ensuring that universities receive grants for research in humanitarian law.

The doctrine of command responsibility was touched on. Following Lt. Col Clapham's description of the events that led to the trial of Corporal Kenyon, it was observed that while the cases of a number of junior officers in the British and American armed forces had come to courts martial, there had been very few cases in which more senior officers were put on trial. In the opinion of one speaker, the British army does not differ from the ICTY in any respect as far as command responsibility is concerned. In the case of the events at Breadbasket Camp, it was stated that the decision to exclude Major Taylor from prosecution was based on the judgement that there was not a causal link between the orders given by Major Taylor and the actions of Corporal Kenyon and his section, and moreover that it was not the case that he ought to have known about the misbehaviour of the soldiers under his command.

In her address, Michelle Mack included the increasing prevalence of private military companies and private security companies among her list of obstacles to compliance with IHL in non-international armed conflict. A speaker asked whether they currently counted as armed groups in law, and whether any customary law is developing for their treatment in cases where they behave badly. Another speaker indicated that these questions are being actively considered within the project on reaffirmation and development of IHL in the ICRC. In particular, there is active discussion ongoing in terms of how to identify where those private military companies and private security companies do in fact have IHL obligations and where there is state responsibility for violations.

One speaker returned to Rule 159 of the study regarding the granting of post-conflict amnesties. The only exception in the rule being for cases of war crimes, the speaker asked whether this should be understood as meaning that the authority in power should endeavour to grant post-conflict amnesties to soldiers who have committed other crimes during hostilities, which did not amount to war crimes. In reply, it was stated that the intention of the rule was that amnesty be granted only for the act of

participation in hostilities. As such, common crimes committed during hostilities are beyond the scope of the rule.

Picking up Michelle Mack's point about the variety of armed groups, one speaker stated the sophistication of armed group leaders' attitude to IHL varies very widely. Some armed groups are led by very well-educated people, and employ experienced legal advisers. In these cases, the leaders are usually easier to reach and talk to; they are usually knowledgeable about IHL, and are able to distance themselves from accusations of violations of IHL. Other armed groups are led by so-called warlords, many of whom are criminals. They are very difficult to reach and talking to them about IHL is usually a waste of time.

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Session 6

IHL and the challenges of contemporary armed conflict: the way forward

Chair: **Daniel Bethlehem QC**, Director, Lauterpacht Centre for International Law
Speakers: **John Crook**, Commissioner, Eritrea/Ethiopia Claims Commission
Sir Franklin Berman QC, Essex Court Chambers
Professor Wolff Heintschel von Heinegg, Europa-Universität Viadrina

Daniel Bethlehem QC noted that one document that would help to frame the debate in this session is the report prepared by ICRC, "*IHL and the Challenges of Contemporary Armed Conflicts*," (December 2003) in which the following issues were considered:

- i) *Direct participation in Hostilities* (status & treatment of prisoners who have taken a direct part in hostilities, what constitutes 'direct participation', the problem of the temporal element)
- ii) *Conduct of hostilities* (changing nature of warfare has meant particular scrutiny is required when considering 'military objectives', the principle of proportionality when considering the balance between civilian protection and military advantage, and the requirement to take 'precautionary measures'.)
- iii) *Occupation* (rules applicable under a UN mandate)
- iv) *Rules in Non international armed conflict*
- v) *Terrorism* (whether IHL is applicable, issues of proportionality, status, etc.)

John R. Crook

Thoughts on the Way Forward – Institutional Possibilities

Our panel has been assigned the task of examining the way forward. This is a challenge. A noted American philosopher and baseball figure named Casey Stengel observed that the difficulty with predicting the future is that you do not know what is going to happen. Nevertheless, some institutional developments already underway suggest interesting possibilities for the future application of international humanitarian law (IHL).

As we all know, the 1990's produced several new international legal institutions aimed at strengthening compliance with IHL by applying the criminal law – notably the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, and the International Criminal Court. As President

Meron described in his fine lecture this morning, the UN Tribunals have produced important judgments in a relatively small but important body of cases involving major abuses. The International Criminal Court has attracted enormous attention, but is just getting underway. These institutions have involved much effort and expense, as well as some broken political crockery. However, I suspect that most present here would say that the game has been well worth the candle.

I will attempt to survey some other contemporary institutions rooted more in the law of state responsibility than in criminal responsibility. Some of these primarily apply IHL; others apply it to a lesser degree, or not at all. However, I believe they all suggest useful approaches for strengthening application of IHL in some situations. All of these institutions grow out of specific historical situations and have peculiar characteristics. This is not a bad thing. I am sceptical of "one size fits all" institutional responses to complex situations. I am also a firm believer in the idea that giving parties some ownership in an institution can strengthen their commitment to it. Some say this is "politics" and is a bad thing. I don't agree.

MASS CLAIMS INSTITUTIONS: Let me begin by recalling the recent proliferation of mass claims institutions set up to provide compensation or other kinds of relief following large scale human tragedies. The last 15 years have seen several new institutions created to collect and process claims and provide compensation following wide-scale deprivations of rights. In some ways, this is not a new phenomenon. Scores of mass claims institutions were created in the 19th and early 20th century to sort through the aftermath of wars and insurrections. Two things are new today, however. First is the sheer magnitude of modern programs and the associated technological innovations that make them possible. Second is the way in which these institutions are addressing new types of individual claims. Some of these claims have their origins in IHL, while others do not. But many of them are claims for which relief would not be available through traditional processes of diplomatic protection.

The best known of these new institutions is the UN Compensation Commission, which has processed over 2.6 million claims arising from the invasion of Kuwait in 1990, and paid out over \$18.8 billion in compensation. The vast majority of these claims were those of individuals, most of them people with limited resources from developing countries whose lives were disrupted by the invasion and war.

Many of the people involved in creating the UNCC were "graduates" of the Iran-US Claims Tribunal, which did not do a very good job of dealing with the 2800 small claims on its docket, most claims of individuals. From the outset, the UNCC was designed to avoid the Iran Tribunal's shortcomings. It gave small claimants, most from developing countries, clear priority in processing and payment. There is a substantial literature on the UNCC, listed in a good bibliography on the UNCC website. Those interested should take a look.

Throughout, the UNCC process was marked by a constant tension between the needs for accuracy and fundamental fairness, and for timely claims processing at acceptable cost. Except for the largest of its claims, the UNCC abandoned individualized case-by-case adjudication. It instead used other techniques aimed at providing "rough justice," including application of relaxed standards of proof and processing very large groups of similar claims together. Some important voices have questioned aspects of the UNCC endeavor, and some have maintained that the Security Council was wrong from the start in creating it. I've written elsewhere why I don't agree. However, I don't propose to renew that debate here. I simply want to highlight the enormous scope and success of the UNCC as a piece of legal technology.

Several other important mass claims processes have been created since the UNCC. All of them have utilized the sorts of procedures the UNCC pioneered, although the extent of "borrowing" has varied. These processes are complex, and can be mentioned here only in broad terms. They include:

- The Claims Resolution Tribunal for Dormant Bank Accounts in Switzerland (CRT), a process that is still underway. This process grew out of longstanding tensions between major Swiss banks and Jewish groups and individuals who contended that the banks wrongfully concealed Holocaust victims' accounts. The CRT process evolved significantly after 2000, when a U.S. court approved an extensive lump sum settlement of claims that Swiss banks wrongfully retained victims' accounts and wrongfully benefited from financial transactions with the Nazis. The settlement provided for a fund of \$1.25 billion dollars, \$800 million for bank claims, and the balance to other specified types of claims. As of early 2005, about \$700 million reportedly has been paid from the settlement account, including \$220 million to bank account claims.

Several other large-scale processes were created to address Nazi-era claims. These included:

- A process addressing claims against major German firms that used forced and slave labor during the Nazi era. Following extensive negotiations, the German Government and major German companies created a 10 billion DM fund to provide compensation. Eligibility decisions are again based on relaxed standards of proof.
- France created a process for certain claims for wartime abuses.
- Austria likewise created a process to address claims by Jews and others injured during the Nazi period.
- Public pressure, as well as pressure from U.S. state insurance regulators, led to a process to address claims relating to insurance policies covering persons who died under Nazi persecution. A total of \$108 million has reportedly been offered or paid through this process to date.

There have also been significant processes involving claims to real property. Hundreds of thousands of Bosnians and others were driven from their homes during the Balkan wars of the early 1990s. The 1995 Dayton Accords created a process to address their claims. This process collected and assessed dispossessed persons' claims to real property, set aside questionable transfers, and issued documentation establishing certainty of title. It concluded in 2003, having issued over 311,000 final and binding decisions. The Commission's decisions have not consistently led to the recovery of property, but they have permitted holders to recover value through the operation of real estate markets.

A similar mechanism is operating in Kosovo. About 29,000 claims were filed; as of February 2005, over 23,000 have been resolved, and the process is due to end this year. The Iraqi authorities are establishing a similar commission to address property displacements under the prior regime, particularly in Kurdish areas.

These experiences resonate in other cases involving large-scale violations of IHL and human rights. Last October, Security Council Resolution 1566 created a Security Council working group to consider "an international fund to compensate victims of terrorist acts and their families." The February 2005 report of the U.N. Commission of Inquiry on Darfur also recommended a compensation commission. A significant number of large-scale claims processes have been established to address historic injustices at the national level. Other similar national and international programs are readily conceivable.

MASS CLAIMS - ACCOMPLISHMENTS AND LIMITATIONS: All of this experience shows that the job can be done. It is possible to create international mass claims processes that provide rough justice to large numbers of people deprived of their rights under IHL, human rights law or other bodies of law, based on the consistent and transparent application of agreed principles, and within the claimants' lifetimes. Further, these processes can widen significantly the remedies available to individuals. These systems do not need to be bound by the procedural

and substantive limitations of diplomatic protection under international law. Claimant classes, evidence requirements, and remedies all can be tailored as required to address the human, political and economic dimensions of the problem at hand.

Nevertheless, these institutions have important limitations. They do not deal well with disputed or complicated facts. They offer the greatest benefits where several unusual factors come together: (a) large numbers of similarly situated people have suffered similar injuries, (b) some body has made an authoritative judgment that these injuries entitle the victims to compensation, and (c) there is an underlying political consensus and adequate resources supporting the process. Where these factors converge, a claims institution can define the classes of injured persons, collect individual claims and evidence, and determine whether individual claimants belong to the classes entitled to compensation. As the attention given to each individual claimant increases, the potential benefits of speed and economy diminish. There is a relentless trade-off between mass claims processing and individual assessment.

Second, while mass claims programs offer large cost savings over other methods of claims resolution, they cannot be done “on the cheap.” The UNCC had a peak staff of over 375; the Bosnian real property commission employed 400. These programs require a serious commitment of people and resources and a secure financial foundation. Several of the institutions mentioned above suffered serious financial uncertainties. There is little justice in raising claimants’ expectations, and collecting their claims, if the process cannot be completed and compensation paid.

Third, programmes must be constructed to win the greatest possible confidence of affected communities. Given the historical bitterness typically underlying such programs, and their costs, they are vulnerable to loss of political support and eventual failure if outcomes are not seen as timely or fair.

Finally, experience shows the crucial need for care and deliberation in the initial design of mass claims systems. Claims collection will typically be a one-shot process. It may be impossible to go back to tens of thousands of claimants seeking additional information if the initial claims questionnaire was badly designed. Similarly, adding additional claimants to a process underway will add delay, confusion, and prejudice. Claims processes are like great ships. Once underway, it is difficult to change their course.

ARBITRATING A WAR: Since early 2001, I have been involved as a commissioner in quite a different kind of institution set up to address the legal aftermath of war – the Eritrea-Ethiopia Claims Commission. The two countries created the Commission as part of their December 2000 agreement to end the terrible 1998-2000 war between them. This is not the boundary commission, but rather a second commission set up to resolve through binding arbitration a range of claims for violations of IHL and other international law related to the war and its immediate aftermath. The commission’s costs are borne entirely by the two parties; it operates with logistical support from the Permanent Court of Arbitration and the assistance of a talented PCA attorney who serves as Commission registrar. Although the process has received little public comment, the parties and the Commission have worked diligently to complete the docket. The Commission just concluded two weeks of hearings in The Hague on the merits of the last of the parties’ claims. The parties and the Commission now are consulting regarding the next steps.

The Commission process is still underway, and there are limits about what I can say about it. The Commission has issued three sets of awards. All are public and are available on the PCA website (www.pca-cpa.org). All of the Commission’s awards also have been, or soon will be, published in International Legal Materials. The awards contain much information about the structure of the process, the nature of the claims, and the parties’ very different perceptions of what happened during the

war. The first set of awards deals with the two parties' claims that their prisoners of war were mistreated. The second addresses complex groups of claims that the two side's military forces abused civilians, engaged in indiscriminate or other unlawful attacks, or otherwise violated IHL in the Central Front of the war. In the third pair of awards issued last December, the Commission addressed extensive claims of mistreatment of civilians in areas away from the fighting fronts. The fourth and final set of claims, heard over the last two weeks, include claims related to the conduct of air and ground operations, for closures of ports, for claimed violations of diplomatic law, and several other matters.

Without violating the confidentiality of our internal processes, I believe that you can discern the following from our awards.

First, wars are extremely complex events and give rise to a myriad of claims. Creating a process to marshal these and provide for their orderly arbitration was a challenge. The procedural aspects are probably of more interest to arbitrators than to humanitarians, so I will not go into further detail here. But the challenges of designing an appropriate process should be borne in mind.

Second, the law the Commission has applied has particular relevance to this conference. Because Eritrea did not become a party to the 1949 Geneva Conventions until the war was well underway, and because the parties were not bound by Protocol I, the Commission has relied heavily upon customary humanitarian law. Given the nearly universal acceptance of the 1949 Geneva Conventions, the Commission and the parties have in very large measure accepted them as evidence of custom. The parties have likewise referred to some important provisions of Protocol I as expressing custom. In the awards rendered to date, the parties did not dispute the customary status of particular provisions of Protocol I they relied upon. Given the parties' seeming agreement and the fundamental character of the particular provisions involved, the Commission has not found it necessary to address their customary status in detail. The Commission has advised the parties that if the customary status of a particular Protocol I provision should be disputed, the initial burden will lie with the party opposing application of the provision. This approach might appear unusual in the abstract. Nevertheless, the Commission concluded that it would offer the most efficient method for framing the issues for decision in case of a dispute, and was reasonable given the wide acceptance of many key elements of Protocol I as reflecting custom and the relative ease of proving the negative.

Third, determining the facts has posed challenges. The fog, confusion and complexity of war are well known. The difficulties of determining the facts are multiplied by states' familiar tendency to hold closely to their own understandings of what happened. As its awards make clear, the Commission sometimes has faced large amounts of sharply conflicting sworn testimony from Eritrean and Ethiopian witnesses. Such conflicts in testimony have led the parties to seek to reinforce their cases with varying types of evidence derived from outside sources. One interesting development has been the use of commercially purchased satellite images to show the physical condition of towns and the locations of military installations at relevant times. Commercial imagery often is available for relevant places and times. Its one-meter resolution is such that even arbitrators can interpret images of buildings and equipment with limited coaching. Moreover, it can be acquired and used without the difficulties that may accompany satellite imagery of higher resolution from government sources. The parties also have made substantial use of contemporaneous video materials generated by the ubiquitous news media and government camera teams found in modern conflicts. This material is provided to commissioners in data files that can be reviewed on home computers.

The Commission has not always been able to gain access third party evidence that might have helped to clarify the facts. In the prisoner of war cases, both parties,

supported by the Commission, requested the ICRC's permission to use its confidential reports on conditions in their respective POW camps in their evidence. In keeping with its policies regarding confidentiality, which the Commission well understands, the ICRC declined to authorize the use of its reports, notwithstanding the requests of the Commission and of both governments concerned.

Fourth, the proceedings are a reminder that there can be a cultural gap between litigating lawyers and the world of military affairs. The Tribunal sometimes has had to press counsel and witnesses in pursuit of adequate understanding of the terrain, the deployment of opposing forces and other military considerations required for informed assessment of such matters as claims of indiscriminate use of mines or artillery.

As I indicated, the commission has now been underway since 2001. It completed its final hearings on the merits of the parties' claims last week, and is consulting with them regarding future steps. Whatever the Commission's future, I believe the parties' steady support and engagement over the last four years indicate that they find it useful, and suggest that such a commission may offer a useful tool in resolving some other future situations.

Let me close with a brief comment regarding another institutional setting in which IHL claims are being addressed — national courts. I have heard of cases in U.S. courts in which claims of violations of IHL have been factored into cases under the U.S. Alien Tort Claims Act against, for example, oil companies operating in conflict areas. I have reservations about the suitability of U.S. courts as the forum for these matters. Nevertheless, this is an area that bears watching. It reminds us that national courts also may come to provide a significant venue for the adjudication of claims based on IHL. Moreover, several of the mass claims processes described above resulted from the settlement of U.S. and other litigation, so these cases, or others like them, may significantly shape the future legal landscape in other ways as well.

Professor Wolff Heintschel von Heinegg

The purposes of IHL and military necessity

In considering some of the challenges that contemporary armed conflict poses, it would be useful to remind ourselves of the main purposes of IHL. The three main purposes of the laws of armed conflict include the protection of victims (which is obviously not restricted to civilians); limiting the methods and means of warfare (in the words of the St Petersburg's Declaration, "mitigating the calamities of war"); and of course, preventing the escalation of conflict. This last point is all too often forgotten.

Although I believe there has been too much focus on non-international armed conflict (NIAC) by previous contributors, that does not mean I do not recognize that the majority of armed conflicts today are non-international in character. But I believe that international armed conflict (IAC) is far from dead. Future IACs will certainly not only be those of a multi-national character, where a group of States is responding to a law-breaker or to an aggressor, but I believe that there are many regions where the existence of natural resources (including, for example, minerals and water) will contribute to a 'preparedness' to resort to the use of unilateral armed force.

The very reasons why a State may resort to force — either with or without a Security Council mandate and whether it is for humanitarian or altruistic reasons or for mere economic gain — may have an impact on the application and implementation of IHL during the conflict. Previous speakers have referred to 'doctrinal' considerations that may be of importance by identifying the military or operational goal that is being pursued by the belligerents. These doctrinal considerations may then have repercussions on, for example, what is deemed to be a valid military objective. This in turn informs what, or who, is a valid military target. I suggest that these developments, and those that we have witnessed over last several years, may have

a negative impact on IHL. Why might this be so? Because when such doctrinal considerations begin to play a dominant role, there is a real risk of a 'renaissance' of considerations of military necessity.

What is too often forgotten is that the laws of armed conflict already represent a compromise between the considerations of military necessity on the one hand and humanitarian considerations on the other. There is no reason to give 'renewed' value and weight to the principle of military necessity since the laws that govern armed conflict today (the origins of which date back over 150 years) already fully incorporate the principle.

Where States resort to armed force, their conduct must continue to be regulated by certain binding rules of international law. Moreover, if we in Europe and North America are keen to promote the values we share – including the principles of democracy, the rule of law, and of fundamental human rights – we are the first who must obey, observe and comply with the laws of armed conflict especially since we consider that IHL is an expression of those very values.

Asymmetries in IHL

I want now to consider the 'asymmetries' of contemporary armed conflict.

Asymmetries are not confined to actors who are involved in armed conflicts. Of course, in many cases we are referring to non-State actors who have participated in an armed conflict. Questions arise as to how these non-State actors should be treated. They are obviously not members of the regular armed forces; since there is no State authority, reciprocity does not play a role. It has been suggested that the only way of effectively fighting such actors is to target, for example, their families or their homes, or to deny them certain basic needs. Although initially, this might appear convincing, I do not believe, on closer scrutiny, this position is sustainable. This is because the law of armed conflict developed in reaction to what had transpired during WWII when the German military also faced a similar situation. They too were confronted by partisans, by non-State actors and the result was war crimes. Where States forsake the principle of distinction in favor of considerations of military necessity it results in a situation in which no rules apply. In such a scenario, States can do whatever they deem necessary to achieve their operational or political goals, resorting to all means available without any consideration of the principle of distinction, of protected objects or persons. This asymmetry which some might claim to be novel is far from so.

Another asymmetry that need to be mentioned is terrorism. Although terrorism itself is not a new phenomenon the idea that IHL can and should apply to the "global war on terror" is new. This link was only made following the detention on the battlefield of individuals who were allegedly engaged in terrorist activities. Of course, when these individuals were captured on the battlefield, the Geneva Conventions had to be applied in order to determine their status. But the rhetoric surrounding the "global war on terrorism" led to much confusion. Few would question that States are entitled to fight terrorists and that the right to self-defence applies to the fight against terrorism; moreover, where there is no other means available, there is a right to kill an individual engaged in an act of terrorism. However, where a terrorist has been captured, they are entitled to certain minimum human rights.

Another asymmetry that is often overlooked concerns the technology gap. Other speakers have already referred to the problems that arise where a technologically highly advanced and well-equipped super power is engaged in a conflict with an adversary which has not got at its disposal a comparable arsenal. In such instances, the latter, may then feel inclined to resort to 'dirty tricks' by resorting to means and methods of warfare that are in violation of IHL. Smaller, weaker States may even feel justified in relying on the Advisory Opinion of the ICJ in the *Nuclear Weapons Case* that where the very survival of the State was at stake, resort to nuclear, biological or chemical devices might be contemplated.

The technology gap is also a problem in the context of multi-national operations. Within NATO itself, there is already a huge counter-productive technological gap which makes joint and combined military operations far more difficult today. This starts with communications but also extends into other areas.

A further asymmetry that needs to be considered concerns the legal obligations that bind individual States. Some commentators have suggested that where doubt arises, the strictest rules would apply. In multi-national operations, it is far more likely that the lowest common denominator will guide operations to achieve the military objective.

Methods and Means of Warfare

Although the introduction of new weaponry is governed by Article 36 API and, as such, new weapons have to comply with the laws of armed conflict, in many cases, States tend to make that determination on the basis of battlefield practice. That there is a tendency among States to test these new weapons on the battlefield should be recognized and closely scrutinized.

Conclusion

The law of armed conflict is an order of necessity. It applies in exceptional cases where the international collective security system of the UN has failed. This order of necessity is founded on a compromise between military necessity and humanitarian considerations. Because this legal order is addressed to professionals engaged in an armed conflict it is vital that the rules are clear. The purpose of laws of war are not to determine whether there is a right to resort to force for that is governed by *jus ad bellum*. Unfortunately over the last two decades States have consistently confused *jus ad bellum* with *jus in bello* considerations reflecting a dangerous emerging trend. Any suggestion that undermines the application of *jus in bello* by considerations based upon *jus ad bellum* or even the just war theory must be resisted. As Immanuel Kant noted, commentators like Grotius and Pufendorf are “vexatious comforters”.

So does the law of armed conflict as it stands today need to be reformed? I do not think so. Of course it needs to adapt to changing technologies and to changing circumstances. But there are certain fundamental principles that characterize the laws of armed conflict that are so well-established that even with the changes we have witness in recent years with the so-called ‘global war on terror’ and the rise in the number of new ‘actors’ any deviation from, or modification of the principles of distinction or proportionality cannot be justified and must surely be resisted. The conduct of hostilities must continue to conform with the principles that underpin IHL.

Sir Franklin Berman QC

The first point I make is extremely broad. Nothing I have heard in this conference has increased my appetite for another codification of the law of armed conflict. By ‘codification’ of course I mean a formal international process for the purpose of establishing agreed and accepted formulations of the rules. This is so not merely because I have considerable doubts, born of experience, about the current capacity of international system for codification, but because the substantive basis for a new codification is not present. Are there ‘new’ challenges? Or is the law ‘old’? That case still remains to be proved.

If there is no room for a new codification then it is customary law that we fall back on. I believe that this area of customary law is special; and its ‘special-ness’ needs to be noted. Why is it special? Firstly, because there is no other area of international law in which those who implement it are constantly engaged in that in almost every aspect of what they do; their entire activity implicates the rules of customary law in the area that we are talking about. I mean, in the first instance, the professional

military and others involved in armed conflict. This constant engagement with rules which are rules of international law is a defining characteristic of this area. But also, that engagement happens at all levels. It is not just at the level of the head of State or military commanders, but operates down to the very junior levels. That is an important characteristic and therefore not only is clarity required, but the rules, if they are to be internalised, must also make sense to those who have to apply it. The third defining characteristic is that a sanction lies behind every violation of a rule – a sanction, whether it be of a criminal, quasi-criminal or disciplinary kind. When I said we fall back on customary law rather than look to new law, it is not because I am suggesting that there are no difficulties; it is obvious that there are difficult areas. I believe that there are some areas that are important and need attention.

i) *Non-International Armed Conflict (NIAC)*

The rules for NIAC cannot ever be exactly the same as those regulating IAC. Why are these situations inherently different? Because IAC has, at its core, some notion that both parties to the conflict have a right to bear arms against one another and have the right to use violence against one another. The rules of IAC grew up at a stage at which there was no *jus ad bellum*. Afterwards, when the *jus ad bellum* was developed, it could be engrafted onto the *jus in bello* without affecting the principle that 'just cause' is not a reason for discrimination in the application of the rules of law designed for the protection of victims of an armed conflict. That is a fundamental postulate.

But can the underlying presumption, that both sides have a right to bear arms, ever be applicable in NIAC? Even were it to apply in theory, can one, in practice, ever get the governmental party to an internal insurrection to accept the proposition that the insurrectionist movement has the right to take up arms against it? This is an important problem. Another example is the status of people captured in hostilities in a NIAC. Of course it isn't a question as to how you treat the individuals but the claim to be treated as a POW is often an important political claim made by the insurrectionist movement during a NIAC. And if that claim were to be conceded, it would be an enormous political event with huge implications. One can see that in the terrorism field.

As previous speakers have also asked, does customary international law apply to armed groups and to private military companies (PMCs) and private security companies (PSCs)? Yes, of course it does; because the essence of the law is that it applies to all those who are engaged in organised armed conflict. One expects all individuals involved in armed conflicts to comply and that sanctions will apply in the event of non-compliance.

But look at the international picture. The law of armed conflict does not only involve the individuals engaged in hostilities, but the expectation is that there is a higher entity – the State – which is responsible for ensuring, under international law, that the rules are complied with all the way down the chain of command to the soldier on the battlefield. This gives meaning to many things, including the grave breaches provisions, including all the requirements in the Geneva Conventions for the prosecution of war crimes; and it gives meaning to the complementarity principle found in the statute of the ICC.

How do you replicate that in the situation of a NIAC? Somebody must bear the responsibility for ensuring that the non-orthodox group and its members comply with the law of armed conflict. Given that the leaders of such groups do not possess the sovereign jurisdiction which is at the heart of the organisational structure of international law, who can that 'somebody' be other than the State? It must be part of the responsibility of the very State against whom the insurrection is being mounted to ensure – of course by legal processes which are recognisably fair and appropriate, the application of the law of armed conflict.

ii) 'New-style' wars

A second problem to which I now turn is the 'new-style' wars (which Mike Schmitt referred to as wars of 'compellance'). Examples of these types of wars might include a humanitarian intervention, or possibly an intervention to deal with weapons of mass destruction, or a direct authorisation by the Security Council to deal with a situation where international peace and security has been gravely threatened, implicated or broken. Here again you get that awkward resurgence because the underlying political and ethical idea behind the international action has to be that you are dealing with wrongdoing. And wrongdoing at a sufficiently serious level as to justify the application of the collective military force of the international community. So there is the other problem: you have to find a way in which you can rationally maintain the moral construct of severe evil on the one side, and the remedy for severe evil on the other side, with the equal application of the laws of armed conflict. It is a problem which keeps on raising its head. I think it was raised by even by Lauterpacht very shortly after the negotiation of the UN Charter as to whether the ordinary laws of armed conflict would arise in the case of a Chapter VII operation undertaken by the Security Council. The problem is there.

To maintain the essential principles of the law, it does not help if we pretend that the underlying problems do not exist. Perhaps the answer is that these 'new-style' conflicts implicate rather more the jus ad bellum than the jus in bello. One can look at the jus ad bellum which is being changed by practice, whereas the jus in bello retains all its essentials intact and continues to develop. There are, however, pressures which operate in that area too. Pressures against maintaining intact a distinction between jus ad bellum and jus in bello. I think we therefore have to ask ourselves the question – we all tend to treat it as axiomatic – whether there must be a categorical distinction between jus ad bellum and jus in bello. We tend to insist on the distinction for good reasons – to preserve the jus in bello – but I wonder whether the underlying proposition has to hold good in all circumstances. We tried in the UK, at the time of the Falklands, to run together the jus ad bellum and jus in bello; to organise the way we conducted the armed conflict according to the rules of self-defence as we understood them, as it was operative at the time, partly to introduce an additional limitation within at least that part of the jus in bello that relates to the selection of targets and the methods of attack. And it didn't work too badly.

The question is now of very considerable importance if humanitarian type actions are going to become more commonplace, because the rules of armed conflict are all designed around the idea of possession and control of territory. Many of the essential concepts, particularly in the attacks and targeting area, have to do with military advantage, with military objectives, which are really designed around the idea of control of territory, and it can often be extremely hard to make sense of the proportionality requirements without having that as your underlying concept. But 'compellance' operations? They are not really about control or defence of territory at all – as in the case of the intervention in Kosovo. So there is a big challenge there. I do not think – pace Mike Schmitt – that we are talking necessarily about situations where the collective security of the UN system has broken down; these problems arise also where the collective security system of the UN is operating at full steam because the Security Council has brought the armed intervention into effect by issuing a direct authorisation.

iii) Occupation

Another area that must demand further attention is the law of occupation; the category in the Conventions is belligerent occupation. It is a law which looks primarily to the situation while the armed conflict is being waged, or for a very limited period after that, following which the assumption was that there would be debellatio and you would move on to a new legal situation. If however we are talking now about compellance operations for policy reasons, the whole purpose of the operation is going to be to produce a dramatic and overall, and perhaps a total, change in the

target country. Not to leave the institutions in the target country intact, as in Iraq. Do we have a law of occupation that deals adequately with those situations? The answer is obviously not. So we have a curious amalgam of Security Council authorisations expressed in Delphic terms and an attempt to apply the rules of the Geneva Conventions and the Additional Protocols, and the situation is not very satisfactory. It certainly cannot be very satisfactory when you bring it down to the small-scale level.

So customary law is very much alive and kicking as a way of dealing with these situations. But it is customary law which is formed and which develops according to the well known processes of customary law. Judge Meron's lecture illustrated perfectly the incremental process by which customary law is extracted and understood, and which moves carefully from case to case. It moves in a way which is very closely associated with the facts of particular situations. That gives real meaning to the need for the coincidence between practice and *opinio juris* – not as an abstract matter, but as a very practical combination of the way in which an understanding of the law develops in relation to particular situations, problems and circumstances.

The other characteristic in the development of customary law is that there are no final answers. Customary law never stops, so there are no final answers in judicial pronouncements either. Certainly not in the extremely terse and therefore problematical utterances of the ICJ in a number of Advisory Opinions. The same applies to judicial pronouncements of the ICTY – none of which will be the final answer either because particular cases will continue to present themselves. In all these situations we wait to see what the reception will be, both in international opinion and in the platform that they provide for dealing with future cases, of the pronouncements laid down in particular judicial decisions of that kind.

If that applies to the judicial pronouncements, then the same applies to the monumental study before us. There too, we will have to see the way in which that settles down in international opinion, particularly in educated opinion of the sort that is represented at this conference and in those that will follow. And also in looking at whether it provides the recipes for dealing effectively with situations that actually present themselves on the ground. I imagine that it is not the intention of the ICRC to seek the formal approval by Governments of this text, though it could be certainly be taken note of with admiration for the amount and quality of the work that has gone into it; there are good precedents for that in the practice of the UN General Assembly. Far better to leave the study to settle down as a key text for further study and practice in this area.

Questions & Answers/ Discussion

A question was raised as to what laws applied to the global “war on terror” and whether there could ever be a conflict in which neither the rules of international armed conflict (IAC) nor those of non-international conflict (NIAC) applied. There was a general consensus that the “war on terror” was governed by customary international law. Where the “fight” amounted to an armed conflict, IHL is applicable; whether the rules were those of IAC or NIAC would depend on the circumstances; if there were and inter-State character of the “war” the applicable rules were not limited to those relevant to a NIAC.

The relationship between international criminal law and the law on State responsibility was discussed. Although some participants voiced their concern that States would be inclined to take advantage of the developments in international criminal law to evade State responsibility, other participants observed that in some instances, States had chosen to ‘shift’ the responsibility for a wrongful act from the individual to the States as in the case of the Rainbow Warrior. One speaker observed, that from his personal experiences, there were times when individuals who

had suffered some form of injury in the course of a conflict were, for the purposes of closure, willing to recognize a claim grounded in State responsibility. Another participant emphasized the need, as in the Iran-US Claims Tribunal cases, to ensure that some questions were resolved under binding international law. Another participant suggested that an inter partes remedy should not necessarily exclude an erga omnes remedy; in other words, in some instances, there was scope for both remedies.

One participant voiced his surprise that the Eritrea/Ethiopia Commission had adopted an approach based on the presumption that Protocol I applied unless the parties could prove otherwise, thereby reversing the usual burden. Responding, the speaker explained that given the Commission's modest resources, the approach adopted was based simply on pragmatic considerations and that the parties to the proceedings had consented to this decision.

One participant raised questions regarding the relationship between IHL and international human rights law suggesting that, especially in times of conflict, the two bodies of law should not be conflated. It was further suggested that the need to consider the specific human rights obligations of individual States introduced an element of uncertainty for those engaged in military operations – particularly where multi-national forces were deployed. In response, it was emphasized by other participants and speakers that most human rights obligations were enshrined in the conventions on IHL and that States were already under a legal obligation to uphold these rights, quite apart from their obligations under IHR law.

Session 7: Conclusions

Elizabeth Wilmshurst, International Law Programme, Chatham House

Dr FranVois Bugnion, Director for International Law and Cooperation, ICRC

Dr Bugnion recounted the opening remark of Elizabeth Wilmshurst as to whether the objective of the conference was to launch the study and thereby have a lively debate on the relevance of international humanitarian law today, or alternatively, whether it was to have lively debate and thereby launch the study. He agreed that a fascinating debate had occurred over the two days, and had not imagined quite how successful a launch for the study it would be. The study was used as a guiding thread throughout the debate.

To dissipate a misconception regarding the origin of the ICRC study: in no circumstances was the objective to circumvent the refusal of certain states to ratify certain treaties, in particular Additional Protocols I and II. Indeed, the contrary was true, as it was noticed that the refusal of those states (in particular the United States) to ratify Additional Protocol I, was basically due to a limited number of well-known provisions which were controversial and unacceptable to those states. The ICRC were also aware that according to statements made on behalf of those states or in excellent articles published by some legal advisers of those governments, those same non-ratifying governments had accepted a significant number of other provisions (in particular relating to the conduct of hostilities). Therefore, the idea of the ICRC was to build on this consent, rather than in any way to circumvent refusal to ratify.

The second major objective of the ICRC study was to overcome the gaps in the law applicable to NIACs. Two scholars had opened up new ground in this field. They were Professors Frits Kalshoven and Antonio Cassese in two articles published in

1970, where they opened up the field for reflection on the customary law applicable to NIACs. This being the objective, the study was a major challenge - a huge undertaking - and the ICRC consider it an accurate assessment of the present state of customary international humanitarian law and will take guidance from it in the conduct of their activities.

As regards the impact of the study - it would of course depend first and foremost on the way that states react to it (whether positively or not). However, it would also depend on the reactions of the scientific community, and other players who can also influence the debate (such as the national Red Cross and Red Crescent societies, or NGOs). State opinion will be decisive however. It would seem, so far, that other than expressing gratitude for receiving a copy of the book, no state has registered any formal opinions on the study. The response of the scientific community has been varied: while some consider that the authors indulged in wishful thinking (which was not their intention), some others consider that we have been too restrictive in our views, and that we should have used this opportunity to expand the field of customary law, and so forth. All in all, while specific aspects have been criticised, the first reaction appears to have been a large measure of support.

The impact of the study in future will depend on the use which states and other bodies will make of the study: for instance will States take guidance from it in drawing up military manuals in the future? Will the courts make reference to it? Furthermore, it was noted that a tremendous example has been given by the San Remo Manual on Naval Warfare which was published only a few years ago, but has already been widely used by naval forces.

In any event, the study will have the consequence of generating debate. The ICRC's objective is not to consider the study as the end of the debate. Rather, it is a basis for future debate, and that debate is necessary.

Looking towards the near future, there will be a series of events to launch the study in the Hague, Washington, Adis Ababa, New Dehli, Oslo and other places. Volume I will also be translated into French, Spanish, Arabic, Russian and Chinese, so as to ensure wide dissemination. Naturally, this will of course lead to other launch events in Paris, Cairo, Moscow etc., once the translations are available.

Regarding longer-term reflection. The study is, in the words of Yves Sandoz, a still photograph of the law as it stands, whereas custom is (by definition) an evolving process. Thus, new elements are coming in and old elements disappearing. An example of a new element coming in since the authors completed their work, is the significant publication of the military manual of the UK which unfortunately could not be taken into account in the ICRC study. However, as at some point the work must stop if it is to be finished.

As for the ICRC's intentions, it was noted that the only decision that the ICRC have made at this stage, is to maintain an up to date data bank of the research. So the ICRC will continue to collect data to keep the data bank relevant. As to whether there will be a second edition of the study, or one that will be more complete etc, it is impossible to make comment – this will be up to successors to decide. However, the study will of course be submitted to the next statutory meetings of the Movement, starting with the Council of Delegates (which is a meeting of all national Red Cross and Red Crescent societies which will occur in Seoul in November 2005); and of course, the ICRC will report - hopefully in an adequate way - at the next International Conference of the Red Cross and the Red Crescent due to take place in November 2007 in Geneva. In this regard note had been taken of the remarks of Sir Franklin

Berman –to submit the study to governments with the objective of having it endorsed would have the effect of changing the process from an assessment/restatement of customary law to a process of codification. Such a process was not likely to contribute to its success. On the other hand, it was hoped that that Conference would acknowledge the work done and show appreciation for it.

Elizabeth Wilmshurst concluded that a very wide number of issues had been discussed over the course of the conference. One issue which had been a theme in many of the panels, although not dealt with in depth in the customary law Study, was the relationship between human rights law and IHL; it was to be hoped that more work would be done on this in the future, perhaps in Chatham House. It was not just the question of whether human rights apply in certain situations, but *how* they apply.

There was no doubt that any future discussion on international customary law in armed conflict would start with the statement in the ICRC Study. The proceedings at the conference had made it clear that the discussion would not *end* with the publication of the Study; it raised many questions which needed further reflection.
