

# **INTRODUCTION TO INTERNATIONAL HUMANITARIAN LAW & IHL MOOT IN ASIA-PACIFIC REGION**

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Co-editor: International Committee of the Red Cross



**ICRC**

# INTRODUCTION TO **International Humanitarian Law** & **IHL Moot in Asia-Pacific Region**

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## PREFACE

Violent conflicts have long existed even before the emergence of humankind, but only in the last 150 years have international rules been made to limit the effects of armed conflict for humanitarian reasons. Henry Dunant, the founder of the Red Cross had, by chance, witnessed the battle of Solferino in 1859. Appalled by the lack of help for the wounded, he organised local villagers to come to their aid. Out of this act came one of the key elements of the first Geneva Convention - humane treatment of those who were no longer part of the battle, regardless of which side they were on. As we all know, the Geneva Convention has developed and become the cornerstone of International Humanitarian Law (IHL) today.

Armed conflicts have evolved greatly over the past 60 years and it has been increasingly blurred to draw the lines between various parties to an armed conflict, as well as between combatants and civilians. We have witnessed prolonged period of armed violence that has caused the drawn-out suffering of civilians in places such as Afghanistan, Colombia, Iraq, the Philippines, Somalia and Sudan for the past two decades or more, and have observed that fighting takes a direct and indirect toll on people's lives, resulting in both chronic and acute deprivations.

In present day armed conflicts, the challenge of upholding humanitarian values is not the result of a lack of rules but a lack of respect for them. Knowledge of IHL is a condition of its respect. Dissemination of IHL is an important part of the work of the Red Cross Movement and we need to reinforce enduring effort with the increasing occurrence and prolonged periods of armed violence in our world. Over the years, the Red Cross Movement has disseminated to a variety of target groups, both military and civil, as well as to its own members. Universities are also one of the key partners in efforts to build respect for the law. By encouraging universities to offer courses in IHL and involving universities in moot competition, the Red Cross reaches out to the leaders of tomorrow.

Hong Kong Red Cross (HKRC), as a global citizen, coupled with our membership of the Red Cross Movement, is honored to hold a regional IHL Moot competition in Hong Kong for the Asia Pacific for 9 years since 2003, with professional and indispensable support of the International Committee of the Red Cross (ICRC) as co-organizer, and the law faculties of The University of Hong Kong, City University of Hong Kong and The Chinese University of Hong Kong as collaborators.

This Moot competition helps disseminate IHL among law students in the Asia-Pacific Region through studying this aspect of the law, thereby exposing them to the humanitarian actions and role of humanitarian agencies in the field. The moot activity is contributing to the preparation of the future legal leaders, whom we expect to have the capacity to develop in their respective countries or cities, the International Law system in the region. After 9 years, I am encouraged to see the enthusiastic participation of law students from as many as 20 distinguished universities every year from major cities in the region after the local rounds in their respective countries or districts before coming to Hong Kong.

Luckily, Hong Kong does not fall inside a conflict zone, but this may have reduced the awareness and participation of the people of Hong Kong to the desperate needs for respect of human dignity during wartime. However, by hosting the regional IHL Moot competition, we hope the HKRC could make a small contribution to the global efforts in disseminating such awareness in this region. Contrary to many moot competitions which have a primary aim to train up law students' skills mainly in court proceedings, our objective puts more emphasis on raising awareness of international humanitarian issues among participants and enhancing their understanding of the IHL rather than black letter law.

HKRC is deeply thankful to those who have offered us help as judges for the oral hearings and memorials in the competitions of past years, comprising experienced legal professionals, members of the Judiciary, foreign consulates in Hong Kong, scholars from local and overseas universities, as well as IHL experts from ICRC. We would also like to express our special thanks to Mr Michael Crowley, the chief editor of this booklet, who has indeed contributed greatly in the important capacity as writer of the moot problems and judges' notes since the 5<sup>th</sup> Red Cross IHL Moot (Asia-Pacific Region) in 2007, as well as being a final round judge of the competition in the recent years.

There were many other supporters who have made the moot competitions of the past years possible and successful, and we are looking forward to their continuous support in our future competitions. The HKRC would also like to express our sincere gratitude to them, in particular the Panda Hotel, which has long been supportive to our accommodation provision, as well as our volunteers, members of the Moot's Organizing Committee, staff and all those who have provided logistic support to the event.

While we are planning for the 10<sup>th</sup> anniversary of this regional IHL Moot in 2012, we hope this booklet would be a summary and consolidation of the experiences and insights we have accumulated over the past 9 years, and simultaneously a practical guide for universities and participants joining our future moot competitions. It is HKRC's determination to keep this competition running and growing.

In closing, may I quote the inspiring speech delivered by the Honourable Wong Yan-lung, SC, JP, Secretary for Justice of the Hong Kong Special Administrative Region, when he first officiated in the prize presentation ceremony of the 4<sup>th</sup> IHL Moot in 2006: "*The competition has given you some taste of what it is like to apply IHL in situations that cause deep human sufferings. You may find that the law might not hold all the answers to the atrocities and acts of violence that people commit against each other. But you could also find that the challenge of protecting human life and dignity is a calling that those of us in the law should never forget and forsake.*"

**The Honourable Sir T L Yang, GBM, JP**

*Chairman*

*Hong Kong Red Cross*

## PREFACE

The annual IHL Moot Competition in Hong Kong constitutes today the prime event of this kind in the entire Asia Pacific region. Judging by the steadily growing number of participating universities over the past 9 years, the competition also enjoys considerable popularity among students who come together and measure their skills as young lawyers developing arguments, preparing briefs and litigating a case involving war crimes. By doing so they gain insights into the dynamics of international humanitarian law and become familiar with one of the major elements conditioning the respect for that law, which is precisely the element of sanctions for violations of the law.

There are, of course, a variety of factors which contribute in one way or another to such violations. First, and most critically, there is the issue of the political will of the parties to an armed conflict to abide by international humanitarian law. Ideological or religious radicalism or merely criminal conduct without any ideological pretension seem to be little receptive to arguments based on law, or on a moral principle such as humanity for that matter. The space left to humanitarian action carried out by an organization like the Red Cross can become extremely limited. At times, one may even be tempted to question the value of norms in the absence of a will to apply them. But this would equal pretending that violations of the law would somehow invalidate the law itself. It would give way to a “law of the jungle” with most dramatic consequences. It would also distract from the fact that ensuring compliance with international humanitarian law is an obligation for every State and every party to an armed conflict.

In order to comply with such obligations, States have to adopt certain measures giving practical effects to the treaties they adhered to. There is a link between the absence of such implementing measures and violations of international humanitarian law that has been recognized long ago. In particular the International Committee of the Red Cross (ICRC) and the International Conference of the Red Cross and the Red Crescent have regularly reminded States of the necessity to adopt such measures to ensure compliance with the law and to alleviate the suffering of the victims of armed conflict. It is important to realize that such suffering does not derive from a weakness of the law. If international humanitarian law would be systematically respected, the human cost of armed conflict would certainly be much reduced.

By fostering understanding of international humanitarian law, the Red Cross IHL Moot Competition for the Asia-Pacific Region contributes to the efforts of ensuring respect of the law and through that to the protection of the lives, integrity and dignity of people caught in armed conflicts. The ICRC hopes that the present publication may facilitate participation in the competition and also serve as a reference tool for all those interested in knowing more about international humanitarian law and the Red Cross.

**Vincent Cassard**

*Deputy Head of Regional Delegation for East Asia  
International Committee of the Red Cross*

## **PREFACE**

This book has its origins in the Red Cross International Humanitarian Law (IHL) Moot, an inter-university competition for the Asia-Pacific Region. The original concept for the book developed out of a conversation with Wilson Wong some years ago when he was Deputy Secretary General of Hong Kong Red Cross. We envisaged a publication that would complement the moot competition, facilitate the dissemination of humanitarian law principles and encourage law students not only to read about this crucial area of law but also to develop advocacy skills. The aim is to provide law students and other readers with an introduction to key readings on international humanitarian law, moot skills and the history of this important and relevant competition. Many of the chapters were kept short not only to make these concepts concise but also to encourage readers from non-English language backgrounds to engage with this area of law and advocacy.

Experts from academia, legal practice and the judiciary, with a keen interest in international humanitarian law and moot, have contributed chapters whereas staff at Hong Kong Red Cross have co-ordinated and compiled the publication. A number of contributors work for National Red Cross Societies or the International Committee of the Red Cross where they are involved in disseminating humanitarian law principles. Their writing reveals both expertise and experience, and I thank everybody for their contribution.

I hope this book contributes and enhances the future development of the moot and international humanitarian law principles in the region. Finally, I would like to thank all those students, staff of Hong Kong Red Cross, academics, diplomats, legal practitioners, judges and others who have contributed to making the Red Cross IHL Moot (Asia-Pacific Region) the success it is today.

**Michael Crowley**



# INTRODUCTION

To promote International Humanitarian Law (IHL), Hong Kong Red Cross joins hands with the International Committee of the Red Cross (ICRC), in collaboration with the law faculties of the three local universities in Hong Kong to organize the Red Cross IHL Moot (Asia-Pacific Region). With the successful inception of the 1<sup>st</sup> Moot organized only for local participation in 2003, it has now been expanded to a regional level having 20 universities from the Asia-Pacific Region to participate in 2011.

This is the first book written on the experiences and insights related to IHL and IHL Moot in Asia-Pacific Region. Contributed by numerous professionals knowledgeable on IHL and mooted competitions, the booklet is a collection of experience sharing after organizing the IHL Moot in the past 9 years. The writers include academic scholars who assisted on writing the moot cases/problems for previous moots or who are expertise on the IHL; judges who have rich experience in judging performance of participating teams before; as well as ICRC representatives who would share on actual practice of IHL in real cases.

As year 2012 marks the 10<sup>th</sup> Anniversary of the Red Cross IHL Moot (Asia-Pacific Region), this publication aims to enhance knowledge of students and the public on IHL in relation to the Red Cross Movement, International Criminal Court, as well as human rights and international law. Besides, the publication will also highlight techniques and skills on writing memorials and oral presentations for participants of mooted competitions. This would be an indispensable reference publication essential for law students, legal professionals and the general public for enriching their knowledge on IHL and its application, as well as to get to know more about the IHL Moot.

## ACKNOWLEDEMENTS

I am indebted to those who have taken the time and effort to contribute chapters. There are many people who have helped and supported in the writing and reviewing chapters of this book. Reviewers included Richard Desgagné, Roderick O'Brien, Dr Ann-Claire Larsen and Anthony Hevron. In particular, we are indebted to Wilson Wong of the Hong Kong Red Cross, with his previous capacity as the Deputy Secretary General, for his foresight in supporting this initiative and contributing to the publication, together with KM Chan, Brenda Kwan and her staff, Maggie Yim, Lucia Fan, and Maggie Leung, for their continued support and assistance. I would also like to thank Richard Desgagné and Roderick O'Brien for their advice and helpful suggestions on content, chapter headings and sequencing of chapters. A special thanks to my colleagues Dr Ann-Claire Larsen whose advice on editing was invaluable and who checked the text for linguistic and grammatical error; Anthony Hevron who helped with checking the referencing and Karen Woods for her secretarial assistance. Last, but not least, I thank my partner Dr Julianne Crowley for her editorial advice, assistance and loving support. Finally, notwithstanding the help and assistance above I am responsible for any mistakes and errors.

**Michael Crowley**

## LIST OF CONTRIBUTORS

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**JUSTICE PATRICK CHAN** is currently one of the three Permanent Judges of the Court of Final Appeal in Hong Kong. Justice Chan holds a Bachelor of Laws Degree from The University of Hong Kong and was awarded an Honorary Doctor of Laws from City University of Hong Kong. Between 1987 and 1991, he served as a judge in District Courts, and was then appointed Deputy Registrar of the Supreme Court, and then a judge in the Court of First Instance of the High Court of Hong Kong. In 1997, Justice Chan was appointed Chief Judge of the High Court of Hong Kong and became the first local graduate to serve in that position. In 2000, Justice Chan was appointed a Permanent Judge of the Court of Final Appeal. Justice Chan has played a seminal role in the development of a distinctive constitutional jurisprudence and identity following the return of Hong Kong to Chinese sovereignty. He has also been involved with the Red Cross International Humanitarian Moot (Asia-Pacific Region) since its inception.

**MICHAEL CROWLEY** is a Senior Lecturer in Law at Edith Cowan University in Perth, Western Australia. He joined the university in 2006 from private practice as a barrister where he specialised in criminal law. Mr Crowley maintains a current practicing certificate and is a member of the Western Australian and New South Wales Bar Associations. He is a graduate of the University of Sydney and Macquarie University holding undergraduate degrees in arts and law and postgraduate degrees in education and international law. At Edith Cowan University Mr Crowley teaches, amongst other units, public international law and evidence as well as being the competitions co-ordinator. He is the Australian Universities representative to the International Negotiation Competition. Mr Crowley has been involved with the Red Cross International Humanitarian Law Moot (Asia-Pacific Region) since 2007 and serves on the International Humanitarian Law Committee of the Western Australian Division of the Australian Red Cross Society. His research interests are in terrorism and international humanitarian law.

**RICHARD DESGAGNÉ** is currently Regional Legal Adviser for East and South East Asia for the International Committee of the Red Cross (ICRC). He joined the ICRC in 2001 as a legal adviser in the ICRC Advisory Service on International Humanitarian Law in Geneva. From 2003 to 2006, he was regional legal adviser for West and Central Africa, and from 2006 to 2008, for Central and Southeast Europe. He holds a law degree (LL.B.) from the University of Montreal, a business administration degree (B.A.) from the University of Quebec (UQAM), a master of laws degree (LL.M.) from McGill

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**LUCIA FAN** is currently an Assistant Project Manager for the Secretariat of the Hong Kong Red Cross (HKRC). She is responsible for planning, implementing and coordinating agency-wide events, where the Red Cross International Humanitarian Law Moot (Asia-Pacific Region) is one of the signature events of the HKRC. She has been actively offering assistance in organizing the event since 2004, and has witnessed its fruitful development and expanding scope of participation in the past years.

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Conflict and Repression and leads the Law School's four new International Law Masters. Professor Linton has many years of international legal practice in international organisations with; for example, the Mission of the Organisation for Security and Cooperation in Europe to Bosnia-Herzegovina, the Office of the United Nations High Commissioner for Human Rights, as well as international courts and tribunals in the Former Yugoslavia and East Timor. She publishes widely and is engaged in several major research projects.

**JOHN NADER** was admitted to the New South Wales Bar in 1962 where he practiced in industrial law and criminal law. In 1974 Mr Nader was appointed Crown Prosecutor in New South Wales and subsequently Queens Counsel in 1980. In 1981 he became a Justice of the Supreme Court of the Northern Territory and chairman of the Northern Territory Criminal Code Review Committee. Whilst in the Northern Territory he wrote the final judgment in the long running case of Lindy Chamberlain when a verdict of acquittal was directed. He retired in 1992 to become involved in the Heinrich Wagner prosecution. After returning to New South Wales, Mr Nader became a chairman of the New South Wales Parole Board and also presided over a commission of inquiry into allegations made in the New South Wales Legislative Assembly by Franka Arena to the effect that the then Premier, Leader of the Opposition, Justice Wood (of Police Royal commission fame) and others had conspired together to protect paedophiles in high places. From about 1950 until the late 1980s, Mr Nader served in the Army Reserve, both in the infantry and in the Australian Army Legal Corps, where he was promoted to Lieutenant Colonial.

**RODERICK O'BRIEN** is an Australian lawyer. He holds a law degree from the University of Adelaide and a Master of Arts from The University of Hong Kong. From 1994 to 2005 Mr O'Brien taught in several universities in China (including The University of Hong Kong). Since the 1980's he has been an active in the dissemination of International Humanitarian Law and has served as a member, deputy chairman and chairman of the International Humanitarian Law Committee of the South Australian Division of the Australian Red Cross Society. Roderick has been a speaker on International Humanitarian Law at professional meetings and at universities in Australia and Asia, and has published on International Humanitarian Law, international criminal law and ethics in Europe, Asia, and Australia, in English and in Chinese. Mr O'Brien is actively involved in mooting in the region including a key role in fostering the development of the Red Cross International Humanitarian Law Moot (Asia-Pacific Region).

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included criminal law, criminal procedure, evidence and criminal justice. Mr Upham now undertakes some part-time lecturing at The University of Hong Kong and freelance consultancy work. Mr Upham has been associated with the Red Cross International Humanitarian Law Moot (Asia-Pacific Region) since 2006.

**WILSON WONG** was former Deputy Secretary General of the Hong Kong Red Cross and has been involving in humanitarian and relief works for nearly 18 years. Wilson Wong studied Sociology during the undergraduate level. He then continued his postgraduate studies on various aspects, namely international law, public administration, public service management, and social policy analysis in different academic institutions. He left his footprints in over 20 countries, and actively participated in both local and overseas disaster-related projects. He was the one working in Rwanda during the genocide period and was appointed by the International Federation of Red Cross and Red Crescent Societies in Geneva to take up the role as one of three core team members responsible for the overall worldwide relief coordination for the tsunami operation for 3 months. Besides, he was a member of the United Nations Office for the Coordination of Humanitarian Affairs. With his rich experience in various aspects in Red Cross Movement, he was one of the core members, being the Secretary, of the regional Red Cross International Humanitarian Law Moot (Asia-Pacific Region) for 8 years, responsible for cooperation with different parties on implementation and development of the regional IHL Moot.

**GUO YANG** is a Legal Officer for the Regional Delegation for East Asia of the International Committee of the Red Cross (ICRC). He holds a master's degree in International Law from China University of Political Science and Law. Mr Guo Yang originally worked as a legal officer in the Treaty and Law Department of the Ministry of Foreign Affairs, People's Republic of China. In this role, he also served as Legal Adviser of the Chinese Delegation to Ad hoc committee on deliberation of the Optional Protocol to the Convention against Torture; Ad hoc committee on deliberation of the United Nations Convention against Transnational Organised Crime, as well as the 57<sup>th</sup> and 58<sup>th</sup> Session of the General Assembly of the United Nations (Third Committee). Mr Guo Yang joined the ICRC Regional Delegation for East Asia in 2005. As the legal officer of the Delegation, he is responsible for cooperation with the authorities and academic circles on promotion and implementation of International Humanitarian Law in this region.

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Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) 1948	36, 63, 68
Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954 Hague Convention) 1954	12, 21, 23, 24, 34, 48, 50, 54-56, 58, 86, 87
<b>E</b> European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) 1950... Article 19	62, 63, 67, 72, 81
<b>G</b> Geneva Gas Protocol 1925	55, 59
<b>H</b> Hague Convention (IV) Respecting the Laws and Customs of War on Land 1907	47, 66
Hague Regulations Respecting the Laws and Customs of War on Land 1907... Article 20.	42, 44, 47, 67
<b>I</b> International Covenant on Civil and Political Rights (ICCPR) 1966	62, 63, 66, 67, 69, 72, 75, 76, 78, 80, 81, 121
International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966	62, 67, 78, 79

International Convention for the Protection of All Persons from Enforced Disappearance 2006	63, 68, 74, 82
International Convention for the Suppression of the Financing of Terrorism 1999	68
International Convention for the Suppression of Terrorist Bombings 1997	68
International Convention Against the Taking of Hostages 1979	68
<b><u>O</u></b> Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts 2000	63, 68, 74, 82
<b><u>P</u></b> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I) 1977	5, 11, 14, 20, 21, 23-25, 33, 34, 37, 39-42, 44, 46-48, 57-59, 63, 67, 74, 82, 84, 86-87, 99
Protection of Victims of Non-International Armed Conflicts (Additional Protocol II) 1977	3, 5, 11, 23, 33, 34, 38, 41, 46, 57, 59, 61, 63, 67, 68, 70-71, 82, 86-87
The Adoption of an Additional Distinctive Emblem (Additional Protocol III) 2005	2, 5, 11, 33, 41, 46, 87
Protocol amending the Slavery Convention 1953	68
<b><u>R</u></b> Rome Statute of the International Criminal Court (Rome Statute) 1998	6, 55-59, 93, 99, 119, 121, 122
<b><u>S</u></b> Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention (Slavery Convention) 1926	68
Statute of the International Court of Justice 1945	5, 68
<b><u>U</u></b> United Nations Charter 1945	68
United Nations Convention on Conventional Weapons and its Protocols	59
United Nations Convention against Corruption 2003	68
United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1990	68
Universal Declaration of Human Rights 1948	62, 63, 67, 70-72, 80
<b><u>V</u></b> Vienna Convention on the Law of Treaties 1969... Art 53	68, 79

# INTERNATIONAL HUMANITARIAN LAW – ITS SCOPE AND APPLICATION

*Tony Upham*

International Humanitarian Law (IHL) does not attempt to outlaw the use of armed force; its direction is towards achieving order and regulation in the use of armed force by defining how, when and where armed force can be used. IHL is particularly concerned with protecting non-combatants, civilian property and humanitarian organisations attempting to alleviate the suffering caused by armed conflict. These concerns are addressed in Four Geneva Conventions<sup>1</sup> and three Amending Additional Protocols.<sup>2</sup> These Conventions and the Additional Protocols deal with humanitarian issues arising from armed conflict and its aftermath. Directing armed force against civilians, non-combatants and humanitarian agencies or mistreating prisoners of war are all violations of IHL.

In the nineteenth century the production of ever more sophisticated and destructive weaponry brought appreciation that issues of armed conflict should be addressed nationally with, consequentially, movement towards a written international humanitarian law. The Hague Conventions of 1899 and 1907 addressed the rights and duties of belligerent states who were parties to the Conventions in conducting military operations.<sup>3</sup> These Conventions, sometimes referred to as the Laws of War, address military concerns. The 1899 Hague Convention refers to ‘seeking means to preserve peace and prevent armed conflicts among nation’ and to the necessity ‘to have regard to cases where an appeal to arms may be caused by events which their solicitude could not avert’.<sup>4</sup> The objective was, ‘to revise the laws and general customs of war, either with the view of defining them more precisely, or of laying down certain limits for the purpose of modifying their severity as far as possible’. The 1899 Hague Convention and the four accompanying Additional Declarations limited the use of weaponry by prohibiting, *inter alia*, the use of chemical weapons and hollow point bullets, dropping projectiles from balloons, killing or wounding an enemy who had surrendered, declaring that no quarter be given, using arms causing superfluous injury, making improper use of flags of truce and destroying or seizing enemy property unless imperatively demanded by the necessities of war.

Contemporary IHL emphasizes protecting civilians, civilian property, humanitarian organisations, those who can no longer fight and regulating armed conflict. The First Geneva Convention addressed the Amelioration of the Condition of the Wounded and the Sick in Armed Forces in the Field, the Second Convention was expressed to be ‘for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea’, the Third Convention addressed issues ‘relative to the Treatment of Prisoners of War’ whilst the Fourth Convention was concerned with matters ‘relative to the Protection of Civilian Persons in Time of War’. There are three additional amending protocols: Protocol I relating to the Protection of Victims of International Armed Conflicts, Protocol II relating to the Protection of Victims of Non-International

Armed Conflicts and Protocol III relating to the Adoption of an Additional Distinctive Emblem (for a humanitarian relief agency).



The First Geneva Convention came about from the activities of such persons as Florence Nightingale, who had nursed soldiers wounded in The Crimean War (1853 to 1856) and Henry Dunant who had seen the suffering of wounded soldiers at the battle of Solferino during the Franco-Austrian War.<sup>5</sup> That battle involving some 300,000 men was fought at close quarters and left about 6,000 dead and more than

40,000 wounded. The medical services, such as they were, were totally overwhelmed.

In his book ‘A Memory of Solferino’ published in 1862 Dunant advocated the formation of relief societies with nurses to care for the wounded in wartime and for their protection through an international agreement.<sup>6</sup> His ideas led to the creation of ‘the International Committee for the Relief to the Wounded’, which subsequently became the International Committee of the Red Cross (ICRC) and to a Diplomatic Conference in Geneva in 1864 attended by representatives of 12 governments, which resulted in the First Geneva Convention.

Just as the battle of Solferino saw the start of a structured approach to IHL, the First World War 1914-1918 and the Second World War 1939-1945 led to a more detailed and far reaching IHL. The First World War saw a massive loss of life and suffering in the trench warfare that characterized the fighting, extensive use of poison gas and the beginning of long range aerial bombardment. The Second World War saw more advances in weaponry and extensive aerial bombardment with inevitable consequences for civilians and civilian property. The bombing of cities such as Warsaw, Rotterdam, London and Coventry were seen as acts of terror directed at the civilian population. Subsequent saturation bombing of German, Italian and Japanese cities was however viewed by the Allies as legitimate and designed to end hostilities despite high civilian casualties and widespread destruction of civilian property.<sup>7</sup> The Second World War also saw the advent of the cruise missile: the V1 and the V2.<sup>8</sup> Both caused much loss of civilian life and destruction of civilian property. There was no defence against the V2. Both weapons were intended to cause widespread terror: their name ‘Vergeltungswaffe’ indicating their purpose was vengeance.

The suffering inflicted upon non-combatants during the Second World War underlined the need for a universal standard to protect non-combatants civilians and civilian property from the effects of armed conflict. This led, in 1949, to revisions to the First and Third Geneva Conventions and the adoption of the Fourth Geneva Convention. The Fourth Geneva Convention contained detailed provisions about civilians and their property, matters not addressed in the earlier Conventions.

The four Geneva Conventions and the three Additional Protocols are the body of IHL. They are designed to limit the use of armed force. Armed force can only legitimately be used to weaken the military forces of the enemy: civilians and civilian areas are not legitimate targets. Careful assessments are required about the risk of civilian casualties in attacking legitimate military targets. If the risk to civilians or



civilian property outweighs the military value of the target, it should not be attacked. But what if the other side places legitimate military targets such as cruise missile launchers inside the grounds of a hospital or in a residential area?

The Fourth Geneva Convention and the revisions to the three earlier Conventions in 1949 drew upon experiences and lessons from armed conflicts up to that date which had generally been international in nature and between states. Understandably the 1949 revisions looked towards armed conflicts where at least one of the States involved had ratified the Conventions. The increasing number of non-international conflicts after 1949 directed towards ending colonial rule or States splitting into smaller States was addressed by Additional Protocol II in 1977. That Protocol applied the Geneva Conventions to armed conflicts occurring in the territory of States party to the Geneva Conventions involving dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as enables them to carry out sustained and concerted military operations and to implement the Protocol. Protocol II does not extend to internal disturbances such as riots or sporadic violence. This is not classed as armed conflict and falls to be addressed under national laws or other relevant in international law or custom.

The changing nature of armed conflict and the rise of terrorism brings problems of definition. Questions arise about what is an insurgency, about dissident armed forces, about what amounts to sustained and concerted military action, and about who is a combatant.

The Geneva Conventions regard combatants as persons in an organised force, under responsible command, identified by a flag or other distinguishing symbols, who openly carry arms and who adhere to the laws and customs of war.<sup>9</sup> This definition appears to exclude groups not identified by a flag or other distinct symbol and not carrying arms openly who carry out serious acts of violence either directed at citizens or not discriminating between civilians and military personnel. Presumably they are not combatants for the purposes of the Geneva Conventions and their acts are not violations of IHL but of national law or other applicable international law.

The next issue is, how is IHL enforced? State Responsibility requires States to honour their obligations. Where a violation of IHL is committed by a State, which has ratified

the Conventions, there is an obligation to cease the violation and make reparation for the breach. Article I of all four Geneva Conventions requires States to ‘respect and ensure respect’ for the Conventions. There is a positive duty both to adhere to the Conventions and to ensure they are respected by other ratifying States. The duty to respect the Conventions requires States to exercise close control over their armed forces, over military personnel and over all its institutions involved in an armed conflict and its aftermath. States must ensure that military personnel are properly trained, are aware of the requirements of IHL and observe them when taking military action. Enacting national legislation and actively prosecuting violations of IHL provide evidence a State is honouring its Convention obligations.

The duty to ensure respect for the Conventions requires States not involved in the armed conflict to act if the parties to the conflict violate IHL. This action may involve diplomatic or political pressure or trade, financial or business sanctions. Action, and its effectiveness, depends upon the will of other States and trade or other considerations may become preponderant. Whatever action is taken must be legitimate and proportional. Ideally the action will be co-ordinated if not led by the United Nations.

Where a State breaches its international obligations another State could ask the International Court of Justice (ICJ) to investigate.<sup>10</sup> The Court’s role is to settle, in accordance with international law, legal disputes submitted to it by States. Only States have standing before the Court in contentious cases.<sup>11</sup> A dispute can only be entertained if the States concerned have accepted its jurisdiction either by entering into a special agreement to submit to the Court’s jurisdiction, by a jurisdictional clause in a treaty or through the reciprocal effect of declarations made by them under the Court’s statute. The Court’s judgment is final and binding upon the State Parties to the dispute.<sup>12</sup> States are expected to honour the judgment and to take the necessary measures to implement the judgment. If a State Party considers the other State Party to the dispute before the Court has failed to implement the Court’s judgment, it may refer the matter to the United Nations Security Council which may decide upon the measures to be taken by the defaulting State to implement the Court’s judgment.

State responsibility does not exclude individual responsibility. Responding to individual violations is fundamental to the credibility of IHL. For various reasons, States which breach IHL may not be the subject of action by other States or action may be ineffective. The ICJ is not a criminal court and has no jurisdiction over individuals. The prosecution of individuals who violate IHL is for national courts. On occasions special tribunals have been set up by the United Nations to try individuals who have committed the most serious violations of IHL.<sup>13</sup> Concerns over the lack of a unified procedure to address serious violations of IHL by individual and concerns about the problems of setting up special tribunals to deal with specific cases led to the establishment of the International Criminal Court (ICC) in 2002.<sup>14</sup>

The ICC is independent and permanent. It deals with the most serious violations of IHL: genocide, crimes against humanity and war crimes. It is a court of last resort and

will not act where a case is investigated or prosecuted nationally unless that process is a façade to exonerate the individual concerned. The ICC has jurisdiction where the accused is a national of a State which has accepted its jurisdiction and the alleged crime occurred on the territory of the State Party or in territory of another State Party to the ICC. The United Nations Security Council may however refer a case to the ICC Prosecutor whatever the nationality or wherever the offence occurred. Over 100 States have accepted the ICC's jurisdiction though there are notable exceptions: the United States for example. The ICC can try individual violators as well as those who aid, abet or otherwise assist the alleged crime. Military commanders are a case in point either for directly ordering or directing the commission of offences or for failing to take necessary measures to prevent violations.

The ICC avoids the delays, costs and uncertainties of setting up specific tribunals. It brings an enforcement face to IHL and allows the development of a consistent and authoritative approach to violations of IHL with a greater overall deterrent effect. More however needs to be done to achieve universality of application and enforcement of IHL.

<sup>1</sup> Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 75 U.N.T.S. 31 (Geneva Convention I); Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea 75 U.N.T.S. 81 (Geneva Convention II); Convention (III) relative to the Treatment of Prisoners of War 75 U.N.T.S. 135 (Geneva Convention III) and Convention (IV) relative to the Protection of Civilian Persons in Time of War 75 U.N.T.S. 287; opened for signature 12 August, 1949 (entered into force 21 October 1950) (Geneva Convention IV); (Geneva Conventions). The text of the Conventions can be readily accessed through <<http://www.icrc.org>>.

<sup>2</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 U.N.T.S. 3 (Additional Protocol I). Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, 1125 U.N.T.S. 609 (Additional Protocol II). Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Adoption of an Additional Distinctive Emblem, 8 December 2005 (Additional Protocol III). The text of the Protocols can be readily accessed through <<http://www.icrc.org>>.

<sup>3</sup> The text of the Conventions can be readily accessed through <[http://wwi.lib.byu.edu/index.php/Hague\\_Convention](http://wwi.lib.byu.edu/index.php/Hague_Convention)>.

<sup>4</sup> The Convention was signed on 29 July 1899, entered into force on 4 September 1900.

<sup>5</sup> The battle occurred on 24 June 1859 during the Franco-Austrian War 1859.

<sup>6</sup> The book can be obtained through the ICRC web-site <<http://www.icrc.org>>.

<sup>7</sup> For an outline of issues and information about the bombing of Dresden see Detlef Siebert, *British Bombing Strategy in World War*, at <<http://www.bbc.co.uk/history/worldwars/wwtwo>>. And see also, Charles S. Maier, "Targeting the city: Debates and silences about the aerial bombing of World War II", 87 *International Review of the Red Cross*, September 2005, 429.

<sup>8</sup> For information on the development and use of the V1 and the V2 see World War 2 German "Vengeance weapons" through <<http://www.theotherside.co.uk>>.

<sup>9</sup> See Geneva Convention III, above note 1, Article 4.

<sup>10</sup> See: *Statute of the International Court of Justice* (1945), adopted on 26 June 1945, 1976 Y.U.B.N. 1052; 59 Stat. 1031; T.S 993 (entered into force 24 October 1945) (*ICJ Statute*), see also the ICJ website at <<http://www.icj-cij.org>>.

<sup>11</sup> Charter of the United Nations, adopted 26 June 1945, entered into force 24 October 1945, as amended by G.A. Res. 1991 (XVII) 17 December 1963, entered into force 31 August 1965 (557 UNTS 143); 2101 of 20 December 1965, entered into force 12 June 1968 (638 UNTS 308); and 2847 (XXVI) of 20 December 1971, entered into force 24 September 1973 (892 UNTS 1190), Article 98 available at <<http://www.un.org/aboutun/charter/>> Article 98 of the UN Charter enables the General Assembly or the Security Council to request the ICJ to give an advisory opinion on any legal question.

<sup>12</sup> *ICJ Statute*, above note 10, Article 60.

<sup>13</sup> For example see the Special International Criminal Tribunals for Rwanda and Yugoslavia available at: <<http://www.unictt.org/>> and <<http://www.icty.org/>> respectively.

<sup>14</sup> *Rome Statute of the International Criminal Court*, adopted on 17 July 1998, UN Doc.A/CONF.183/9 (entered into force 1 July 2002), (*Rome Statute*).



# WHAT IS THE ICRC AND HOW DOES IT RELATE TO THE RED CROSS AND RED CRESCENT MOVEMENT?

*Anton Camen\**

The International Committee of the Red Cross (ICRC) is one of the largest humanitarian organizations in the world. It operates on an annual budget of 1 billion US dollars with a staff of 12,000 people based in 80 countries.<sup>1</sup>

But it is not size or outreach that sets the ICRC apart both from intergovernmental agencies, such as those of the United Nations, and from non-governmental organizations. It is the ICRC's specific mission and mandate, and the way the organization has been putting that mandate into practice as part of the International Red Cross and Red Crescent Movement.



# ICRC

Even so, the characteristics and the functions of the ICRC are not always well understood. This can lead to misunderstandings, but most importantly it may negatively impact on operations carried out for people that depend on it. The present contribution proposes to highlight the specificities of the ICRC and to clarify its role within the Red Cross and Red Crescent Movement.<sup>2</sup>

The ICRC is neither an intergovernmental nor a non-governmental organization. Legally, it is a private association under Swiss law, but it is entrusted with an international mandate under international law, which confers to it an international legal personality, similar to an intergovernmental organization. The ICRC has a hybrid character in the sense that it combines elements of non-governmental and of governmental organizations, which makes its legal personality *sui generis* in international relations. In accordance with the mandate conferred upon it and the function it fulfils, States treat the ICRC as an intergovernmental organization and not as a private organization.<sup>3</sup>

Originally, after the institution was founded in 1863, its activities were meant to focus on bringing medical assistance to wounded soldiers.<sup>4</sup> However, the ICRC quickly broadened those, first to the benefit of other categories of persons and, along with that, to supply other needs those persons experienced. Today, the ICRC carries out humanitarian activities to all persons suffering from armed conflicts or other situations of violence, such as disturbances or tensions. This includes wounded or sick combatants and fighters, internally displaced persons, prisoners of war and security detainees, children separated from their families, or simply civilians. In addition, those activities are not limited to medical assistance. They include a wide range of other activities that aim to respond to the different needs people may face in an armed conflict or another situation of violence. In that sense, the ICRC has an 'all-victims, all-needs' approach.

According to its mission statement, the ICRC is an impartial, neutral and independent organization who has an exclusively humanitarian mission to protect the lives and dignity of victims of armed conflict and other situations of violence, and to provide them with assistance. All the efforts undertaken by the ICRC converge in those objectives.



In addition to the ICRC's operational work of protecting and assisting persons, the ICRC also endeavours to prevent the suffering engendered by war or other situations of violence. This involves promoting and strengthening respect of humanitarian law and universal humanitarian principles.

The two lines of work are inextricably linked because the first operates within the framework provided by the second, and the second draws on the experience of the first and facilitates the ICRC's response to the needs identified. Together they constitute two key features that have been characteristic for the ICRC since Dunant's intervention at Solferino.

The development of international humanitarian law treaties significantly reflects this dynamic between humanitarian action and the codification of rules. It is not exaggerated to affirm that, to a very large degree, it is because of the efforts of the ICRC that international humanitarian law has developed into the dense and comprehensive body of rules that it is today. From the adoption of the original Geneva Convention in 1864 to the Convention on Cluster Munitions of 2008, it was the experience and knowledge acquired in the field that allowed the ICRC not only to recognize humanitarian needs, but to conceive normative solutions responding to the problems encountered, and eventually engage the States to strengthen the law through new international treaties.

The special role of the ICRC is formally recognized in international law, which is rather unique for a private organization. The most important humanitarian law treaties, the four Geneva Conventions of 1949<sup>5</sup> and their Additional Protocols<sup>6</sup>, explicitly refer to the ICRC sixty-six times.<sup>7</sup> International tribunals have consistently underlined that the ICRC is a special institution with very specific functions in international relations. Notably, in the *Simic* case, the International Criminal Tribunal for the former Yugoslavia acknowledged that the ICRC

enjoys a special status in international law, based on the mandate conferred upon it by the international community. The Trial Chamber notes that the functions and tasks of the ICRC are directly derived from international law, that is, the Geneva Conventions and Additional Protocols. Another task of the ICRC, under its Statute, is to promote the development, implementation, dissemination and application of international humanitarian law.<sup>8</sup>

The tribunal further observed that ‘by accepting to be bound by the Geneva Conventions, the States party to them have agreed to the special role and mandate of the ICRC.’<sup>9</sup>

This recognition is also reflected in various United Nations' resolutions. Notably, Resolution 45/6 of 1990 of the United Nations General Assembly considered ‘the special role carried on accordingly by the International Committee of the Red Cross in international humanitarian relations’. Through that resolution the General Assembly conferred the status of permanent observer to the ICRC.<sup>10</sup> Such a status facilitates participation in debates on issues of humanitarian concern in order to draw attention to the situation of victims of armed conflict and obtain diplomatic support for humanitarian action.<sup>11</sup>

The ICRC's role is further confirmed by article 5 of the Statutes of the International Movement of the Red Cross and the Red Crescent. That article also recognizes the mandate of the organization to protect and assist persons in situations of violence that do not qualify as armed conflict.<sup>12</sup>

The ICRC fulfils its mandate as a part of the Red Cross and Red Crescent Movement. The ICRC is the founding body of the Movement. In addition to the ICRC, the Movement consists today of 186 national Red Cross or Red Crescent societies and their International Federation.<sup>13</sup> Although sharing the same principles and a central objective – to prevent and alleviate human suffering and to protect human dignity – the three components of the Movement are independent from each other. Each has its own status and exercises no authority over the others.<sup>14</sup>

The Statutes of the International Red Cross and Red Crescent Movement define the relationship between the different Red Cross and Red Crescent institutions.<sup>15</sup> The coordination within the Movement is to a large degree based on an agreement, known as the Seville Agreement of 1997<sup>16</sup> and another document of 2005 containing the Supplementary Measures to Enhance the Implementation of that agreement.<sup>17</sup>

The Seville Agreement confers on the ICRC the role of lead agency for international operations conducted by the Red Cross and Red Crescent in situations of armed conflict and other situations of violence. Therefore, the ICRC directs and coordinates international relief activities in such situations. In addition, the ICRC often contributes the specific expertise it has developed over the years in restoring links between family members that have been separated by a conflict. Today those efforts also benefit people who have been separated from their loved ones by situations other than conflicts, such as natural disasters, pandemics or other events, provided that the ICRC's work constitutes an added value.<sup>18</sup>

The ICRC therefore combines two roles as part of the Red Cross and Red Crescent Movement. One consists of the humanitarian work that derives from its own mandate and its specific areas of competence. The other consists of coordinating the international operations of the Movement's components.

The ICRC is responsible for ensuring that future Red Cross or Red Crescent national societies meet the criteria for membership of the Movement and that they are in a position to conduct their activities in accordance with the Fundamental Principles. The criteria for membership in the Movement are defined in article 4 of the Statutes of the International Red Cross and Red Crescent Movement.<sup>19</sup> If they fulfil the conditions set, the ICRC grants the national societies official recognition. This allows them to become full members of the Movement and they may then apply to join the International Federation.

The ICRC and the International Federation support the national societies in ensuring compliance with the Fundamental Principles, which is key for the integrity of the societies and consequently for their ability to undertake efficient actions when needed. Such support involves, amongst others, a Joint ICRC/International Federation Commission for National Society Statutes, which provides assistance to national societies on adopting or adapting internal statutes and national legislation in order to strengthen their legal bases.



The ICRC cooperates with national societies in all matters of common concern. This involves developing effective operational partnerships and capacity-building, including management procedures for projects. Particular efforts are dedicated to programs for assisting persons in conflict and other situations of violence, restoring family links, promoting respect for international humanitarian law and

the Fundamental Principles, and engaging in mine-action activities. Through such cooperation the complementary mandates and skills of the Movement partners can be optimized to enhance the efficiency of protection, assistance and prevention activities.

The Movement's Fundamental Principles of humanity, impartiality, neutrality, independence, voluntary service, unity and universality constitute the common values that distinguish the Movement from other humanitarian organizations.<sup>20</sup> The Movement has entrusted the ICRC with upholding and disseminating these principles.

Most if not all humanitarian organizations can identify with the principles of humanity and impartiality. The underlying idea behind the principle of humanity is the respect to which every human being is entitled. Impartiality is based on the notion that people in need ought to be treated equally, according to their needs, and without any discrimination.

Issues tend to be more complex when it comes to neutrality and independence. The exact wording of the principle relating to neutrality states that 'in order to continue to enjoy the confidence of all, the Red Cross may not take sides in hostilities or engage

at any time in controversies of a political, racial, religious or ideological nature'.<sup>21</sup> Independence from any authority, group or entity with vested interests in a situation of violence ensures that the ICRC can accomplish its activities on an exclusively humanitarian basis, no matter what those interests might be. For humanitarian work, neutrality and independence are essential elements to gain trust and acceptance. These are necessary preconditions to be able to access those needing help.

Yet, neutral and independent humanitarian action is questioned by some, as is the legal framework under which such action takes place. Controversies arose in particular in relation to the so-called 'war on terror'. Some suggested that certain people's lives and dignity were somehow undeserving of protection, even when detained or wounded. It is however one of the great achievements of humanity that all human beings are protected by law, regardless of the acts they might have committed. The ICRC attaches much importance to neutral, impartial and independent humanitarian action, because this approach offers the best chance of being accepted during an armed conflict or another situation of violence where those involved tend to be very polarized or radicalized.

The States recognized the need for a specifically neutral and independent organization, which could, when needed, act as an intermediary between the parties. Only such an organization would be accepted by all parties, and recognised as having a specific role, different from political projects or military goals. The ICRC is expected to be neutral and through that quality to be able to accomplish its mission close to the persons needing its services, regardless on which side they are or in whose power.

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\* At the time of writing, the author served as Deputy Head of Delegation and Legal Adviser at the ICRC's Delegation in Beijing. This article reflects the views of the author and not necessarily those of the ICRC.

<sup>1</sup> The initial field budget for 2010 was 983 million Swiss francs, the budget for headquarters was 173 million Swiss francs.

<sup>2</sup> For more details see : *Discover the ICRC*; document available at : <<http://www.icrc.org/eng/resources/documents/publication/p0790.htm>>. Also: 'The International Committee of the Red Cross: its mission and work', (2009) 93 *International Review of the Red Cross* 874, 339-413.

<sup>3</sup> For example when governments conclude so-called headquarters agreements with the ICRC. Such agreements have been concluded in most countries where the ICRC works. They grant the ICRC privileges and immunities similar to those granted to intergovernmental organizations.

<sup>4</sup> It was Henry Dunant's reaction to the wounded of the battle of Solferino in 1859 that led to the creation of the Red Cross.

<sup>5</sup> Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 75 U.N.T.S. 31 (Geneva Convention I); Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea 75 U.N.T.S. 81(Geneva Convention II); Convention (III) relative to the Treatment of Prisoners of War 75 U.N.T.S. 135 (Geneva Convention III) and Convention (IV) relative to the Protection of Civilian Persons in Time of War 75 U.N.T.S. 287; opened for signature 12 August 1949 (entered into force 21 October 1950) (Geneva Convention IV); (Geneva Conventions).

<sup>6</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 U.N.T.S. 3 (Additional Protocol I). Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, 1125 U.N.T.S. 609 (Additional Protocol II). Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Adoption of an Additional Distinctive Emblem, 8 December 2005 (Additional Protocol III), (Additional Protocols).

<sup>7</sup> See in particular article 3 common to the four Geneva Conventions, article 9 of Geneva Conventions I, II

and III, and article 10 of Geneva Convention IV; as well as article 81 of Protocol I. Also, article 73, 122, 123 and 126 Geneva Convention III; article 76, 109, 137, 140 and 143 Geneva Convention IV. The ICRC is also mentioned by numerous other treaties, for example the 2008 Convention on Cluster Munitions, Protocol II (mines, booby-traps and other devices) and Protocol V (explosive remnants of war) to the 1980 Convention on Certain Conventional Weapons, the 1999 Second Protocol to the 1954 Convention on the Protection of Cultural Property in the Event of Armed Conflict, and the 1997 Convention on the Banning of Antipersonnel Landmines.

<sup>8</sup> *Prosecutor v Simic et al.*, IT-95-9-PT, Decision on the Prosecution Motion under Rule 73 for a Ruling concerning the Testimony of a Witness, 27 July 1999, 46 (*Simic*). As a result of its specific status, the ICRC has a right to abstain from giving evidence in judicial proceedings. That right has further been recognized in the Rules of Procedure and Evidence of the International Criminal Court, rule 73(4). As the International Criminal Tribunal for Rwanda noted ‘the ICC’s Rules of Procedure and Evidence similarly grant such privilege only to the ICRC, and not to any other organization.’, *Prosecutor v Munvunyi*, ICTR-2000-55A-T, 15 July 2005, [16].

<sup>9</sup> *Simic*, above note 8, [48].

<sup>10</sup> General Assembly Resolution 45/6, 16 October 1990. The ICRC was the first international organization other than intergovernmental to be granted such status. In addition to the United Nations, the ICRC maintains a dialogue with all the most important international organizations such as the European Union, the Council of Europe, the Organization for Security and Cooperation in Europe, the African Union, the Organization of the Islamic Conference, the Non-Aligned Movement, the Organization of American States, the League of Arab States and the Inter-Parliamentary Union, amongst others.

<sup>11</sup> Many resolutions of United Nations bodies recognize the role of the ICRC. A recent one is Resolution 1894 (2009) of the Security Council, adopted on 11 November, 2009.

<sup>12</sup> According to article 5(3) of the *Statutes of the International Red Cross and Red Crescent Movement*, the ICRC ‘may take any humanitarian initiative which comes within its role as a specifically neutral and independent institution and intermediary, and may consider any question requiring examination by such an institution’.

<sup>13</sup> The Movement has about 100 million members and volunteers.

<sup>14</sup> The Red Cross and Red Crescent Movement shares seven fundamental principles, which were proclaimed at the XX<sup>th</sup> International Conference of the Red Cross in 1965, i.e. humanity, impartiality, neutrality, independence, voluntary service, unity, universality.

<sup>15</sup> The ICRC, the International Federation and the national societies meet every two years in the Council of Delegates and, together with the States Parties to the Geneva Conventions, every four years in the International Conference of the Red Cross and the Red Crescent.

<sup>16</sup> Agreement on the Organization of the International Activities of the Components of the International Red Cross and Red Crescent Movement, Council of Delegates, Sevilla, 25-27 November 1997 (The Seville Agreement).

<sup>17</sup> The Seville Agreement has been published in (1997) 48 *International Review of the Red Cross*, 322, 159-177. For the Supplementary measures see Resolution 8 of the Council of Delegates of 2005. Also, the Report on the implementation of the Seville Agreement, prepared by the Council of Delegates in 2007 available at: <<http://www.icrc.org/web/eng/siteeng0.nsf/html/council-delegates-2007-seville-151007>>.

<sup>18</sup> See article 5(3) of the Statutes of the Movement, which stipulate that the ‘International Committee may take any humanitarian initiative which comes within its role as a specifically neutral and independent institution and intermediary, and may consider any question requiring examination by such an institution.’ Article 5(2)(d) provides that the ICRC’s role is ‘to endeavour at all times – as a neutral institution whose humanitarian work is carried out particularly in time of international and other armed conflicts or internal strife – to ensure the protection of and assistance to military and civilian victims of such events and of their direct results’.

<sup>19</sup> The Statutes of the International Red Cross and Red Crescent Movement were adopted by the 25<sup>th</sup> International Conference of the Red Cross at Geneva in October 1986 and amended by the 26<sup>th</sup> International Conference of the Red Cross at Geneva in December 1995. Article 4 of the Statutes stipulates that, ‘In order to be recognized [...] the society shall meet the following conditions:

1. Be constituted on the territory of an independent State where the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field is in force.
2. Be the only National Red Cross or Red Crescent Society of the said State and be directed by a central body which shall alone be competent to represent it in its dealings with other components of the Movement.

3. Be duly recognized by the legal government of its country on the basis of the Geneva Conventions and of the national legislation as a voluntary aid society, auxiliary to the public authorities in the humanitarian field.
4. Have an autonomous status which allows it to operate in conformity with the Fundamental Principles of the Movement.
5. Use the name and emblem of the Red Cross or Red Crescent in conformity with the Geneva Conventions.
6. Be so organized as to be able to fulfil the tasks defined in its own statutes, including the preparation in peace time for its statutory tasks in case of armed conflict.
7. Extend its activities to the entire territory of the State.
8. Recruit its voluntary members and its staff without consideration of race, sex, class, religion or political opinions.
9. Adhere to the present Statutes, share in the fellowship which unites the components of the Movement and co-operate with them.
10. Respect the Fundamental Principles of the Movement and be guided in its work by the principles of international humanitarian law.<sup>20</sup>

<sup>20</sup> For a detailed presentation of the Fundamental Principles, see: Jean Pictet, *The Fundamental Principles of the Red Cross: Commentary*, (1979). The text is available at: <<http://www.icrc.org/web/eng/siteeng0.nsf/html/fundamental-principles-commentary-010179>>.

<sup>21</sup> *Ibid*, 1.

# THE ROLE OF THE ICRC IN ARMED CONFLICTS AND OTHER SITUATIONS OF VIOLENCE

*Anton Camen\**

## ***Protecting Lives and Dignity***

The International Committee of the Red Cross (ICRC) is probably best known for the work it accomplishes through its delegates in the field, helping people affected by armed conflicts and other situations of violence. Such work saves lives and alleviates suffering. It may involve providing safe water, food and medical assistance, monitoring conditions of detention of prisoners of war and security detainees, facilitating the exchange of messages between family members that have been separated, organizing reunions of dispersed families, tracing missing persons and monitoring respect of international humanitarian law. Yet much less is known about the nature of this work and how that it is actually being carried out.<sup>1</sup> The present contribution proposes to shed some light on this role.

Ever since it was created in 1863, the ICRC has played a crucial role in the effort of mitigating human suffering in armed conflicts. The institution has done so by bringing assistance to people suffering the consequences of war. But not only did the ICRC manage to protect lives through its action in the field, it also sought to address the wider problems leading to the plight of adversely affected persons, namely by promoting the development of norms that would prevent the suffering from occurring. This two pronged approach, consisting of bringing a humanitarian response to the needs of people and of engaging in the development of a legal framework protecting those people, has characterized the ICRC from the very beginning. Henry Dunant assisted the wounded at Solferino as he later convinced the States to commit themselves to certain rules that would ensure that assistance and care be provided to wounded soldiers in the battlefield.<sup>2</sup>

## ***Legal Basis for Action***

The mandate and activities of the ICRC are based on international treaties adopted by the States and on the statutory provisions of the International Red Cross and Red Crescent Movement, which have also been accepted by the States.<sup>3</sup> The scope of these instruments determines the role and mandate of the ICRC in the different situations they respectively apply to.

In international armed conflicts, the four Geneva Conventions<sup>4</sup> and Additional Protocol I<sup>5</sup> entrust the ICRC with a specific mandate to protect and assist the victims of the conflict. This includes a mandate to visit prisoners of war and civilian internees. They also entrust the ICRC with a broad right of initiative to offer its services.<sup>6</sup> In non-international armed conflicts, that right is recognized under common article 3 of the Geneva Conventions.<sup>7</sup> In other situations of violence that are not armed conflicts, those treaties do not apply.<sup>8</sup> In such situations the ICRC derives its mandate from the Statutes of the Movement, which provide that the ICRC shall



endeavour at all times – as a neutral institution whose humanitarian work is carried out particularly in time of international and other armed conflicts or internal strife – to ensure the protection of and assistance to military and civilian victims of such events and of their direct results.<sup>9</sup>

### ***Combined Approaches***

The activities of the ICRC in armed conflicts and other situations of violence follow essentially four approaches, which derive from its mission statement.<sup>10</sup> They include activities involving protection, assistance, prevention and cooperation. Although each of them presents its own characteristics and is distinct from the other, they are intrinsically intertwined to the point where it can become difficult to draw lines separating one from the other.



For example, when food is provided to people in a village the immediate purpose of the activity is to provide assistance. But the mere fact of being there may also have the effect of providing protection from fighting or acts of violence. Moreover, the assistance will often be supplied in partnership with a national Red Cross or Red Crescent society, so that there is also an aspect of cooperation within the Movement. There is also at least some degree of prevention work, because in all likelihood the provision of food had to be explained and negotiated with the parties involved in the conflict or other actors. That convergence of different approaches is also the reason why the ICRC works in a multidisciplinary manner.

The needs experienced by people can be directly generated by an armed conflict, as in the case of military operations causing casualties and destruction. But there are also indirect effects on people. For example, when it is not possible anymore to move around and reach a health centre for medical treatment or simply go and get water or foodstuffs, health and sanitation will deteriorate quickly, leading to deaths, illnesses and diseases which could have been easily prevented.

### ***Protecting People***

Protecting the lives, the integrity and the well-being of people in armed conflicts and other situations of violence is what ultimately motivates the action of the ICRC and drives all its activities. Protection is as much an ideal as it is an action.

For protection activities to accomplish their purpose, the ICRC has to be present where people are at risk and it has to be able to engage those influencing such risks, for example armed groups. Presence is not only a matter of credibility, but a condition for apprehending the threats and dangers people face and for developing an appropriate response. The goal is to minimize those dangers, prevent violations of international norms, address the consequences of violations that have occurred, and reduce vulnerabilities and exposure to threats and dangers.<sup>11</sup>

Access can never be taken for granted and is a constant concern for the ICRC. Access often has to be negotiated and explained, so that those in charge can make informed decisions, for it is primarily their obligation to protect the lives and dignity of persons under their control. Only persons in control can provide protection.

For the ICRC it is essential to be able to have a constructive and sustained dialogue with any such authority, whether governmental or not, so that there is a relationship of trust that can effectively translate into measures benefiting the persons affected by the conflict or violence. Such relationships are based on confidentiality in the sense that the ICRC shares its findings only with the authorities concerned and works with them to solve problems observed and bring about the necessary improvements.<sup>12</sup>

In armed conflicts it is regularly those who do not participate in the fighting that are most affected by the hostilities and all sorts of acts of violence and abuse. Ensuring their protection is therefore a priority for the ICRC. Some categories of persons may require particular attention. For example, people who had to leave behind their homes and became internally displaced or refugees, children or detainees.



The ICRC carries out visits to places of detention to prevent or put an end to ill-treatment, disappearances, and to improve conditions of detention when necessary. During such visits, ICRC delegates conduct private interviews with each detainee in order to learn about the problems they may face. Such problems and possible solutions are subsequently discussed with the authorities in a confidential dialogue.

Protection activities also involve efforts to ensure that relatives can maintain contact with each other. In armed conflicts or other situations of violence families are often torn apart without anyone knowing what had happened to a missing relative. This involves establishing the whereabouts of the people sought for and enabling their families to re-establish contact. Special attention is given to particularly vulnerable groups, such as children separated from their parents or elderly people. Sometimes, a person might not have identity papers to travel to his or her family or to return home. In such cases, the ICRC can provide a special travel document facilitating the journey.

### ***Assisting People***

Assistance activities typically focus on health, economic security, water and habitat. They aim at ensuring that people do not lack the most basic goods and services, despite the conflict, and to reduce their vulnerabilities. As in the case of protection activities, assistance can be provided in many forms and needs to be adapted to each particular situation. It may include the provision of food, shelter and medicine. But it often also consists of building capacity, for example to construct or repair water-supply systems

or medical facilities, or to train personnel providing health-care, including surgeons and prosthetic/orthotic technicians.

In terms of health activities, the ICRC seeks to guarantee that people have access to adequate preventive and curative health care, so as to reduce mortality, morbidity, suffering and disabilities. In addition to the direct and indirect physical consequences of conflicts, the ICRC also seeks to ensure that the often traumatic impact on the mental health of people is properly addressed. Emergencies such as armed conflicts can quickly overburden local health services and cut off those who need it from access to health care facilities, staff and supplies. In such situations, the ICRC assists the local services such as hospitals.<sup>13</sup> It can also provide such services directly, especially when health structures are no longer functional or not accessible.



The ICRC also carries out health activities in places of detention. This occurs during regular visits where a doctor or a nurse accompanies the delegates and assesses the prisoners' health, looking into possible ill-treatment and other problems such as hygiene, epidemiology, nutritional needs and vitamin deficiencies, tuberculosis and HIV/AIDS.

Other health related activities benefit specifically people who have become disabled, typically because of anti-personnel mines or unexploded remnants of war. Such efforts seek to ensure that there are properly functioning rehabilitation services.<sup>14</sup> The ICRC has also set up a Special Fund for the Disabled to ensure that persons with physical disabilities have access to rehabilitation centres, that the centres provide good quality services and are capable to function in the long term.<sup>15</sup>

In terms of economic security, the ICRC focuses on making sure that households and communities can meet their basic economic needs. Activities involve providing goods and services that are necessary for the survival of people, programs to ensure that the means of production are guaranteed and also interventions at the level of processes, institutions and policies from which depends the capacity to secure a population's livelihood.

Concerning water and habitat, the ICRC seeks to ensure that people have access to clean water and proper sanitation, and to a safe living environment. Typical activities involve rehabilitating water and sanitation networks, including for hospitals and health centres damaged as a result of armed conflict; and improving hygiene conditions in places of detention.

### ***Preventing Suffering***

Prevention work basically contributes to fostering an environment where the lives and dignity of persons are respected, despite an armed conflict or another situation of violence. Consequently, it is about gaining understanding, recognition and acceptance

of relevant principles and rules by all those whose actions and decisions affect the victims of such situations. In order to have such an impact, prevention work requires considerable efforts in communicating and networking at different levels.

International humanitarian law relies to a large extent on positive action by the States, and in particular on the national measures they should adopt to implement treaty obligations.<sup>16</sup> Without such measures the norms of international humanitarian law risk being confined to the paper they are written on. The emphasis on national measures appears all the more critical for the respect of the law, and in turn the efficiency of the protection of the victims of armed conflicts, when considering that the mechanisms established by humanitarian law treaties to monitor compliance with their rules have been rarely used, if at all.<sup>17</sup>

Prevention programs are in particular addressed to those who determine the fate of people in armed conflicts or other situations of violence. The ultimate aim is to influence attitudes and behaviour so as to improve the protection of people in times of armed conflict, facilitate access to them and improve security for humanitarian action.

This concerns especially members of forces who are in contact with protected persons and who carry out military operations in the field. From a broader angle it becomes also clear that dissemination cannot be limited to that type of audience. It has to take into account the persons and institutions to whom they are accountable to and who influence their behaviour, which amounts to include ultimately the societies in which they live. Public opinion can indeed play an important role for the respect of international humanitarian law by exerting pressure on the parties to an armed conflict to abide by the rules. The media can fuel violations of the law or prevent them.



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Dissemination therefore is a highly complex State obligation that cannot be complied with by occasional presentations on international humanitarian law, as a narrow interpretation of the term might erroneously suggest. It requires a comprehensive and strategic approach to pass knowledge of the norms and principles to different actors, and then to convert that knowledge into actual behaviour.

In the case of the military this involves full integration of the rules into military law, service manuals, and instructions and, in general, the doctrines of the armed forces, for these are the sources that regulate their conduct.

Given that in many conflicts there are armed groups involved in the fighting, often with little or no training, it is crucial for the ICRC to establish relations and build contacts with all actors in a conflict. In this way, it can make the activities and working methods of the ICRC and Red Cross and Red Crescent better known and thus make it easier to reach the victims and ensure the safety of humanitarian workers.

The ICRC also strives to make decision-makers and opinion-leaders, such as parliamentarians, members of NGOs and specialized agencies, aware of its activities in order to gain their support in ensuring the implementation of international humanitarian law. To reach tomorrow's decision-makers and opinion-leaders, the ICRC works with universities on the integration of humanitarian law in teaching plans, particularly of faculties of law, but also political science and journalism.

International fora, such as the United Nations, the African Union, the League of Arab States or the Organization of American States, are essential platforms for the ICRC to facilitate its field operations, to defend and promote impartial, neutral, independent and strictly humanitarian action, and to guard against the use of humanitarian activities for military or political ends. Multilateral and bilateral contacts also aim to promote knowledge, understanding and, whenever appropriate development of IHL, to share the ICRC's position on issues of humanitarian concern and to raise awareness of the plight of those affected by armed conflicts and other situations of violence, including internally displaced persons.

### ***Cooperating in the Red Cross and Red Crescent Movement***

The ICRC carries its work out as part of the International Red Cross and Red Crescent Movement. It works in particular in strategic partnerships with national Red Cross or Red Crescent societies and supports them in enhancing their capacities, when necessary. In many instances, it is thanks to the national societies that the ICRC can accomplish its mission, because they are already present in a given context, have the knowledge of the local environment and understand the needs people may have. Understanding those needs and the complex factors generating them is essential for providing meaningful protection and assistance.

Such partnerships benefit the overall response of the Movement to humanitarian needs. Common activities may focus on providing assistance, on restoring family links, on promoting international humanitarian law and the Fundamental Principles of the Movement.

### ***Consultation and Coordination***

The ICRC maintains bilateral operational and institutional relations with numerous UN and non-UN humanitarian agencies. Such consultations and coordination are necessary today where there is a growing number of relief organizations engaged in carrying out activities in armed conflicts and other situations of violence. This brings along a potential for constructive complementarity, but sometimes also a risk of confusion. That confusion may lead to rejection of humanitarian action by the parties to a conflict, in particular when humanitarian work is being perceived as serving a wider political or military agenda. As a consequence, people already coping with the violence of a conflict will be deprived of humanitarian aid.

There are limits to such coordination that derive from the ICRC's role as an impartial, neutral and independent organization. Any coordination must remain within a strictly humanitarian approach and it is not possible for the ICRC to cede authority over its activities to any other entity.

Apart from field work, consultations with other organizations also take place in the form of participation in meetings and conferences where issues of humanitarian concern are being debated. This allows the ICRC to draw wider attention to concerns and work towards solutions benefiting those affected by armed conflicts or other situations of violence.

### **Conclusion**

The ICRC addresses the full range of needs generated by armed conflicts and other situations of violence. In order to do so, it combines essentially four multidisciplinary and complementary approaches. Through them it seeks to protect people from the human cost generated by armed conflict or other situations of violence by eliminating the causes of the suffering. While doing so, it endeavours to alleviate that suffering as much as possible by providing assistance. In addition, it strives to prevent further suffering from occurring by addressing the underlying factors leading to violations of applicable international law. These activities are generally undertaken in cooperation with partners from national Red Cross or Red Crescent society.

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\* At the time of writing, the author served as Deputy Head of Delegation and Legal Adviser at the ICRC Delegation in Beijing. This article reflects the views of the author and not necessarily those of the ICRC.

<sup>1</sup> For a detailed overview of activities see Overview of Operations 2010; document available at : <<http://www.icrc.org/web/eng/siteeng0.nsf/html/appeals-overview-011209>>. Also: Annual Report 2008; document available at: <<http://www.icrc.org/eng/resources/annual-report/index.jsp>>.

<sup>2</sup> The issue of medical assistance is still today a critical one. For 2010, the ICRC planned significant increases in its expenditure on medical services, foreseeing a field budget for medical activities of 132 million Swiss francs. This represented an increase of 12 million francs over 2009.

<sup>3</sup> The Statutes of the Movement have been adopted in 1986 by the 25<sup>th</sup> International Conference of the Red Cross and Red Crescent Movement, and amended by the 26<sup>th</sup> International Conference in 1995 and the 29<sup>th</sup> International Conference in 2006. The States Parties to the Geneva Conventions also participate in the International Conference and have endorsed the Statutes, together with the ICRC, the national Red Cross or Red Crescent societies and the International Federation of Red Cross and Red Crescent Societies. The International Conference takes place every four years and constitutes the supreme deliberative body of the Movement.

<sup>4</sup> Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 75 U.N.T.S. 31 (Geneva Convention I); Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea 75 U.N.T.S. 81(Geneva Convention II); Convention (III) relative to the Treatment of Prisoners of War 75 U.N.T.S. 135 (Geneva Convention III) and Convention (IV) relative to the Protection of Civilian Persons in Time of War 75 U.N.T.S. 287; opened for signature 12 August 1949 (entered into force 21 October 1950) (Geneva Convention IV); (Geneva Conventions).

<sup>5</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 U.N.T.S. 3 (Additional Protocol I)

<sup>6</sup> See: article 9 of Geneva Conventions I, II and III, article 10 of Geneva Convention IV, as well as article 81 of Additional Protocol I. Also: articles 73, 122, 123 and 126 of Geneva Convention III, articles 76, 109, 137, 140 and 143 of Geneva Convention IV.

<sup>7</sup> The initiative to offer services does not have to be accepted by the parties to the conflict, but the fact that the right of taking such an initiative has been enshrined in the treaties entails that the parties cannot regard it as an unfriendly act and have to consider it in good faith. In practice, based on that right the ICRC was able to develop considerable activities to protect and assist victims of non-international armed conflicts.

<sup>8</sup> For the applicability of the treaties to international armed conflict, see article 2 common to the four Geneva Conventions and article 1(3) and 1(4) of Additional Protocol I; for non-international armed conflict see common article 3 of the four Geneva Conventions.

<sup>9</sup> See article 5(2)(d) of the Statutes of the Movement. The right of initiative further derives from a number

of resolutions of the International Conference of the Red Cross and the Red Crescent, as well as from the ICRC's practice and its acceptance by the States. In addition, article 5(3) of the Statutes recognize that the ICRC can also take action in any other situation, i.e. outside armed conflicts or violence, for example when tensions have not yet degenerated into violence.

<sup>10</sup> See also: *The International Committee of the Red Cross (ICRC): Its mission and work*, document adopted by the Assembly of the ICRC on 19 June 2008, also (2009) 93 *International Review of the Red Cross* 874, 399 – 413.

<sup>11</sup> See also: ICRC Protection Policy, (2008) 90 *International Review of the Red Cross* 871, 751-775.

<sup>12</sup> Confidentiality is a tool and not an end. Without that tool, the ICRC would not be able to perform its role. The importance of the ICRC's confidential approach has been explicitly recognized by the International Criminal Tribunal for the former Yugoslavia when it established that the ICRC enjoys a privilege to keep its confidential information and to have a right to be exempt from testimony in judicial proceedings; see: *Prosecutor v Simic et al.*, IT-95-9-PT, Decision on the Prosecution Motion under Rule 73 for a Ruling concerning the Testimony of a Witness, 27 July 1999, paragraph 46 (*Simic*). That right has further been recognized in the Rules of Procedure and Evidence of the International Criminal Court, rule 73(4). As the International Criminal Tribunal for Rwanda noted 'the ICC's Rules of Procedure and Evidence similarly grant such privilege only to the ICRC, and not to any other organization.', *Prosecutor v Munyuni*, ICTR-2000-55A-T, 15 July 2005, 16. In certain exceptional circumstances the ICRC may express its concerns publicly, namely when there are major and repeated violations, confidential interventions have proved futile and a public statement serves the interest of those affected.

<sup>13</sup> For example, in 2008 the ICRC provided regular support to 284 hospitals and 394 other health structures worldwide. See Annual Report 2008 available at: <<http://www.icrc.org/eng/resources/annual-report/index.jsp>>.

<sup>14</sup> In 2008, the ICRC supported 82 physical rehabilitation centres in 25 countries. See Annual Report 2008 available at: <<http://www.icrc.org/eng/resources/annual-report/index.jsp>>

<sup>15</sup> The 24<sup>th</sup> International Conference of the Red Cross and Red Crescent recommended in 1981 that such a fund be formed. In 1983 the ICRC donated an initial one million Swiss francs to create the Special Fund. In 2001, the Assembly of the ICRC converted the Fund in an official foundation under Swiss law. Since then, the ICRC and the Fund are different entities though functionally interdependent.

<sup>16</sup> Additional Protocol I summarizes the duty of the States in this regard, stipulating in its article 80 that '[t]he High Contracting Parties and the Parties to the conflict shall without delay take all necessary measures for the execution of their obligations under the Conventions and this Protocol'; see Article 80(1) of Additional Protocol I of 1977. The provision complements articles 48, 49, 128 and 145 of the four Geneva Conventions, respectively, which refer to 'the laws and regulations which they [the States] may adopt to ensure the application' of the Conventions. That general rule is being complemented by other, more detailed provisions specified in the different treaties. They contain wording such as to 'undertake to enact any legislation necessary to provide effective penal sanctions', to 'ensure that legal advisers are available, when necessary, to advise military commanders', to 'endeavour [...] to train qualified personnel to facilitate the application of the Conventions and of this Protocol', to 'incorporate guidelines and instructions on the protection of cultural property in their military regulations', to 'take all appropriate legal, administrative and other measures, including the imposition of penal sanctions, to prevent and suppress any activity prohibited'. See article 49 of Geneva Convention I, article 82 of Additional Protocol I, article 6 of Additional Protocol I, article 30(3)(a) of the Second Protocol of 1999 to the Hague Convention of 1954 for the Protection of Cultural Property and article 9 of the 1997 Convention prohibiting anti-personnel mines, respectively.

<sup>17</sup> Indeed, neither the system of Protecting Powers, nor the International Fact-Finding Commission, nor bilateral enquiry procedures have been put in practice as intended by the drafters of the treaties. On Protecting Powers see article 5 of Additional Protocol I of 1977 and articles 8, 8, 8 and 9 of the four Geneva Conventions, respectively; on the International Fact-Finding Commission see article 90 of Additional Protocol I; on the enquiry procedures see articles 52, 53, 132 and 149 of the four Geneva Conventions, respectively.

# THE RESPECTIVE ROLES OF STATES AND THE MOVEMENT IN THE DISSEMINATION OF INTERNATIONAL HUMANITARIAN LAW

*Fork Yow Leong\**

## ***Introduction***

In this article, the author describes and explains the obligation of states and the respective roles and responsibilities of the Movement (which comprises the International Committee of the Red Cross, the National Red Cross and Red Crescent Societies and International Federation Red Cross and Red Crescent Societies) in the dissemination of international humanitarian law. The main focus of this article is the dissemination of International Humanitarian Law among both the armed forces and the civilian population. The author also focuses on the various challenges that are involved in the dissemination of international humanitarian law.

The dissemination of International Humanitarian Law (hereinafter IHL) basically means that its rules as well as its principles should be made known. It is essential to disseminate IHL because the knowledge and proper understanding of its rules are crucial for promoting respect as well as ensuring respect for its rules. The dissemination of IHL is also regarded as an important prerequisite for its implementation by States who have signed and ratified treaties relating to IHL.

The key treaties are the four Geneva Conventions of 1949<sup>1</sup> (hereinafter the four Geneva Conventions) and their 1977 Additional Protocols<sup>2</sup> (hereinafter the Additional Protocols) which are regarded as the most universally accepted and recognized IHL treaties.<sup>3</sup> When states become parties to the Geneva Conventions of 1949 and the 1977 Additional Protocols, they also undertake the legal obligation to disseminate the provisions of these IHL treaties.

This obligation is reinforced in Article 1 common to all the four Geneva Conventions of 1949 (hereinafter Common Article 1) which provides that the high contracting parties (States Parties) shall undertake to respect and ensure their respect for the Conventions in all circumstances. The wording ‘in all circumstances’ in Common Article 1 has been interpreted to mean that the four Geneva Conventions should be disseminated during times of peace as well as during times of war or armed conflict.<sup>4</sup>

The dissemination of IHL is not only the sole responsibility of the States alone. Organizations such as the International Committee of the Red Cross (hereinafter the ICRC), the National Red Cross and Red Crescent Societies and the International Federation Red Cross and Red Crescent Societies, which together form the Movement, also have an equally important role to assist States in the dissemination of IHL. The respective role of States and the Movement in the dissemination of IHL will be discussed in turn.



### *The Role of States in the Dissemination of IHL*

The role of States in the dissemination of IHL is found in the provisions of numerous IHL treaties, which stipulate the obligation of States Parties to disseminate and spread knowledge of IHL.

Today, the principal treaties concerning IHL remain the four Geneva Conventions and its Additional Protocols as well as other IHL-related treaties such as the 1954 Hague Convention for the Protection of Cultural Property and its 1999 Second Protocol to the Hague Convention for the Protection of Cultural Property among others.

#### *i) Dissemination of IHL under the four Geneva Conventions*

The obligation of States Parties to disseminate the rules of IHL are found in specific provisions of the four Geneva Conventions. This includes dissemination in times of war as well as in peace time to both the armed forces and the civilian population.<sup>5</sup>

It reads:

The High Contracting Parties undertake, in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries, and, in particular, to include the study thereof in their programmes of military and, if possible, civil instruction, so that the principles thereof may become known to all their armed forces and to the entire population.

In addition, the Third Geneva Convention of 1949 provides that the officers in charge of prisoner-of-war camps must ensure that these provisions are known to the camp staff and the guards, and are held responsible for their application.<sup>6</sup> Furthermore, the Convention must be posted in places where the prisoners of war can read it.<sup>7</sup>

The Fourth Geneva Convention of 1949 also provides obligations with regard to any civilian, military, police or other authorities who assume responsibilities in respect of civilians, particularly in places of internment.<sup>8</sup>

#### *ii) Dissemination of IHL under the Additional Protocols to the four Geneva Conventions*



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The obligation of States to disseminate the Conventions and the Protocols is also reiterated in the Additional Protocols. In relation to Additional Protocol I whose provisions are only applicable during an international armed conflict, the obligation of States Parties to disseminate this Protocol is clearly stipulated in Article 83 of Additional Protocol I which uses identical wordings to the four Geneva Conventions as mentioned above.

For non-international armed conflict, Additional Protocol II requires that all State Parties disseminate the provisions of this Protocol as widely as possible. Considerable

flexibility to States Parties in means and methods of disseminating the provisions of this Protocol is also given.<sup>9</sup>

*iii) Dissemination of IHL under the 1954 Hague Convention for the Protection of Cultural Property and the 1999 Second Protocol to the Hague Convention for the Protection of Cultural Property*

The 1954 Hague Convention for the Protection of Cultural Property in the event of Armed Conflict (hereinafter the 1954 Hague Convention)<sup>10</sup> requires that its provisions be made known to the personnel engaged in the protection of cultural property.<sup>11</sup>

The 1999 Second Protocol to the Hague Convention for the Protection of Cultural Property (hereinafter the 1999 Second Protocol) further requires that any military or civilian authorities who, in time of armed conflict, assume responsibilities with respect to its application and be fully acquainted with the text of the convention.

According to the 1999 Second Protocol, States Parties must incorporate guidelines and instructions on the protection of cultural property in their military regulations and must also develop and implement peacetime training and educational programmes in cooperation with the United Nations Educational, Scientific and Cultural Organization (UNESCO) and relevant governmental and non-governmental organizations.<sup>12</sup>

*The scope of States' obligation to disseminate IHL*

In addition to making a distinction between the dissemination of IHL to the armed forces and the civilian population, the principal treaties of IHL like the Geneva Conventions and its Additional Protocols have also stipulated specific measures that States Parties must take in order to fulfil their obligation to spread the knowledge of IHL. The specific measures include the following:

• *Translation of IHL treaties*

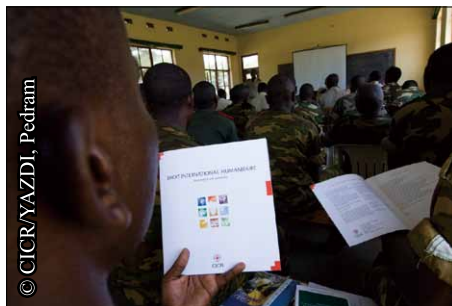
The obligation of States to translate the treaties of IHL into national languages is obviously an important initial step in the dissemination as well as the implementation of IHL given that the authentic versions of most IHL treaties are in certain major languages only. For example, the authentic versions of the Geneva Conventions are in French and English<sup>13</sup> and the authentic versions of the Additional Protocols are in Arabic, Chinese, English, French, Russian and Spanish.<sup>14</sup> The State Parties are not only under an obligation to translate these Conventions, but also to translate the laws and regulations that are adopted and to communicate the translation to one another.<sup>15</sup>

• *Dissemination of IHL among the armed forces*

The incorporation of IHL into the programmes and military instructions of the armed forces is one of the main measures which must be undertaken by States. For instance, the Geneva Conventions and its Additional Protocols provide that States must undertake the primary responsibility to make the rules of IHL known to the armed forces as well as to ensure its proper application. Additional Protocol I also specifies that military authorities

must be fully acquainted with the text of the Protocol.<sup>16</sup>

This obligation is strengthened by the fact that the States must ensure that legal advisers are available to advise military commanders at the appropriate level on the application of the Geneva Conventions and the Additional Protocol I and to advise them on the appropriate instructions to be given to the armed forces on this subject.<sup>17</sup>



In addition, all military commanders must also ensure that all members of the armed forces under their command are aware of their obligations under the Geneva Conventions and the Additional Protocol I.<sup>18</sup>

However, if the programmes and military instructions for the armed forces are to be effective, all relevant IHL rules and principles should be accordingly adopted to facilitate the teaching of IHL in military academies. In addition, the fundamental rules and principles of IHL should be incorporated into military manuals, handbooks, manoeuvres and exercises and also incorporated into the rules of engagement<sup>19</sup> of the armed forces.

- *Dissemination of IHL among United Nations peacekeeping forces*

Today, States which provide forces for peace-keeping or peace enforcement operations under the mandate of the United Nations (hereinafter the UN) must also ensure that all their military personnel serving as peace-keepers are given proper instructions in the fundamental rules and principles of IHL.

In August 1999, the UN Secretary-General's Bulletin (hereinafter the UN Bulletin) entitled OBSERVANCE BY UNITED NATIONS FORCES OF INTERNATIONAL HUMANITARIAN LAW<sup>20</sup> was issued by the then UN Secretary-General, Kofi Annan. The UN bulletin stipulated the fundamental principles and rules of IHL that are directly applicable to the UN forces conducting operations under the UN's command and control. The UN bulletin is also significant because it provides guidelines for all UN peace-keeping forces who are actively engaged in combat roles to observe and respect all the fundamental principles and rules of IHL in situations of armed conflict.

- *Dissemination of IHL among the civilian population*

As mentioned above, the dissemination of IHL should not only be limited to the armed forces although they are logically the main target group to whom the rules of IHL are most relevant and directly applicable. The obligation of States to disseminate the rules of IHL as widely as possible should obviously include the civilian population as a whole both in times of armed conflict as well as in peacetime.

Today, the obligation of States to disseminate IHL among the civilian population has also become more important and relevant. In most armed conflicts around the world today, whether international or non-international, the unfortunate reality is that civilian populations are increasingly becoming its victims as they often attacked and targeted by the parties to the armed conflict.



For instance, the use of child soldiers in armed conflicts as well as the prevalence of rape and other forms of sexual violence affecting women in armed conflict<sup>21</sup> also reflect the need for these vulnerable groups of the civilian population to be aware at least of the basic rules and principles of IHL especially the rules in relation to the protection of civilians during an armed conflict.

During peacetime, IHL should be disseminated to students in universities and incorporated into the existing curricula of faculties of law and other related disciplines such as international relations, political science, international human rights law and journalism. The basic and fundamental principles of IHL should also be taught to young people and included in the curricula of schools.

The rules of IHL should be disseminated to journalists given the increasingly influential role of the media in covering armed conflicts in various parts of the world today. It is notable that journalists who are covering an international armed conflict are regarded as civilians and are thus protected from being targeted or attacked by parties to the armed conflict in accordance with the rules of IHL.<sup>22</sup>

Therefore, journalists, especially those who are involved in dangerous missions in areas of armed conflict should at the very least be given training in the basic rules of IHL that are directly relevant to their work. As civilians, journalists should be aware that they should not be a target of attacks by the parties to the armed conflict under IHL.

#### *The role of National International Humanitarian Law Committees*

It is also worthwhile explaining the role of the National International Humanitarian Law Committees in the dissemination of IHL as well as its important role in the implementation of IHL.

The obligation of states to disseminate IHL is not sufficient without the proper implementation of IHL itself in the States' domestic laws. The implementation of IHL further requires that states need to incorporate the rules of IHL into their own domestic laws or legislation. For example, States must establish rules among others on the punishment or sanctions for violations of IHL, the use and protection of the Red Cross and Red Crescent emblems including the obligation to spread the knowledge of the Geneva Conventions and its Additional Protocols and other IHL related treaties as widely as possible.

To undertake these important tasks, some states have created national inter-ministerial working groups such as committees for the implementation of IHL better known as the National International Humanitarian Law Committees (hereinafter National IHL Committees).<sup>23</sup>

The primary purpose of National IHL Committees is to advise and assist the government in implementing and also in disseminating the knowledge of IHL. These committees usually include representatives of government ministries concerned with both the dissemination and implementation of IHL. It includes representatives from the Defence, Foreign Affairs, Internal Affairs, Justice, Finance, Education and Culture ministries respectively.

It is notable that neither the Geneva Conventions nor their Additional Protocols require such a committee to be set up. It is entirely up to the State concerned to determine how the committee is to be created, how it functions, and who should be its members. However, the establishment of such committees is often regarded as an important step in ensuring the effective application of IHL which have been advocated by the ICRC and the meeting of the Intergovernmental Group of Experts for the Protection of War Victims that took place in Geneva in 1995.

These committees should ideally play an important role in promoting activities to spread knowledge of IHL by conducting studies, proposing activities, and making IHL more widely known. It includes providing training to the armed forces in the rules of IHL, teaching it at various levels of the public education system and promoting the basic principles of IHL among the civilian population.

### ***The Role of the Movement in the Dissemination of IHL***

Before discussing the role of the Movement in the dissemination of IHL, it would be useful to first explain the three components that form the Movement itself.

#### *The components of the Movement*

The International Red Cross and Red Crescent Movement (better known as the Movement) is the largest global humanitarian movement in the world today. Today, the Movement is present and active with more than 100 million members and volunteers spread around the world.

The Movement is basically comprised of 3 components namely:

- a) the International Committee of the Red Cross
- b) the 187 National Red Cross and Red Crescent Societies
- c) the International Federation of Red Cross and Red Crescent Societies.<sup>24</sup>

Each component in the Movement is united and guided by the seven Fundamental Principles namely the principles of humanity, impartiality, neutrality, independence, voluntary service, unity and universality.<sup>25</sup> These seven fundamental Principles form the basis for each component's respective roles and responsibilities in its humanitarian work and missions around the world.

- *International Committee of the Red Cross*

The International Committee of the Red Cross, which was founded in 1863, is the Movement's founding body. The ICRC is neither an intergovernmental nor a non-governmental organization. It is a private association that is subject to Swiss laws and it is granted with an international mandate to protect and assist victims of armed conflict by States Parties to the Geneva Conventions including their Additional Protocols.

In addition to carrying out its main operational activities to protect and assist victims of armed conflict, the ICRC has been regarded as the promoter and guardian of IHL and the seven Fundamental Principles of the Movement.

- *National Red Cross and Red Crescent Societies*

Today, all the 187 National Red Cross and Red Crescent Societies (hereinafter the National Societies) around the world embody the humanitarian work and principles of the Movement.

National Societies are regarded as an autonomous organization within the Movement who carry out its humanitarian work and activities in accordance with its own statutes and national legislation.<sup>26</sup> This means that the National Society in a particular country is regarded as an independent and autonomous organization from other components of the Movement such as the ICRC and the International Federation.

National Societies also act as auxiliaries to the public authorities in their own countries. In this regard, National Societies often cooperate and work together with public authorities in their own respective countries to provide a range of humanitarian services including disaster relief, prevention of disease, including the promotion of health and social programmes according to the needs of the people in their respective countries. During an armed conflict, National Societies in cooperation with the public authorities will organize emergency relief operations in order to assist the affected victims of armed conflict.<sup>27</sup>

- *International Federation of Red Cross and Red Crescent Societies*

The International Federation of Red Cross and Red Crescent Societies (hereinafter the International Federation) works on the basis of the Fundamental Principles of the Movement to inspire, facilitate and to promote all humanitarian activities carried out by its member National Societies with a view to improve the situation of the most vulnerable people.

Founded in 1919, the International Federation is primarily responsible for directing and coordinating international relief operations to victims of natural disasters, refugees and in health emergencies. The International Federation also acts as the official representative of its member national societies in the international field and promotes cooperation between National Societies by strengthening their capacity to prepare effectively for natural disasters as well as to carry out health and social programmes.

### *The Statutes of the International Red Cross and Red Crescent Movement*

The Statutes of the International Red Cross and Red Crescent Movement<sup>28</sup> (hereinafter the Statutes of the Movement) is an important document that defines and demarcates the respective roles and responsibilities as well as the relationship between 3 components of the Movement including the important role of each component to disseminate the knowledge and understanding of IHL. The role and responsibilities of the 3 components in the Movement were further clarified by the 1997 Seville Agreement.<sup>29</sup>

- *The role of the ICRC in the dissemination of IHL*

As the guardian of IHL, the ICRC is often regarded as the most important component in the Movement that is given the mandate by the State Parties to the Geneva Conventions and its Additional Protocols to disseminate the knowledge of IHL. ICRC's mandate to disseminate IHL is also based on the specific provisions found in the Statutes of the Movement. The Seville Agreement confirms the ICRC's lead role in the Movement in relation to the promotion and dissemination of IHL.<sup>30</sup>

According to the Statutes of the Movement, the ICRC has a mandate to work for the faithful application, understanding and dissemination of IHL including a requirement to take cognizance of any complaints concerning alleged breach of IHL.<sup>31</sup>

The ICRC does not work alone in its efforts to disseminate IHL as it also assists States in disseminating IHL. The ICRC also works very closely with all the National Societies in the dissemination of IHL in accordance with the Statutes of the Movement.<sup>32</sup>

The ICRC has delegates who are specialized in the area of dissemination who are specifically assigned to the task of IHL dissemination in various countries. Today, ICRC's dissemination activities cover various target groups such as the armed forces, police, bearers of weapons/arms and academic circles where the ICRC regularly conducts conferences, seminars and workshops for all these target groups.

### *Disseminating IHL among universities and young people*

Over the years, the ICRC has intensified its dissemination of IHL among academic circles by working with leading universities and institutions of higher learning around the world. The ICRC works closely with academics and professors to promote the teaching and research in contemporary issues concerning IHL.

To facilitate the dissemination of IHL in universities, the ICRC regularly organizes courses on IHL in collaboration with selected universities to introduce academics and professors to the subject and to explore ways of teaching IHL. The ICRC also provides teaching aids, ICRC publications and also assists in the development of model syllabi to promote the inclusion of IHL into existing university courses in areas such as public international law, international relations and international human rights law as well as non-law disciplines such as political science and journalism. In addition, the ICRC also organizes events and activities specifically for students, such as the IHL moot court competitions, IHL debating competitions and essay writing competitions with the ultimate objective to increase their awareness and interest in studying IHL.



Over the years, the ICRC has also undertaken the task of disseminating IHL to young people between the ages of 13 to 18 years via an education programme known as Exploring Humanitarian Law (hereinafter EHL) programme. The EHL programme, which was initiated in 1998, by the ICRC was later implemented in 2001 on a gradual basis in various countries around the world.

The EHL programme was primarily aimed at promoting and inculcating humanitarian values such as respect for life and human dignity to young people. More importantly, the EHL programme was based on the philosophy that young people should also be aware of the importance of humanitarian values, which are not only applicable in times of armed conflict, but equally in peacetime as well. The EHL programme also seeks to facilitate ICRC's ultimate objective of integrating IHL into the formal curricula of schools with the involvement and support of the teachers in selected schools and ministries of education as well as support from the national societies.<sup>33</sup>

- *The role of the National Societies in the dissemination of IHL*

The National Societies also have a mandate to disseminate IHL. According to the Statutes of the Movement, National Societies play an important role in assisting their respective governments to disseminate IHL knowledge of the law as well as cooperating with their government to ensure respect for IHL. They must take initiatives to that effect and recruit, train and assign the necessary staff to undertake this important task.<sup>34</sup>

- *The role of the International Federation in the dissemination of IHL*

Although the International Federation does not have a lead role in this respect, it still has a role in at least assisting the ICRC in promoting and developing IHL. In this regard, the Federation is supposed to collaborate and work together with the ICRC in disseminating of IHL.<sup>35</sup>

- *The role of the International Conference of the Red Cross and Red Crescent*

It is worth mentioning the role of the International Conference of the Red Cross and Red Crescent (hereinafter the International Conference) in the dissemination of IHL. According to the Statutes of the Movement, the International Conference is the supreme body for the Movement. The members of the International Conference comprise representatives from the National Societies, the ICRC and the International Federation as well as representatives from the States Parties to the Geneva Conventions and also State Parties to the Additional Protocols.

At the International Conference, which normally meets every four years, the delegations consisting of representatives of the three components of the Movement will meet up with representatives of the States Parties to the Geneva Conventions and its Additional Protocols to support of the overall humanitarian work and mission of the Movement.



The representatives of the Movement, together with the representatives of States, will discuss and decide upon any humanitarian issues that are of common interest to all parties concerned.

One of the important roles and functions of the International Conference is to contribute promoting respect for IHL and its development. More importantly, the International Conference will regularly remind States of their obligations to disseminate IHL. During the International Conference, it will normally adopt all its decisions, recommendations or declarations in the form of resolutions. Over the years, the International Conference has stated its commitment to the dissemination of IHL in a number of resolutions it adopted.<sup>36</sup>

### ***Dissemination of IHL: the Challenges***

It is also important to discuss and highlight the various challenges that confront both States and the Movement in disseminating knowledge of IHL.

The main challenge for States and the Movement is that the dissemination of IHL among the armed forces or civilian population is no guarantee in ensuring a higher level of awareness of its rules and principles, nor does it necessarily ensure the respect and compliance for its rules and principles. This fact is supported by the numerous studies and surveys that have been conducted over the years by various organizations, in particular the ICRC.

The following are a number of important questions that have been raised in relation to the challenges involved in the dissemination of IHL:

*i) Is the mere dissemination of IHL sufficient to ensure its respect and compliance among combatants during an armed conflict?*

To address this issue, the ICRC conducted an important study in 2004.<sup>37</sup> One of the main objectives of this study was to identify and analyse the factors that influence the behaviour of combatants in armed conflicts.

The main findings of this study revealed that the mere dissemination of the knowledge of IHL or humanitarian principles to combatants (whether in the regular armed forces or non-state armed groups) in itself is not sufficient to ensure respect and compliance with the rules of IHL during armed conflict. This study is also significant because it sought to analyse the main characteristics of combatants, which has a direct impact on their behaviour in the battlefield. The study also provided valuable insights as to why the rules of IHL are violated by combatants during an armed conflict. For the ICRC, the study was significant in assessing its overall effort and strategies as well as its impact on the dissemination of IHL.

*ii) What is the level of awareness and knowledge of IHL among the civilian population?*

There are still a substantial majority of the civilian population around the world who are not aware of the existence of IHL and the Geneva Conventions (including its

Additional Protocols) especially in countries that do not have any armed conflict. Studies and surveys conducted have also revealed that even in countries who either have experienced or are experiencing an armed conflict, the level of awareness of IHL differs in each country.

To assess the level of awareness among civilians regarding IHL as well as the Geneva Conventions, a number of important studies and surveys were conducted by the ICRC with the assistance of external consultants.

A study was conducted by the ICRC in 1999<sup>38</sup> in conjunction with the 50<sup>th</sup> anniversary of the Geneva Conventions. In this study, the ICRC conducted consultations with civilian populations (including combatants) via national opinion surveys, as well as in-depth focus group discussions and face-to-face interviews in twelve countries<sup>39</sup> that have experienced an armed conflict.

The significance of this study is that the findings revealed that the level of awareness of IHL and the Geneva Conventions in particular differed from country to country. In addition, the results of this study also revealed that most civilians in the 12 war-torn countries who were surveyed believed that war should have limits and civilians should be protected from the effects of war.

Ten years later in 2009, the ICRC also conducted a number of studies and surveys on the impact of armed conflicts on civilians. A survey entitled “Our World: Views from the Field”<sup>40</sup> was commissioned by the ICRC to commemorate two important anniversaries, namely the 150<sup>th</sup> anniversary of the Battle of Solferino and the 60<sup>th</sup> anniversary of the Geneva Conventions.

In this two-part survey, the ICRC with assistance from an external consultant interviewed the general public in eight countries<sup>41</sup> who have or are experiencing an armed conflict as part of its quantitative and qualitative research to assess the impact of armed conflict on civilians and behaviour during an armed conflict. The interviews among others covered various issues and questions concerning the civilians’ personal experiences of armed conflict and violence, the impact that it had on them, their views regarding the acceptable conduct of combatants and more importantly the awareness of the Geneva Conventions. The results of the survey provided powerful insights into the actual experiences and opinions of civilians coping with situations of armed conflict. This study was also useful in assessing their level of awareness as well as perceptions about the effectiveness and relevance IHL and the Geneva Conventions.

The results of these studies and surveys by the ICRC points to the fact that there is still much work to be done by both States and the Movement, in particular, the ICRC, in the dissemination of IHL to both the armed forces and the civilian population.

## Conclusion

To conclude, it can be said that the dissemination of IHL is basically an ongoing process that both States and the Movement have a common interest and objective of promoting the knowledge of this area of law with a view to promoting its respect and ensuring its respect.

However, given the unfortunate reality that the rules of IHL are frequently violated in times of armed conflict, the main challenge for States and the Movement goes beyond making its rules widely known to both the armed forces and civilian populations.

For the armed forces, the dissemination of IHL must also produce the desired effect of changing the behaviour of combatants in the battlefield and to ensure that it is respected in particular by military commanders. It is a well known fact that it is the military commanders who have the authority and power to influence the behaviour of military personnel under their control and to ensure that the rules of IHL are enforced in practice.

For the civilian population, the main challenge is not only to enhance their level of awareness about IHL but it is equally important to change their perceptions regarding the effectiveness and relevance of IHL, especially in relation to protecting civilians during times of armed conflict.

More importantly, the dissemination of IHL is equally essential for promoting humanitarian values and ideals, and the spirit of peace among nations.<sup>42</sup>

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<sup>1</sup> Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 75 U.N.T.S. 31 (Geneva Convention I); Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea 75 U.N.T.S. 81 (Geneva Convention II); Convention (III) relative to the Treatment of Prisoners of War 75 U.N.T.S. 135 (Geneva Convention III) and Convention (IV) relative to the Protection of Civilian Persons in Time of War 75 U.N.T.S. 287; opened for signature 12 August 1949 (entered into force 21 October 1950) (Geneva Convention IV); (Geneva Conventions).

<sup>2</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 U.N.T.S. 3 (Additional Protocol I). Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, 1125 U.N.T.S. 609 (Additional Protocol II). Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Adoption of an Additional Distinctive Emblem, 8 December 2005 (Additional Protocol III). (\*Additional Protocols)

<sup>3</sup> As of January 2012, the Geneva Conventions have 194 state parties, Additional Protocol I has 171 state parties and Additional Protocol II has 166 state parties.

<sup>4</sup> Jean Pictet (ed), *Commentary to the Geneva Conventions of 12 August 1949*, Vol. I-IV, Geneva, ICRC, 1952.

<sup>5</sup> Geneva Conventions I-IV, Articles 47, 48, 127 and 144 respectively.

<sup>6</sup> Geneva Conventions III, Article 39.

<sup>7</sup> Geneva Conventions III, Article 41.

<sup>8</sup> Geneva Conventions IV, Article 99.

<sup>9</sup> Additional Protocol II, Article 19.

- <sup>10</sup> *Convention for the Protection of Cultural Property in the Event of Armed Conflict*, opened for signature 14 May 1954 (entered into force 7 August 1956), (1954 Hague Convention). As of January 2012, the 1954 Hague Convention had 123 state parties.
- <sup>11</sup> *Ibid*, Article 25.
- <sup>12</sup> Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict The Hague, opened for signature 26 March 1999 (entered into force 9 March 2004) Article 30.
- <sup>13</sup> Geneva Conventions I-IV, Articles 55, 54, 133 and 150 respectively.
- <sup>14</sup> Additional Protocols I and II, Articles 102 and 28 respectively.
- <sup>15</sup> Geneva Conventions I-IV, Articles 48, 49, 128 and 145 respectively; Additional Protocol I, Article 84. See also 1954 Hague Convention, Article 26.
- <sup>16</sup> Additional Protocol I, Article 83(2).
- <sup>17</sup> Additional Protocol I, Article 82.
- <sup>18</sup> Additional Protocol I, Article 87(2).
- <sup>19</sup> Rules of engagement (ROE) determines when, where and how force shall be used. See also the British Ministry of Defence which officially defines ROE as “directives issued by competent military authority which delineate the circumstances and limitations under which the UK forces will initiate and/or continue combat engagement with other forces encountered”.
- <sup>20</sup> Observance by United Nations Forces of International Humanitarian Law, UN Secretary General Bulletin ST/SGB/1999/13, 6 August 1999 which is available on the ICRC website <<http://www.icrc.org>>.
- <sup>21</sup> Charlotte Lindsay, *Women facing War: ICRC Study on the impact of armed conflict on Women*, ICRC, October 2001. This report can be accessed on the ICRC website <<http://www.icrc.org>>. See also *Women and War*, ICRC publication, February 2008 which is available on the ICRC website <<http://www.icrc.org>>.
- <sup>22</sup> Additional Protocol I, Articles 79(1) and (2) respectively. It is notable that for non-international armed conflict in Additional Protocol II, there is no similar provision for the protection of journalists covering such armed conflicts.
- <sup>23</sup> See ICRC Advisory Service on IHL which regularly updates the collection of documents on implementation of the law in individual countries. It is available on the ICRC website <<http://www.icrc.org/ihl-nat>>.
- <sup>24</sup> Statutes of the International Red Cross and Red Crescent Movement, Article 1 which can be accessed on the ICRC website <<http://www.icrc.org>>.
- <sup>25</sup> See the Preamble to the Statutes of the International Red Cross and Red Crescent Movement (Statutes of the Movement).
- <sup>26</sup> *Statutes of the International Red Cross and Red Crescent Movement* Adopted by the 25<sup>th</sup> International Conference of the Red Cross at Geneva in October 1986 and amended by the 26<sup>th</sup> International Conference of the Red Cross and Red Crescent at Geneva in December 1995 and by the 29<sup>th</sup> International Conference of the Red Cross and Red Crescent at Geneva in June 2006. Articles 3(1) and 3(2) respectively.
- <sup>27</sup> *Ibid*, Article 3(2).
- <sup>28</sup> *Ibid*.
- <sup>29</sup> Agreement on the organization of the international activities of the components of the International Red Cross and Red Crescent Movement Council of Delegates, Seville, 25-27 November 1997 (The Seville Agreement). Available on the ICRC website <<http://www.icrc.org>>.
- <sup>30</sup> Seville Agreement, Article 9.3.1.
- <sup>31</sup> Statutes of the Movement, Articles 5(2)(c) and 5(2)(g) respectively.
- <sup>32</sup> Statutes of the Movement, Article 5(4)(a). See also Seville Agreement, Article 7.2.2(c).
- <sup>33</sup> To promote the EHL programme, the ICRC has set up the EHL Virtual Campus which is a web-based resource centre which contains all the relevant resource materials and information about all the EHL programmes and training. The EHL Virtual Campus can be accessed at <<http://www.ehl.icrc.org>>.
- <sup>34</sup> Statutes of the Movement, Articles 3(2) and 3(4) respectively.
- <sup>35</sup> Statutes of the Movement, Article 6(4)(j). See also Seville Agreement, Article 9.3.1.
- <sup>36</sup> For example, in 1869, the final resolution of the Second International Conference of the Red Cross stipulated that ‘Knowledge of the Articles of the Geneva Convention must be disseminated as widely as possible, particularly among soldiers’.
- <sup>37</sup> Daniel Munoz Rojas and Jean-Jacques Fresard, *The Roots of Behaviour in War: Understanding and Preventing IHL Violations*, ICRC, October 2004. This report can be accessed on the ICRC website <<http://www.icrc.org>>.
- <sup>38</sup> *The People on War Report: ICRC Worldwide Consultation on the Rules of War*, ICRC, October 1999. This

report can be accessed on the ICRC website <<http://www.icrc.org>>.

<sup>39</sup> Afghanistan, Bosnia-Herzegovina, Cambodia, Colombia, El Salvador, Georgia/Abkhazia, Israel and the occupied territories, Lebanon, Nigeria, Philippines, Somalia and South Africa.

<sup>40</sup> For further details, see *Our World: Views from the Field*, Opinion Survey which can be accessed on the ICRC website <<http://www.icrc.org>>.

<sup>41</sup> Afghanistan, Colombia, the Democratic Republic of Congo, Georgia, Haiti, Lebanon, Liberia and the Philippines.

<sup>42</sup> See Resolution 21: “Dissemination of International Humanitarian Law applicable in armed conflicts” adopted by the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in International Armed Conflicts 1977. Resolution 21 is annexed to the Additional Protocols of the Geneva Conventions, 115.

# THE RELEVANCE OF THE GENEVA CONVENTIONS AND THEIR ADDITIONAL PROTOCOLS IN CONTEMPORARY ARMED CONFLICTS

*Richard Desgagné\**

The Swiss government, at the prompting of the five founding members of the International Committee of the Red Cross (ICRC), convened the 1864 Diplomatic Conference, which was attended by 16 States who adopted the Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field.<sup>1</sup> The Geneva Convention of 1864 was the very first contemporary international humanitarian law treaty aimed at ensuring that wounded soldiers, regardless of which party they belong, were not left to die on the battlefield but were protected and cared for. Since then, international humanitarian law (IHL), as it is commonly known – the body of rules that protect civilians and people who are no longer fighting, including wounded and sick military personnel and prisoners of war – has not been stagnant. Appalling events and brutalities have largely driven the development of IHL. The depiction of the suffering and the bloodshed at the battle of Solferino<sup>2</sup> inspired the creation of the Red Cross Movement and prompted the adoption of the first Geneva Convention of 1864. The atrocities of the World Wars led to Nuremberg, the Genocide Convention and the Geneva Conventions for the protection of victims of war. A result of the brutalities of the last decades in the former Yugoslavia, Rwanda and elsewhere led to the establishment of the *ad hoc* criminal tribunals for former Yugoslavia and Rwanda, and of the International Criminal Court, which have – and continue to have – broad influence on the development of international humanitarian law.<sup>3</sup>

Today, the four Geneva Conventions of 1949<sup>4</sup> and their Additional Protocols<sup>5</sup> are the backbone of a complex web of humanitarian law rules aimed at limiting the effects of violence in armed conflict. Their prime purpose is not to put an end to the conflict but rather to limit the barbarity of war and minimize the suffering caused by it. The development of IHL serve to illustrate both its resilience and adaptability. This body of law is resilient because its fundamental aim, shared by all civilizations and peoples, is to ensure that persons affected by war are treated with humanity. The fact that States, as the principal creators of IHL, have chosen to constantly expand the specific legal rules giving expression to the principle of humanity attests to the enduring nature of this common value.

The adoption of the 1977 Additional Protocols constituted a very important stage in the codification of IHL because they completed the provisions of the Geneva Conventions, while adapting humanitarian standards then in force to present-day realities. They secured better protection for the individual in armed conflicts by taking into account new realities on the battlefield, in particular the emergence of guerrilla warfare and technical advances in weapons' technology. The value of the two Protocols also resides in their multicultural backdrop; indeed, all of the world's main powers took part in

drafting the texts. The Geneva Conventions and their Additional Protocols are among the most widely accepted legal instruments. At present, 170 States are party to the First Additional Protocol and 165 to the Second Additional Protocol, while all States have accepted the 1949 Geneva Conventions.

The Geneva Conventions only apply to international armed conflicts, with the exception of Article 3 common to all four Conventions, which also covers non-international armed conflicts. The adoption of this article in 1949 was a breakthrough since previous IHL treaties had only covered situations of wars between States. However, most of today's wars are non-international armed conflicts. This changing nature of conflicts has a close relationship to normative developments in IHL.<sup>6</sup> If Additional Protocol I was a step forward in adapting the law to new demands, the Additional Protocol II is the first-ever universal treaty devoted exclusively to the protection of the individual and restriction on the use of force in non-international armed conflicts.

The following text will highlight some of the developments of IHL that have taken place since the adoption of the 1949 Geneva Conventions.

### ***The Geneva Conventions of 1949: Common Provisions***

At the start of World War II, the law protecting victims of war is essentially embodied in the following instruments: the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1929)<sup>7</sup>, Convention (X) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention (1907)<sup>8</sup> and the Geneva Convention relative to the Treatment of Prisoners of War (1929).<sup>9</sup> The idea of drafting the 1949 Conventions, which are undoubtedly coloured by the atrocities perpetrated during World War II, had already been launched before the end of the war.<sup>10</sup>

#### *Scope of application*

The 1929 Conventions referred to “wartime” without otherwise defining that term. During World War II, the benefit of the 1929 Convention relative to the Treatment of Prisoners of War had not been extended to several victims for the Detaining Power had claimed that there was no war or denied the existence of the opposing State, which made the Conventions non-applicable. To remedy this, common Article 2 of the 1949 Geneva Conventions defines the situations to which the Conventions will apply, i.e.

all cases of declared war or of any other armed conflict which may arise between two or more [States Parties], even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Additional Protocol I extended the definition of “international armed conflict” to include wars of self-determination.

The Geneva Conventions only apply to international armed conflicts, with the exception of Article 3 common to all four Conventions. The adoption of this article in 1949 was one of the most striking successes of the Conference since it gave legal expression to

a notion that is widely accepted today – that armed conflicts taking place within the confines of a country are a matter of international concern. The ICRC had initially suggested that in cases of armed conflict not of an international character, the Parties be bound to apply the provisions of the Conventions.<sup>11</sup> However, the provision finally adopted has a more limited scope, by which the Parties to a non international armed conflict undertake to respect fundamental rules with regard to persons in their power. Common Article 3, sometimes referred to as a kind of ‘Convention in miniature’,<sup>12</sup> remains vitally important because it sets a baseline for the protection of people who are not or no longer fighting, to which all sides – State and non-State parties to conflict – must abide.

The definition of an ‘armed conflict not of an international character’ was a difficult issue from the outset of the discussions on common Article 3. A compromise was finally accepted which omitted a precise definition of an ‘armed conflict not of an international character’ and adding that ‘the application of the preceding provisions shall not affect the legal status of the Parties to the conflict’. The material scope of common Article 3 has remained to this day ill-defined. While the text of common Article 3 differs from the initial proposal to have the Conventions applied as a whole to non international armed conflicts, it nonetheless ensures the application of the rules of humanity. This is recognized as essential by civilized nations and provides a legal basis for interventions by the ICRC. These interventions can no more be viewed as an unacceptable interference in the internal affairs of States. In addition, this provision is applicable automatically, without any condition in regard to reciprocity.<sup>13</sup> Over time, the protections set out in common Article 3 came to be regarded as so fundamental to preserve a measure of humanity in war that they are now referred to as ‘elementary considerations of humanity’ that must be observed in all types of armed conflict as a matter of customary international law.<sup>14</sup>

The law governing non-international armed conflict has gone through constant development since it was first codified, in particular with the adoption in 1977 of Protocol II additional to the Geneva Conventions, which ‘develops and supplements Article 3 common to the Geneva Conventions.’ Additional Protocol II is a remarkable complement to common Article 3 as its rules on fundamental guarantees for all those not involved in the fighting, on the treatment of persons deprived of liberty and on judicial guarantees for individuals subject to penal prosecution represent a milestone in the development of international law, which all go far beyond those contained in the ‘hard core’ of human rights law. However, treaty law may be said to still fall short of meeting some essential protection needs in non-international armed conflicts.<sup>15</sup> In addition, the material field of application of the Protocol is more restrictive than that of common article 3. Since its adoption then, however, there has been a clear trend in international practice, whether through new international instruments or through the development of customary law, to merge the respective fields of application of the rules contained in common Article 3 and Additional Protocol II.



## ***Control and Supervision of the Application and Punishment of Grave Breaches***

### *Duty to respect and ensure respect in all circumstances*

Common Article 1 of the Geneva Conventions reads that “the High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.” Previous conventions had no similar provisions, although the 1929 Convention provided that ‘the provisions of the present Convention shall be respected by the High Contracting Parties in all circumstances’<sup>16</sup> in order to give a more formal character to the Parties’ undertakings under the treaty.<sup>17</sup>

The provision adopted in 1949 – in particular its reference to ‘all circumstances’ – draws attention to the special character of that instrument:

It is not an engagement concluded on a basis of reciprocity, binding each party to the contract only in so far as the other party observes its obligations. It is rather a series of unilateral engagements solemnly contracted before the world as represented by the other Contracting Parties. Each State contracts obligations vis-à-vis itself and at the same time vis-à-vis the others.<sup>18</sup>

Moreover,

although it may well have first been intended to address the obligations of a party to comply with the Convention and ensure respect by its entire civilian and military apparatus, and perhaps even by its entire population, Article 1 has subsequently been interpreted as creating standing for states parties vis-à-vis violating states. Parties could therefore endeavour to bring a violating party back into compliance and thus promote universal application.<sup>19</sup>

The use of the expression ‘to ensure respect’ was intended to emphasize and strengthen the responsibility of State Parties. In particular, it is for the State to supervise the execution of orders and directives, as well as to prepare in advance the legal material or other means of implementation of the Conventions. Implementation presupposes access to and understanding of the law, as well as proper training and command supervision. It also means that appropriate sanctions, including criminal, will be applied against those who violate the rules.

Under Additional Protocol I, with a view to ensuring better respect of international humanitarian law, States agreed to assign a greater degree of responsibility to commanders. They are required to prevent and, where necessary, to suppress and report breaches to competent authorities.

### *Punishment of grave breaches*

Each of the Geneva Conventions has specific provisions listing acts that are considered grave breaches of their rules. The common provisions prescribing the suppression and repression of breaches of the Conventions were an important development over previous Conventions. The numerous violations committed in the course of the World War II and their punishment had raised much interest among the public opinion and the authorities in the different countries.

The system of the Conventions is based on three fundamental obligations: the obligation to enact special legislation to punish grave breaches; the obligation to search for any person accused of violation of the Conventions, and the obligation to try such persons, regardless of their nationality, or, if the State prefers, to hand them over for trial to another State concerned. These are completed by a list of ‘grave breaches’ of each of the four Conventions, and by a clause providing accused persons with safeguards of fair trial. The list of grave breaches was expanded with the adoption of Additional Protocol I to criminalize certain other acts, particularly those aimed at harming civilians through the unlawful methods of combat. The Conventions and Additional Protocol I thus not only encourage States to bring perpetrators of war crimes to justice, they demand it, including by means of exercise of universal jurisdiction.

Important strides have been made over the last 20 years with regard to the creation of international mechanisms for individual criminal responsibility, including in non-international armed conflicts. Ad hoc tribunals have been established, as well as a permanent International Criminal Court, and special or mixed tribunals. Some States have also proved more ready than others to exercise extraterritorial jurisdiction in order to prosecute and punish serious violations of humanitarian law.

### *The Protection of the Wounded, Sick and Shipwrecked*



The First and Second Conventions of 1949 reaffirmed the principles of the earlier Conventions of 1906 and 1929 that military personnel who are wounded, sick, or shipwrecked must be respected and protected in all circumstances, and treated humanely and cared for without any adverse distinction.<sup>20</sup> To this end, ambulances and military hospitals, as well as medical personnel are protected.

The most important issues discussed at the 1949 Diplomatic Conference were the status and the retention/repatriation of medical and religious personnel. The principles of the previous Conventions were that medical personnel were not to be treated as prisoners of war and that such personnel may not be retained after they have fallen into the hands of the enemy.<sup>21</sup> World War II had however shown that these provisions were difficult to apply in practice, and at the Conference, diverging trends of opinion appeared. On one side, some believed that medical personnel should be assimilated with prisoners of war; others were in favour of maintaining the existing rules, retention of medical personnel being the exception rather than the rule. The Conference finally adopted a compromise solution in article 28 of Geneva Convention I: Medical personnel ‘who fall into the hands of the adverse Party, shall be retained only in so far as the state of health, the spiritual needs and the number of prisoners of war require’.



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The First and Second Conventions also reinforced and strengthened the basic principle that the wounded, sick and shipwrecked shall be protected. Notably with regard to the role and protection of people who voluntarily collect and care for the wounded and sick, the role and duties of national relief societies and humanitarian organizations. It also provided a means for the possible establishment of medical zones and localities as well as revised provisions for the protection of medical aircraft, the conditions of protection, the rights and duties of neutral countries with regard to their relief actions, the treatment of medical personnel and the wounded and sick on their territory; and the complete revision of the law applicable to sea warfare, largely reflecting those applicable to land warfare. Additional Protocol I

reinforced many of those provisions, in particular, it extended the protection to civilian medical personnel and units. Additionally Protocol II reinforced the application of the principle of the protection and respect of the wounded and sick in non-international armed conflicts already recognized in common Article 3. In particular, it recognized the right of relief societies located in the country and of the civilian population to offer their services to collect and care for the wounded, sick and shipwrecked.<sup>22</sup>

The distinctive emblem of the red cross/red crescent is the visible sign of the protection afforded to medical personnel, units and transports. The provision on the distinctive emblem of Geneva Convention I remained similar to earlier conventions.<sup>23</sup> The 1929 compromise admitted the encroachment of the principle of unity of the emblem by recognizing the Red Crescent and the red-lion-and-sun as distinctive emblems for those countries that already used the latter was maintained in 1949. The issue of the recognition of new emblems was however raised in 1949 and in 1977, but the fear that the proliferation of new emblems would weaken the universal protective value of the emblem prevented the acceptance of new emblems or the creation of a totally new single emblem. In 2005, a Third Additional Protocol to the Geneva Conventions was adopted. It established a new emblem – the Red Crystal – which has the same status as the existing emblems under the Geneva Conventions.



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### *The Protection of Prisoners of War*

Although the 1929 Convention had, where applicable, offered protection to thousands of prisoners during World War II, some of its provisions needed to be revised.<sup>24</sup> One important issue that needed to be clarified related to the definition of the categories of persons protected by the Convention. The 1929 Convention simply defined protected persons by reference to the first articles of

the Hague Regulations of 1907 dealing with the qualifications of belligerents. The 1949 Convention thus defines in detail the different categories of protected persons. Notably, the Third Geneva Convention prescribes the assimilation of resistance movements to militias and corps of volunteers ‘not forming part of the armed forces’ of a Party to the conflict, even if they operate in occupied territory, if they fulfilled the four conditions expressed in Article 1 of the 1907 Hague Regulations.<sup>25</sup> New categories were also introduced: members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power; members of crews of the merchant marine and the crews of civil aircraft and; persons belonging, or having belonged, to the armed forces of the occupied country, if the occupying Power considers it necessary by reason of such allegiance to intern them, in particular where such persons have made an unsuccessful attempt to rejoin the armed forces to which they belong and which are engaged in combat.<sup>26</sup>

Controversial at the time, but much less so today, were the innovations of Additional Protocol I regarding combatant and prisoner of war status. ‘Armed forces’ was defined as including regular members of the armed forces and other organized armed forces that belong to a Party to the conflict.<sup>27</sup> It also relaxed the obligation of combatants to distinguish themselves for the civilian population ‘in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself’.<sup>28</sup> While some States felt uneasy about the changes introduced, they reflected the new reality of international relations: the emergence of national liberation movements employing tactics of guerrilla warfare.

Another important innovation of Geneva Convention III is the inclusion of a provision on the responsibility of a Detaining Power in case of transfer of prisoners to another State Party. Under Article 12, the Detaining Power must ‘satisfied itself of the willingness and ability of such transferee Power to apply the Convention’ and in such circumstances ‘responsibility for the application of the Convention rests on the Power accepting them while they are in its custody.’ However, if the transferee Power fails to meet its obligations, the former Detaining Power must ‘take effective measures to correct the situation or ... request the return of the prisoners of war.

The 1907 Hague Regulations provided only that the repatriation of prisoners of war should be carried out as quickly as possible after the conclusion of peace.<sup>29</sup> As the conclusion of peace could come considerably later than the actual end of hostilities, the 1929 Convention attempted ‘to expedite repatriation by stipulating that it should, if possible, take place as soon as an armistice had been concluded.’<sup>30</sup> World War II further ‘exposed the inadequacies of both the Hague and the Geneva formulation.’<sup>31</sup> Article 118 of Geneva Convention III provides that ‘[p]risoners of war shall be released and repatriated without delay after the cessation of active hostilities.’ Although, the language of Article 118 seems clear and categorical, it raised the difficult question whether prisoners of war could be repatriated without their consent. As some observed, the interpretation of Article 118 rested on whether the right corresponding to the duty of the State to repatriate prisoners of war, was ‘a right of the prisoner to be repatriated’ or ‘the

right of his state to have him repatriated.<sup>32</sup> While the principle of individual choice and the interest in ensuring the protection of individuals were taken into account in Article 45 of the Fourth Geneva Convention, which provides that a protected person shall not be transferred to a country where he or she fears persecution for political or religious beliefs, the Third Geneva Convention does not confer such protection. However, under the influence of human rights law, the interpretation of Article 118 has ‘drastically modified its categorical language, steering it to respect for individual autonomy. This adjustment exemplifies the potential of developing the law through interpretation and custom.’<sup>33</sup>



### *The Protection of Civilians*

The lack of an international convention dedicated to the protection of civilians obviously showed the importance of filling that gap in 1949. At the time of World War II, only a few provisions addressed the treatment of civilians: articles 42 to 56 of the Hague Regulations of 1907, which protects civilian populations in occupied territory. Those provisions had

already proved themselves inadequate during the First World War and the experience of the Second World War demonstrated the need for a more protective regime. Thus, in contrast to Conventions I, II and III, which were updating previous conventions, the 1949 Geneva Convention IV was an entirely new treaty.

Part II of Geneva Convention IV relates to the general protection of civilian population from certain effects of war, and applies to the territories of all the Parties to the conflict. It addresses issues such as the establishment of safety zones, the protection of the wounded and the sick, as well as of hospitals and medical personnel, the consignment of medical supplies and measures relating to child welfare and dispersed families.

Part III of the Convention regulates in particular two types of situations: foreigners in the territory of a belligerent and the civilian population in occupied territory. Common provisions provide that

protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, [...] without any adverse distinction based, in particular, on race, religion or political opinion.<sup>34</sup>

Coercion, any measure of such a character as to cause the physical suffering or extermination, murder, torture, corporal punishment, mutilation and medical or scientific experiments not necessitated by the medical treatment of a protected person, collective penalties, pillage, reprisals and hostage taking are strictly prohibited.<sup>35</sup> The second section recognizes the right of foreigners to leave the territory at the outset of, or during a conflict, unless their departure is contrary to the national interests of the State. The

internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary.<sup>36</sup> In such case, they are entitled to have such action reconsidered as soon as possible by an appropriate court or administrative board.<sup>37</sup>

The third section of Part II deals with the protection of civilian population in occupied territory. It contains detailed provisions on the protection afforded to civilians - aliens, general population, vulnerable groups such as children and women, internees - in occupied territories. Individual or mass forcible transfers, as well as deportations of protected persons outside the occupied territory are prohibited. Displacement within the occupied territory are allowed only if the security of the population or imperative military reasons so demand. The transfer by the Occupying Power of parts of its own civilian population into the occupied territory is prohibited. Any destruction of real or personal property is also prohibited, except where such destruction is rendered absolutely necessary by military operations. The Convention also establishes a new balance between the rights of the occupant and the rights of the population of the occupied country,<sup>38</sup> as it requires the occupant to assume active responsibility for the welfare of the population under his control.<sup>39</sup> The section thus also defines the rights and duties of the Occupying Power in the field of labour and protection of workers, food and medical supplies of the population, hygiene and public health, collective and individual relief, and penal legislation and procedure.

Obviously the Fourth Geneva Convention constituted an important advancement for international humanitarian law. One area that was however not addressed is regulation of means and methods of warfare. When the Diplomatic Conference was convened in 1949, the international state of play had already evolved since 1945 with the rise of distrust and suspicion between the former allies and the establishment of the post 1945 world order and balance of power. The Conference thus left aside a number of issues, in particular those related to the conduct of hostilities.

One major breakthrough of Additional Protocol I was the substantial progress achieved in the rules relating to the conduct of hostilities. Contrary to the treatment of civilians in enemy hands, the authorized methods and means of warfare and the protection of the civilian population against the effects of hostilities had remained untouched since the Hague Conventions of 1907. The cornerstone, which stands for the Protocol's aim of better protecting the civilian population, is the principle of distinction. This principle requires that the Parties to the conflict distinguish at all times between the civilian population and combatants and between civilian objects and military objectives. This principle is crucial, as lawful attacks may only be directed at combatants and military objectives. In addition, Additional Protocol I reaffirms and clearly defines for the first time in a treaty the customary principle of proportionality in the conduct of hostilities. By this principle attacks on lawful targets only remain lawful if the incidental casualties or damages are not excessive. It should be emphasized that there are other rules relating to methods and means of warfare, such as the prohibition of weapons and methods of warfare of a nature to cause superfluous injury, which do not only protect the civilian population but also combatants.

### ***Conclusion***

More than 50 years since the adoption of the 1949 Geneva Conventions and 30 years since the adoption of the 1977 Additional Protocols, the special relevance, and that of international humanitarian law in general, in today's armed conflicts should be highlighted. Particularly in recent years, doubt has been raised as to whether international humanitarian law remains applicable to the new security threats posed today. For many years, if not decades, understanding and interpreting international humanitarian law was primarily the preserve of government and military experts and others involved in commanding armed forces or instructing them on how to behave in war. Over the last few years, however, issues relating to international humanitarian law have become front-page news. The Geneva Conventions, war crimes, prisoner-of-war status and Common Article 3 are now debated in the public domain.

There is no question that its norms are adequate to deal with security risks in war because its provisions were designed specifically for the exceptional situation of armed conflict. The generations of experts and diplomats who crafted international humanitarian law over the last two centuries were fully aware of the need to balance state security and the preservation of human life, health and dignity. That balance has always been at the very core of the laws of war. Most scholars engaged in analyzing present-day conflicts are of the opinion that the rules on conduct and protection as expressed in the basic treaties of international humanitarian law meet the basic needs of individuals and peoples caught up in today's wars.

The continued validity of existing law should not be taken to mean that international humanitarian law is perfect, for no body of law can lay claim to perfection, but any attempt to re-evaluate its appropriateness can only take place after it has been determined that it is the law that is lacking, and not the political will to apply it. Yet, international humanitarian law is not static. This body of norms, like all others, is constantly subject to refinement and change. Without neglecting the possibility and need of specific improvements of the law, the real challenge for international humanitarian law, both today and in the future lies in the ability and, even more often, in the political willingness of States and armed opposition groups to fully implement its rules. The rules on conduct and protection as expressed in the basic treaties of international humanitarian law will be just as pertinent in the wars of tomorrow, since the fundamental value, which need to be safeguarded, are timeless.

Today, attention must increasingly be drawn to the poor level of respect for and implementation of the law. Better implementation and enforcement of humanitarian law remains an abiding challenge. It is worth reminding all concerned that poor implementation of existing law does not bode well for the scope and the effectiveness of current and future developments of international legal instruments. While individual criminal prosecution of violators may thus be said to have undergone remarkable development in the last decades, improving compliance with international humanitarian law by parties as a whole, while an armed conflict is ongoing, remains the main challenge. Violations and abuses must be prevented from happening to begin with if the law is to fulfill its protective role.

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<sup>1</sup> D. Schindler and J. Toman, *The Laws of Armed Conflicts*, (1988), 280-281.

<sup>2</sup> H. Dunant, *A Memory of Solferino* (1862).

<sup>3</sup> Theodor Meron, 'The Normative Impact on International Law of the International Tribunal for former Yugoslavia', (1994) 24 *Israel Yearbook on Human Rights*, 163-182.

<sup>4</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 U.N.T.S. 31 (Geneva Convention I); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 75 U.N.T.S. 85 (Geneva Convention II); Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, 75 U.N.T.S. 135 (Geneva Convention III); and Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 U.N.T.S. 287 (Geneva Convention IV).

<sup>5</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 U.N.T.S. 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 U.N.T.S. 609; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III), 8 December 2005, reprinted in 88 *International Review of the Red Cross* 861, 187-196 (2006).

<sup>6</sup> Theodor Meron, 'The Humanization of Humanitarian Law' (2000) *American Journal of International Law*, 239, at 243; see in general J.M. Henckaerts and L. Doswald-Beck (eds), *Customary International Humanitarian Law* (2005).

<sup>7</sup> D. Schindler and J. Toman, *The Laws of Armed Conflicts* (1988), 326-334. The Convention on the wounded and sick of 1929 represents the third version of the Geneva Convention after those of 1864 and 1906. It is no longer in operation following the universal acceptance of the Geneva Conventions of 1949.

<sup>8</sup> *Ibid.*, 314-318. The Second Hague Peace Conference of 1907 revised and enlarged Convention (III) of 1899 concerning the adaptation to maritime warfare of the principles of the Geneva Convention of 1864. The new Convention was based on the Geneva Convention of 1906. The Convention remained in force during both World Wars. It was replaced in 1949 by Geneva Convention II.

<sup>9</sup> *Ibid.*, 341-364. The Convention completes the provisions of The Hague regulations 1907 concerning the treatment of prisoners of war. It was replaced by the third Geneva Convention of 12 August 1949 (Geneva Convention III). It is no longer in operation following the universal acceptance of the Geneva Conventions of 1949. However, two of the main belligerents, the USSR and Japan did not ratify the 1929 Convention relative to the Treatment of Prisoners of War and were thus not bound by it.

<sup>10</sup> G. Best, *War and Law since 1945* (1994), 80. Already in 1934, at the XVth International Conference of the Red Cross adopted a *Draft International Convention on the condition and protection of civilians of enemy nationality who are on territory belonging to or occupied by a belligerent* which had been prepared by the ICRC.

<sup>11</sup> Catherine Rey Schyrr, 'Les Conventions de Genève de 1949 : une percée décisive - seconde partie', *Revue internationale de la Croix-Rouge*, 835, 499-529, text accompanying notes 101 to 105.

<sup>12</sup> Jean de Preux and Jean Pictet (eds) *Commentary on the Geneva Convention (III) relative to the Treatment of Prisoners of War* (1960) 34.

<sup>13</sup> *Ibid.*, 35.

<sup>14</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment of 27 June 1986, ICJ Reports, 1986, [218].

<sup>15</sup> See *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, Document prepared by the International Committee of the Red Cross, Doc. No. 30IC/07/8.4, 30<sup>th</sup> International Conference of the Red Cross and Red Crescent, Geneva, Switzerland, 26-30 November 2007, 20-24.

<sup>16</sup> Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (1929), Article 25.

<sup>17</sup> Jean S. Pictet (ed) *Commentary on the Geneva (I) Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (1952) 25.

<sup>18</sup> *Ibid.*

<sup>19</sup> Meron, above note 6, 248.

<sup>20</sup> Geneva Convention I, article 12; Geneva Convention II, article 12.

<sup>21</sup> The 1929 Convention however added in par. 2 'in the absence of an agreement to the contrary'.

<sup>22</sup> Additional Protocol II, Article 18.



- <sup>23</sup> Geneva Convention I, Article 38.
- <sup>24</sup> Jean de Preux and Jean Pictet (eds), above note 12, 5-6.
- <sup>25</sup> Geneva Convention III, article 4A.
- <sup>26</sup> Geneva Convention III, article 4A and B.
- <sup>27</sup> Additional Protocol I, article 43.
- <sup>28</sup> Additional Protocol I, article 44.
- <sup>29</sup> Hague Regulations Respecting the Laws and Customs of War on Land annexed to Hague Convention No. IV (1907), article 20.
- <sup>30</sup> Jean de Preux and Jean Pictet (eds), above note 12, 541.
- <sup>31</sup> Yoram Dinstein, 'The Release of Prisoners of War', in Christophe Swinarski (ed), (1984) *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, 37, 43.
- <sup>32</sup> Jaro Mayda, 'The Korean Repatriation Problem and International Law' (1953) 47 *American Journal of International Law* 414, 433.
- <sup>33</sup> Meron, above note 6, 256.
- <sup>34</sup> Geneva Convention IV, article 27.
- <sup>35</sup> Geneva Convention IV, articles 31-34.
- <sup>36</sup> Geneva Convention IV, article 42.
- <sup>37</sup> Geneva Convention IV, article 43.
- <sup>38</sup> Meron, above note 6, 246.
- <sup>39</sup> Hersch Lauterpacht, 'The Problem of the Revision of the Law of War' (1952-1953) 29 *British Yearbook International Law*, 381-82.

# IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW

Guo Yang\*

## Introduction

When we talk about implementing International Humanitarian Law (IHL), we refer to all the measures that must be taken to ensure that the rules of IHL are fully respected. These measures include:



(a) steps taken to prepare for ensuring respect of the law in the future, such as spreading knowledge of IHL among the armed forces, enacting national legislation and putting implementing structures such as national information bureaux for prisoners of war into place. Measures falling into this category can be classified as the means of prevention, which aim to ensure that the rules of IHL

are correctly applied when the time comes to apply them;

(b) steps that actually ensure respect of IHL in on-going armed conflicts, for example, by appointing Protecting Powers or requiring military commanders to supervise/better supervise subordinates in order to prevent or suppress violations. These measures can be identified as means of control, which concern the establishment of a supervision regime to ensure the correct application of IHL rules to a real situation demanding their application; and,

(c) steps taken to enforce the law, such as the investigation of violations and the punishment of perpetrators. These means of repression are an integral part of any sound legal system and serve as a valuable deterrent.

It is clear that these three types or measures are linked and complementary to each other, and form an integral part of the whole process of implementation.

Under common Article 1 of the 1949 Geneva Conventions<sup>1</sup>, the States Parties have an obligation to respect and ensure respect of the Conventions in all circumstances, whereas under Article 80 of Additional Protocol I<sup>2</sup> to the 1949 Geneva Conventions, the States Parties must, without delay, take all necessary measures to execute their obligations under the Conventions and the Protocol. Therefore, implementation is a legal obligation for States Parties.

Under IHL, notably under the 1949 Geneva Conventions (I-IV), their Additional Protocols of 1977 (I-II)<sup>3</sup>, the 1954 Hague Convention on Cultural Property and its Protocols of 1954 and 1999,<sup>4</sup> a range of measure must be taken.<sup>5</sup> The main ones are:

1. to have the Convention and Protocols translated into the national language;
2. to spread knowledge of the law as widely as possible both within the armed forces and the general population;
3. to repress all violations of the law and, in particular, to adopt criminal legislation to punish war crimes;
4. to ensure that persons, property and places protected by the law are properly identified, marked and protected;
5. to adopt measures to prevent the misuse of the Red Cross, Red Crescent and other symbols and emblems provided for in the Conventions and Protocols;
6. to ensure that protected persons enjoy judicial and other fundamental guarantees during armed conflicts;
7. to appoint and train persons qualified in IHL, in particular legal advisers within the armed forces;
8. to provide for the establishment and/or regulation of National Red Cross and Red Crescent Societies, civil defence organizations and National Information Bureaux;
9. to take IHL into consideration when selecting military sites and in developing and adopting weapons and military tactics;
10. to provide for the establishment of hospital zones, neutralized zones, security zones and demilitarized zones.

Some of the above measures will require the adoption of legislation or regulations. Others will require the development of educational programs, the recruitment and training of personnel, the setting up of special structures and the introduction of planning and administrative procedures.

This article will address some of the measures that are essential to an effective implementation. It has been said that the establishment of the International Criminal Court (ICC) will strengthen the implementing mechanism for IHL. Thus, the war crimes under the ICC Statute will be dealt with briefly as well.

### ***Means of Prevention***

As stated above, the means of prevention are those used to ensure that the rules of IHL are correctly applied when the time comes to apply them. Measures under this title include:

#### ***• Translation***

The authentic versions of the Geneva Conventions are in French and English. The depositary, that is Swiss Federal Council, is responsible for making arrangements for their official translation in Russian and Spanish. The authentic versions of the Protocols as well as of other IHL treaties are in Arabic, Chinese, English, French, Russian and Spanish. Therefore, States Parties whose national languages are other than the above ones must have the texts translated so that they can be applied and disseminated. Under the four Geneva Conventions and Additional Protocol I (API),<sup>6</sup> the States Parties have not only the obligation to translate the instruments but also to translate implementing laws and regulations and to communicate the translation to one other. This is a sensible

preventive measure to avoid differences of interpretation that might have unfortunate consequences in times of armed conflict.

• *Dissemination and Training*<sup>7</sup>

There is an essentially identical article in each of the four Geneva Conventions<sup>8</sup> providing that the States Parties have an obligation to:



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undertake, in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries, and, in particular, to include the study thereof in their program of military and, if possible, civil instructions, so that principles thereof may become known to the entire population, in particular to the armed fighting forces, medical personnel and the chaplains.

Paragraph 1 of Article 83 of API takes up the same idea and goes further for it requires that ‘these instruments (Conventions and API)’ should be known by the armed forces as well as civilians.<sup>9</sup>

As for non-international armed conflict, common article 3 of the Geneva Conventions and APII are the major sources of conventional applicable law. It is clear that common article 3 should be included in the dissemination and instruction programs required by the Conventions. Article 19 APII also requires that ‘this Protocol shall be disseminated as widely as possible’.

Article 25 of the 1954 Hague Convention for Protecting Cultural Property and Article 30 of its 1999 Protocol provide for similar obligations.

***Means of Control***

The means of control refers to those measures to monitor or supervise the application of the rules of IHL to ensure their respect in times of armed conflict.

• *Supervision of Military Commanders*

During on-going armed conflicts, the armed forces play a key role in implementing IHL since a large part of the law aims at regulating behaviour in the battlefield. Thus, the first and foremost control measure defined by related IHL treaties is the duties of military commanders with regard to the supervision of their subordinates. Protocol I, Article 87, paragraph 1 specifies the duties of commanders as follows:



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1. The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and to report to competent authorities breaches of the Conventions and of this Protocol.

If the commanders fail to prevent or repress breaches that they have knowledge or should have had knowledge of, they will be subject to penal or disciplinary responsibility.<sup>10</sup>

#### • *Protecting Powers*

A Protecting Power is a ‘state instructed by another state to safeguard its interests and those of its nationals in relation to a third state’.<sup>11</sup> The regime of protecting powers is established for the four Conventions and the Conventions must be ‘applied with the co-operation and under the scrutiny of the protecting powers’. However, the appointment of delegates of the protecting powers ‘shall be subject to the approval of the Power with which they are to carry out their duties’.<sup>12</sup>

Article 5 of API strengthens the Protecting Power system. In case that the parties to the conflict have not designated a Protecting Power, a procedure for its designation is laid down in paragraph 3 of this Article and the ICRC is conferred a role in this regard.<sup>13</sup> Paragraph 6 provides that ‘the maintenance of diplomatic relations between the parties or the entrusting of the protection of a party’s interests and those of its nationals to a third state’ shall not be an obstacle to the designation of a Protecting Power. Paragraph 5 states that the designation and acceptance of Protecting Power shall not affect the legal status of the Parties to the conflict or of any territory, including occupied territory.

A Protecting Power is entitled to undertake any intervention or initiative, which may enable it to check the application of any provision of the Convention, or help to improve its application.<sup>14</sup> According to Article 8 of Geneva Conventions I-II, the activities of the Protecting Powers may be restricted as an exceptional and temporary measure when this is rendered necessary by imperative military necessity. This restriction is omitted in the Third and Fourth Conventions, because the First and Second Conventions mainly apply to the battlefield or its immediate surroundings where the belligerent Power has interest in taking strict measure in order to keep military operations secret.<sup>15</sup>

The Protecting Powers system has not been, until now, very effective. The main reasons are: only a few international armed conflicts have taken place since 1949, the majority of conflicts have been non international in nature, the divergent opinions as to the nature of the conflict and the difficulty of finding neutral States acceptable to both parties, and able and willing to act in this capacity.

#### • *Substitute for the Protecting Powers*

In case that the Parties face difficulties in designating Protecting Powers, they can choose a substitute. Under common articles 10-10-10 and 11 of the four Geneva Conventions, the States Parties may at any time entrust the duties of the Protecting Power to an organization, provided that it offers all guarantees of impartiality and

efficacy (paragraph 1). This allows the States Parties to resort to appointing a substitute directly without having to exhaust the possibilities of finding a Protecting Power. Under Paragraph 2, if protected persons do not benefit or cease to benefit from the activities of the Protecting Power or substitute, the detaining power must request a neutral state or an organization to undertake the functions of the Protecting Powers. Paragraph 2 must be applied when all other possibilities of appointing either a Protecting Power or a special organization have been exhausted. In this last case, the choice of the detaining Power does not need to be agreed by the adverse Party. Last but not the least, if none of the above alternative has been adopted, the detaining Power shall request or shall accept the offer of services of an impartial humanitarian organization to assume the humanitarian functions of a Protecting Power.

Some modifications are made in regard to the substitute for Protecting Powers under Article 5, paragraph 4 of the Protocol I. If no Protecting Power is designated after the good offices of the ICRC or an other humanitarian organization have been provided, the parties must accept without delay an offer of the ICRC or any other organization to act as a substitute where there is no possibility that the parties can agree on a substitute. However, the obligation to accept the above offer is not without restrictions. Firstly, the parties shall be consulted before the offer is made. Secondly, the substitute's functioning is subject to the consent of the parties.

The quite complicated procedure to appoint a substitute for Protecting Powers has never been formally used. In practice, many of their functions have been carried out by the ICRC.<sup>16</sup>

- *International Fact-Finding Commission*

The Geneva Conventions have provided for an enquiry mechanism for alleged violations, whose procedure shall be decided by the interested Parties. Once the violation has been established, the Parties to the conflict shall put an end to it and repress it with the least delay.<sup>17</sup> But this regime has never been used because of the lack of consent of the Parties involved.

The enquiry procedure was improved by the establishment of the International Humanitarian Fact-Finding Commission under Article 90 of API.<sup>18</sup> The Commission is composed of fifteen members of high moral standing and acknowledged impartiality, elected for five years by the Parties who have accepted its competence. The Commission is competent to enquire into any facts alleged to be grave breaches or serious violations of the Conventions and API among States Parties that have accepted such competence. The Commission shall submit to the Parties a report on the findings of enquiry with appropriate recommendations. Without the consent of the Parties, the report shall not be made public.

In other situations, the Commission may act if the parties to the particular conflict consent to its acting. In that respect it has made it clear that it is willing to act in relation to non-international armed conflicts as well as international ones.<sup>19</sup>

The Commission was officially constituted in 1991<sup>20</sup> and the seat of the Commission is in Berne, Switzerland. As of January 2012, there are 72 States Parties to API that have accepted its competence. Until now, the Commission and its activities are mainly within the field of humanitarian diplomacy with the UN and other international or non-international organizations.<sup>21</sup>

## ***Means of Repression***

### War Crimes

#### *a) Grave breaches under the Geneva Conventions and API*

The States Parties to the Geneva Conventions are under an obligation to take the necessary measures for the suppression of all acts contrary to the Conventions. To be more precise, in case of grave breaches of the Conventions, the principle of *aut judicare aut dedere* applies, under which the States Parties shall either refer the alleged authors of such breaches to its own courts regardless of their nationality or hand them over for trial to another State Party provided that the latter has made out a prima facie case.<sup>22</sup>

The acts considered as grave breaches are listed in each of the Conventions.<sup>23</sup> The list is supplemented by Article 11 paragraph 4 and Article 85 paragraphs 3 and 4 of Protocol I. They can be categorized as follows:

- Grave breaches common to the four 1949 Geneva Conventions (Articles 50, 51, 130, 147 respectively)
  - wilful killing;
  - torture or inhuman treatment, including biological experiments;
  - wilfully causing great suffering;
  - causing serious injury to body or health;
  - extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
- Grave breaches common to the third and fourth 1949 Geneva Conventions (Articles 130 and 147 respectively)
  - compelling a prisoner of war or a protected civilian to serve in the armed forces of the hostile Power;
  - wilfully depriving a prisoner of war or a protected person of the rights of a fair and regular trial prescribed in the Conventions;
- Grave breaches of the fourth 1949 Geneva Convention (Article 147)
  - unlawful deportation or transfer;
  - unlawful confinement of protected person;
  - taking of hostages;
- Grave breaches of the 1977 Additional Protocol I (Articles 11 and 85 respectively)
  - seriously endangering, by any wilful and unjustified act or omission, physical or

mental health and integrity of persons who are in the power of the adverse Party or who are interned, detained or otherwise deprived of liberty as a result of an armed conflict, in particular physical mutilations, medical or scientific experiments, removal of tissue or organs for transplantation which is not indicated by the state of health of the person concerned or not consistent with generally accepted medical standards which would be applied under similar medical circumstances to persons who are nationals of the Party conducting the procedure and in no way deprived of liberty;

- when committed wilfully and if they cause death or serious injury to body and health;
- making the civilian population or individual civilians the object of attack;
- launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects;
- launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage civilian objects;
- making non-defended localities and demilitarized zones the object of attack;
- making a person the object of attack in the knowledge that he is hors de combat;
- the perfidious use of the distinctive emblem of the Red Cross and Red Crescent or other protective signs;
- when committed wilfully and in violation of the Conventions and the Protocol;
- the transfer by the occupying power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;
- unjustifiable delay in the repatriation of prisoners of war or civilians;
- practices of apartheid and other inhuman and degrading practices involving outrages upon person dignity, based on racial discrimination;
- attacking clearly recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of people and to which special protection has been given, causing as a result extensive destruction thereof when such objects are not located in the immediate proximity of military objectives or used by the adverse party in support of its military effort;
- depriving a person protected by the Conventions or by Protocol I of the rights of a fair and regular trial.

Under paragraph 1 of Article 86, a grave breach may consist of an omission.<sup>24</sup>

It is the responsibility of the States Parties to integrate these provisions in their national criminal legislation to ensure that domestic law enables the repression of all these offences.

Article 28 of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict requires States Parties to prosecute and impose penal or disciplinary sanctions upon whoever commits or orders to be committed a breach of the



Convention. It is further completed by Article 15 of the 1999 Protocol to the 1954 Hague Convention for Protecting Cultural Property, which defines the breaches that States Parties must criminalize.<sup>25</sup> Under Article 17 of the Protocol, the principle *aut judicare aut dedere* is applicable in regard of the most serious violations of the Convention and Protocols.

Under the Geneva Conventions and its APII, serious violations of Article 3 or of Protocol II are not classified as grave breaches. However, the States Parties do have an obligation to put an end to any breaches of IHL. What is more, serious violations of Article 3 common to Geneva Conventions and its Protocol II are regarded as violations that entail criminal responsibility under customary law.<sup>26</sup>

*b) War Crimes under International Criminal Court Statute (Rome Statute)*<sup>27</sup>

The International Criminal Court has jurisdiction over war crimes committed in international armed conflicts as well as non-international armed conflicts. Under the Statute, ‘war crimes’ means (a) grave breaches of the Geneva Conventions of 12 August 1949; (b) other serious violations of the laws and customs applicable in international armed conflict; (c) serious violations of Article 3 common to the four Geneva Conventions; (d) other serious violations of the laws and customs applicable in non-international armed conflict.<sup>28</sup>

The grave breaches referred to in Article 8, paragraph 2 (a) of the Rome Statute, are the grave breaches as defined in the four Geneva Conventions. However, the elements of these crimes are not specified in the Geneva Conventions and they are left to the States Parties’ national legislation. In order to assist the ICC in the interpretation and application of the crimes under its jurisdiction, the Elements of Crimes have been adopted by the Assembly of States Parties.<sup>29</sup> This document can also be used as a reference for national legislation on war crimes, which will contribute to a uniform application of the Conventions.

Article 8 paragraph 2 (b) covers ‘other serious violations of laws and customs applicable in international armed conflict, within the established framework of international law’, which is considered as a compilation of customary international law crimes. Even though it does not refer to any specific treaties, its substance is based on API, the 1907 Hague Regulations, the 1925 Geneva Gas Protocol, the Convention on the Safety of the United Nations and Associated Personnel and treaties related to the use of weapons in armed conflicts.<sup>30</sup>

As for war crimes in non-international armed conflicts, Article 8, Paragraph 2 (c) provides that serious violations of Article 3 common to the Geneva Conventions, which includes murder, mutilation, cruel treatment, torture, outrages upon personal dignity, taking hostage and sentencing or execution without due process, are subject to the jurisdiction of the Court. Therefore, the criminalization of violations of Article 3 has been confirmed and the Elements of Crimes on Article 8 (2) (c) can help States Parties to apply common Article 3 at the national level.

Under Article 8 (2) (e), twelve war crimes (i-xii) are listed for ‘serious violations of the laws and customs applicable in armed conflicts not of an international character’. They are essentially identical to those listed in the same Article (2) (b). Some activities under these provisions are also prohibited by APII.<sup>31</sup>

Thus, in terms of war crimes, especially war crimes committed in non-international armed conflicts, the Rome Statute not only supplements the Geneva Conventions and their Protocols but also takes stock of the development of IHL with regard to individual criminal responsibility. The Elements of Crimes, as well as the future jurisprudence of the ICC, will clarify the concept of war crimes further, which will definitely contribute to the rule of law in time of armed conflicts.

- *Responsibility of Superiors and Commanders*

As noted above, the commander is under the obligation not only to instruct his subordinates in IHL but also to prevent, suppress or to report to competent authorities breaches of IHL.<sup>32</sup> If he fails to do so, the commander may be subject to penal or disciplinary responsibility.<sup>33</sup> It shall be noted that this duty of prevention and control is applicable to both military and civilian commanders, since Article 86 refers to ‘any commander’. It may also be noted that the responsibility of prevention and control in this regard applies to all breaches, and not only the grave breaches. As their competence for the punishment of violations is generally limited to disciplinary or preventive actions, they have a duty to report to the competent authorities in accordance with national legislation where penal sanctions would be required.

The duty of commanders is reflected in Article 28 of the Rome Statute. The Rome Statute, however, makes a distinction between military commanders and civilian superiors in terms of attribution of liability. As for a military commander, the condition for his liability is that he *knew*, or *should have known* that his subordinates are going to commit or have committed crimes, which is applied to both military commander and civilian superiors under Protocol I. As for civilian superiors, the condition for his liability under the Statute is that he *knew* or *consciously disregarded the information*, which clearly indicated that his subordinates are going to commit crimes (emphasis added).

- *Mutual Assistance in Criminal Matters*

Mutual assistance in criminal proceedings related to grave breaches is provided in Article 88 of the API. However, this article serves more as an encouragement of cooperation among States Parties and it neither specifies the procedures nor the scope of assistance and extradition. It only requires that the States Parties provide ‘the greatest measures of assistance’ or cooperate on extradition ‘when circumstances permit’.

The modalities of mutual legal assistance and cooperation on extradition are more developed in the 1999 Protocol to 1954 Hague Convention. Under Article 18 of the Protocol, the serious violations of (a) to (c) shall be regarded as extraditable offences between the Parties and the Protocol may be taken as the legal basis for extradition

for Parties, which make extradition conditional on existence of a treaty. Under Article 19 of the Protocol, the Parties shall afford one another the greatest measure of mutual legal assistance. Under Article 20, serious violations defined by the Protocol are not to be regarded as political offences or grounds for refusal of extradition or mutual legal assistance.

### **Conclusion**

By looking into the major IHL treaties, the measures for their implementation are quite clear. Thus, the States Parties' obligations in that regard are also clear. The best guarantee that IHL will be implemented clearly lies in the respect shown by States for the basic maxim of *pacta sunt servanda*. States should take measures of prevention, control and repression if they really want to alleviate the suffering caused by armed conflicts around the world.

The Rome Statute has strengthened the repression of war crimes for both international and non-international armed conflicts. States Parties to the Rome Statute have no formal obligation to integrate the Statute's war crimes provisions into their domestic law since Article 8 of the Statute aims at specifying crimes only for the purpose of establishing the scope of ICC's jurisdiction. However, these provisions are established 'within the established framework of international law' and thus reflect customary law, under which all States have an obligation to apply. Furthermore, if States want to benefit from the principle of complementarity,<sup>34</sup> they should consider incorporating the ICC crimes into their domestic law for the lack of adequate legislation could lead to the State being 'unwilling or unable' to punish the perpetrators. The case would then be admissible before the ICC.<sup>35</sup>

IHL treaties are quite detailed concerning the measures that should be taken to ensure their respect, whether in terms of measures to prevent their breach or of measures to control their application. Therefore, the real challenges for the implementation of IHL are not so much of a legal nature but derive from the will of governments to effectively adopt implementing measures.

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\* Legal Officer, Regional Delegation for East Asia of the International Committee of the Red Cross (ICRC). The views expressed in this article are those of the author and do not necessarily reflect those of the ICRC.

<sup>1</sup> Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 75 U.N.T.S. 31 (Geneva Convention I); Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea 75 U.N.T.S. 81 (Geneva Convention II); Convention (III) relative to the Treatment of Prisoners of War 75 U.N.T.S. 135 (Geneva Convention III) and Convention (IV) relative to the Protection of Civilian Persons in Time of War 75 U.N.T.S. 287; opened for signature 12 August 1949 (entered into force 21 October 1950) (Geneva Convention IV); (Geneva Conventions).

<sup>2</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 U.N.T.S. 3 (Additional Protocol I).

<sup>3</sup> Additional Protocol I, above note 2 and the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, 1125 U.N.T.S. 609 (Additional Protocol II).

<sup>4</sup> As of January 2012, the 1949 Geneva Conventions have 194 States Parties, which makes them the only

universal treaties. API has 171 States Parties and APII has 166. The 1954 Hague Convention has 123 States Parties its (First) Protocol 100, and its 1999 Protocol has 60.

<sup>5</sup> For a comprehensive survey of required measures under the related treaties, see Dieter Fleck, 'Implementing International Humanitarian Law: Problem and Priorities' in N. Sanjaoba (ed), *A Manual of International Humanitarian Laws* (2004), 350-352.

<sup>6</sup> Geneva Conventions I-IV, above note 2, Articles 48, 49, 128 and 145 respectively; Additional Protocol I, above note 3, Article 84.

<sup>7</sup> For a detailed description, see Mr. Fork Yow Leong's article in this publication.

<sup>8</sup> Geneva Conventions I-IV, Articles 47, 48, 127 and 144 respectively.

<sup>9</sup> It reads: The High Contracting Parties undertake, in time of peace as in time of war, to disseminate the Conventions and this Protocol as widely as possible in their respective countries, and, in particular, to include the study thereof in their programmes of military instruction and to encourage the study thereof by civilian population, so that these instruments may become known to the armed forces and to the civilian population.

<sup>10</sup> Additional Protocol I, above note 3, Article 86 [2].

<sup>11</sup> Jean Pictet (ed), *Commentary to the Geneva Conventions of 12 August 1949*, (1952) Vol. I, 86.

<sup>12</sup> Geneva Conventions, above note 2, common Articles 8, 8, 8 and 9 respectively.

<sup>13</sup> Par. 3 reads: If a Protecting Power has not been designated or accepted from the beginning of a situation referred to in Article 1, the International Committee of the Red Cross, without prejudice to the right of any other impartial humanitarian organization to do likewise, shall offer its good offices to the Parties to the conflict with a view to the designation without delay of a Protecting Power to which the Parties to the conflict consent. For that purpose it may, 'inter alia', ask each Party to provide it with a list of at least five States which that Party considers acceptable to act as Protecting Power on its behalf in relation to an adverse Party, and ask each adverse Party to provide a list of at least five States which it would accept as the Protecting Power of the first Party; these lists shall be communicated to the Committee within two weeks after the receipt of the request; it shall compare them and seek the agreement of any proposed State named on both lists.

<sup>14</sup> Jean Pictet (ed), above note 11, 96.

<sup>15</sup> Ibid, 96.

<sup>16</sup> In this regard, the ICRC can be taken as a control mechanism as well. For the role and activities of the ICRC, please see Mr. Anton Camen's contribution to this publication.

<sup>17</sup> Geneva Conventions, above note 2, Articles 52, 53, 132 and 149 respectively.

<sup>18</sup> According to Article 90 of API, the Commission shall be called 'International Fact-Finding Commission'. When it is established in 1991, the Commission named itself as 'International Humanitarian Fact-Finding Commission'.

<sup>19</sup> <[http://www.ihffc.org/index.asp?page=aboutus\\_general](http://www.ihffc.org/index.asp?page=aboutus_general)>.

<sup>20</sup> According to Article 90 of API, the Commission can only be established when not less than twenty Contracting Parties have agreed to accept its competence.

<sup>21</sup> <[http://www.ihffc.org/index.asp?page=public\\_reports&listfilter=off](http://www.ihffc.org/index.asp?page=public_reports&listfilter=off)>.

<sup>22</sup> Geneva Conventions, above note 2, Articles 49, 50, 129 and 146 respectively.

<sup>23</sup> Geneva Conventions, above note 2, Articles 50, 51, 130, and 147 respectively.

<sup>24</sup> Article 86 (1): The High Contracting Parties and Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so. See also, Pictet Jean (ed), above note 11, 1005.

<sup>25</sup> The defined serious violations include: (a) making cultural property under enhanced protection the object of attack; (b) using cultural property under enhanced protection or its immediate surroundings in support of military action; (c) extensive destruction or appropriation of cultural property protected under the Convention and this Protocol; (d) making cultural property protected under the Convention and this Protocol the object attack; (e) theft, pillage or misappropriation of, or acts of vandalism directed against cultural property under the Convention.

<sup>26</sup> In *Prosecutor v. Dusko Tadic (Jurisdiction)*, 2 October 1995, Case No. IT-94-1-AR72, [86-93].

<sup>27</sup> For comprehensive description of the war crimes under the Rome Statute, especially its relations with provisions of other treaties, see, Antonio Cassese et al (eds), *The Rome Statute of the International Criminal Court: A Commentary* Volume I, (2002), 395-416.

<sup>28</sup> *Rome Statute of the International Criminal Court*, adopted on 17 July 1998, UN Doc.A/CONF.183/9 (entered into force 1 July 2002), (Rome Statute), Article 8.

<sup>29</sup> Ibid, Article 9.

<sup>30</sup> Such as the Brussels Declaration of 1874, Geneva Gas Protocol of 1925 and the United Nations Convention on Conventional Weapons and its Protocols.

<sup>31</sup> Additional Protocol II, above note 3, activities prohibited under Articles 4, 5, 9 11, 12, 13, 16 and 17 are reflected in the related crimes listed under Article 2 (e).

<sup>32</sup> Additional Protocol I, Article 87.

<sup>33</sup> Ibid, Article 86 (2).

<sup>34</sup> Rome Statute, above note 28. According to paragraph 10 of the Preamble and Article 1 of the Rome Statute, the International Criminal Court (ICC) should be complementary to national criminal jurisdiction. According to Article 17, a case is only admissible to the ICC provided that the State which has jurisdiction over it is unwilling or unable to punish the perpetrators.

<sup>35</sup> In the Report of the International Commission on Darfur to the Secretary-General (S/2005/60), the Commission concludes that the Sudanese criminal laws do not adequately proscribe war crimes and crimes against humanity, which, with other legislations granting impunity, are evidence of their unwillingness or incapability to punish the perpetrator. See page 120.

# SOURCES OF PROTECTION FOR THE HUMAN PERSON IN ARMED CONFLICT: CLARIFYING THE TERMINOLOGY

*Professor Suzannah Linton*

## **Introduction**

This contribution aims to provide a necessary clarification of the common terms used to describe the sources of the rules that can protect the human person in armed conflict. There is confusion, as many of the same terms are used in different ways, and they mean different things to different people. Academic courses that are described as being about one thing, sometimes actually teach another thing. This understandably causes great confusion for students and the layman, and also creates pedagogical difficulties for those of us who teach.

One basic mistake that is persistently made is that everything to do with the human person or making the world a more humane place is about ‘human rights’. ‘Human rights’ has a particular meaning and the approach used in the promotion and protection of the human person under ‘international human rights law’ is distinct from the other related areas of international law, but it is undeniably part of the overarching discipline of international law. Then, another common mistake is to regard ‘international humanitarian law’ as the same thing as ‘international criminal law’, and to think that violations of those rules are automatically ‘human rights violations’. They are not. Yet, there is no doubt that there is cross-pollination across these fields, stemming perhaps from inherent linkages between certain common concepts. They are all rooted in ideas about humanity, the worth of the human person and the need to ensure protection from the arbitrary or unlawful conduct of States, participants in armed conflict, and sometimes to protect from other individuals. In the International Criminal Tribunal for the former Yugoslavia’s landmark *Kunarac* decision, the Trial Chamber observed that we should be mindful of the specificities of each body of law, and should be ‘wary not to embrace too quickly and too easily concepts and notions developed in a different legal context...notions developed in the field of human rights can be transposed in international humanitarian law only if they take into consideration the specificities of the latter body of law<sup>1</sup>’.

## ***The International Law of Armed Conflict***

The laws governing armed conflict have evolved, in line with the ad hoc and unregulated nature of its underlying discipline, i.e. public international law, in a disorganised way. Some of the rules are enshrined in treaties and some are reflected in customary international law or peremptory norms (see below). There are several bundles of rules applying to different situations, and much terminology is inconsistently and sometimes incorrectly used in the literature, including in judgments of courts of law.

The international law of armed conflict (ILAC) is the body of disparate international rules that governs situations of armed conflict. It is sometimes called ‘international



humanitarian law’, including by the International Court of Justice, although that term should refer to ‘Geneva law’ only (see below). The ILAC is sourced in treaties, customary international law, general principles of international and peremptory norms, and there is much secondary material affirming the existence and content of these rules. One commentator asserts that this was

based ‘first and foremost on the reciprocal expectations of two parties at war and on notions of chivalrous and civilised behaviour. It did not emerge from a struggle of rights claimants, but from a principle of charity – “*inter arma caritas*”’.<sup>2</sup>

The ILAC has two primary divisions, and within that several more subdivisions. These are a result of the long historical evolution of the law and the changing nature of the international system:

#### a) *The Type of Conflict*

The ILAC contains different rules for international armed conflict (IAC) and for non-international armed conflict (NIAC). And, within NIAC, there are two standards for measuring armed conflict leading to different legal regimes being engaged: one is known as the ‘Common Article 3 standard’ and the other the ‘Additional Protocol II standard’. The treaty-based rules of IAC are considerably more developed than those that apply in NIAC, although the recent ICRC study of customary international law argues that the gap is fast closing.<sup>3</sup>

#### b) *The Object of Regulation*

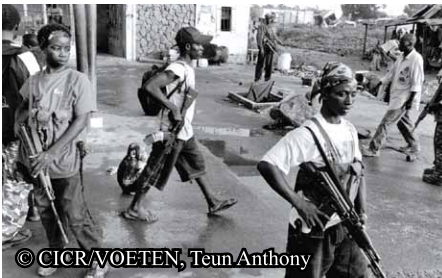
The ILAC comprises rules that regulate combat operations (Hague law) and rules that protect vulnerable categories of person in armed conflict (Geneva law). Hague law is sometimes called ‘the means and methods of war’ or the ‘laws and customs of war’, whereas the common term for Geneva law is ‘international humanitarian law’. Both bodies of law can be traced back in time. Modern Hague law is rooted in the series of treaties that were adopted in 1907 in The Hague, such as Regulations Annexed to Hague Convention IV<sup>4</sup> that governs the conduct of hostilities on land, and more modern treaties such as that governing anti-personnel mines.<sup>5</sup> Modern Geneva law is rooted in the Geneva Conventions of 1929<sup>6</sup> and then 1949 (Geneva Conventions 1949) which have effectively replaced them through universal ratification;<sup>7</sup> these are about protecting the vulnerable in armed conflicts.

This presents the classical and traditionalist position. The ILAC has nothing to do with peacetime, nor anything to do with giving or recognising anyone’s ‘human rights’. Sovereign States are the duty bearers and right holders. As discussed below, the situation has evolved since then.

### *International Human Rights Law*

International human rights law (IHRL) as we know it today is rooted in the Charter of the United Nations (UN Charter)<sup>8</sup> and the Universal Declaration of Human Rights (UDHR),<sup>9</sup> codified into substantive norms in treaties such as the International Covenants on Civil and Political Rights (ICCPR),<sup>10</sup> and on Economic Social and Cultural Rights (ICESCR),<sup>11</sup> the Convention against Torture and Cruel Inhuman and Degrading Treatment (CAT)<sup>12</sup> and the regional human rights treaties, such as the European Convention on Human Rights (ECHR)<sup>13</sup> and the American Convention on Human Rights (ACHR).<sup>14</sup> IHRL is also sourced in customary international law, general principles of international law and peremptory norms. There is much secondary material, such as judgements of international and domestic courts and tribunals, affirming the existence and content of these rules.

As one commentator notes, the ‘rationale for modern human rights is to find a just relationship between the state and its citizens, to curb the power of the State vis-à-vis the individual’.<sup>15</sup> The human rights doctrine is undeniably transformative, it is motored by certain philosophical and ideological approaches, and the aim is to transform States and human society so that there is a better life for all. This is particularly clear in the European system, rooted as it is in the Council of Europe, which emphasises democracy, the rule of law and human rights as pillars of post-war European society. There is nothing transformative in the ILAC.<sup>16</sup> The human rights treaties talk of ‘rights’, individuals having rights that are exercised against the State, and which require the State to take measures to respect, protect and promote. The human rights doctrine recognises differences in these rights, notably that some rights can legitimately be restricted by the State, whereas others cannot be impinged on at all. It also recognises that times of emergency, including armed conflict, may warrant States taking exceptional measures of derogation from regular international obligations under human rights treaties. Some of these treaties specifically refer to armed conflict situations.



In strong contrast to the ILAC, there is a complex web of mechanisms set up to monitor the implementation of IHRL treaties, ranging from the Human Rights Committee to the European Court of Human Rights. These bodies are engaged in matters of State responsibility, not individual accountability. The relative willingness of States to consent to such external scrutiny of their IHRL compliance, as compared with ILAC, is surprising. IHRL compliance can involve very intrusive scrutiny of a State’s conduct, best demonstrated by the proceedings of the European system, including in the judgement implementation stage. Here, the Committee of Ministers works with States, sometimes requiring them to carry out significant structural changes. The European jurisprudence has been particularly progressive in pushing the application of the ECHR in armed conflict, without application of the ILAC which has been argued by many, including the International



Court of Justice and the Human Rights Commission, to be the *lex specialis* and therefore to be applied preferentially, in armed conflict.<sup>17</sup> The human rights bodies generally take the view that in principle, IHRL applies at all times to protect those within the power of a State, subject to certain legal limitations, and so their mandate of scrutiny under the applicable human rights treaty continues to exist in armed conflict.<sup>18</sup> This is a view that has not gone unchallenged by some States. For example, Israel and the USA are particularly strong opponents of the idea that the ICCPR applies in armed conflict, and that it can apply outside the territory of a State. They have both been engaged in disputes with the Human Rights Committee on this matter.<sup>19</sup> The United States is engaged in a tussle that is at time of writing 8 years old with the Inter-American Commission of Human Rights over its authority to scrutinise US conduct at the Guantanamo Bay detention camp.<sup>20</sup>

### ***Combining both ILAC and IHRL***

There are a number of more recent treaties that are of a ILAC nature covering armed conflict exclusively, yet they draw in human rights concepts and approaches. Several notable examples are Additional Protocol I,<sup>21</sup> Additional Protocol II,<sup>22</sup> the Convention on the Rights of the Child and its additional protocol on the participation of children in armed conflict<sup>23</sup> and the Convention against Enforced Disappearances.<sup>24</sup> Additional Protocol I is exceptional for being a treaty clearly within the ILAC, but straddling Hague and Geneva law, and also referring expressly to certain ‘rights’. Some of those are not ‘human rights’ and others are. For example, the reference in Article 43(2) to the ‘right to participate directly in hostilities’, held by combatants, is not a ‘human right’ but an entitlement in the ILAC. On the other hand, the ‘right’ to a fair trial and due process in Article 75 clearly is a ‘human right’, one that is enshrined in the UDHR, the ICCPR, and regional treaties such as the ECHR.

### ***International Criminal Law***

International Criminal Law (ICL) includes a raft of international agreements on issues such as terrorist bombings,<sup>25</sup> terrorist financing,<sup>26</sup> hostage taking,<sup>27</sup> slavery,<sup>28</sup> money-laundering<sup>29</sup> and drug trafficking,<sup>30</sup> including inter-State cooperation in their suppression. These can apply in times of peace and in armed conflict, and some are also sourced in customary international law.

Only some of these treaties in the field of international criminal law concern ‘human rights’. And, where they do concern ‘human rights’, it must be noted that not all ‘human rights violations’ are ‘international crimes’, similar to the way that not everything to do with the human person is about ‘human rights’. Torture and disappearances are ‘international crimes’. They are instances of criminal acts that are rooted in prohibitions that exist in ‘international human rights law’, and in domestic law. It should be noted that they also have roots in the ILAC (torture is expressly prohibited, disappearance obligations relate to the ‘missing’). On the other hand, the Genocide Convention<sup>31</sup> is an example of a treaty that concerns the human person but is not a ‘human rights treaty’. It is very different from the regional and universal human rights treaties. Nor does it fall within the ILAC. The International Court of Justice has described it as being

‘humanitarian’.<sup>32</sup> We can obviously see its provisions as concerning human life and the right of protected groups to live, but the treaty handles the matter of genocide in a way totally different from IHRL. It is about international criminal prohibition of certain conduct and the consequences thereof, and the obligations that this places on States including in relation to individuals.

Crimes against humanity are crimes prohibited in customary ICL. They are not rooted in either IHRL or ILAC, but in the same fundamental notions of humanity that underpin both. The prohibition is of widespread or systematic attacks against the civilian population, in peace or wartime. This can be done through certain ways, such as killing, torture and ‘persecution’. It is here that IHRL can come in, for international tribunals have interpreted what ‘persecution’ as a crime against humanity means by reference to IHRL. For example, in *Kupreskić*, a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia defined persecution as ‘a gross or blatant denial, on discriminatory grounds, of a fundamental right, laid down in international customary or treaty law, reaching the same level of gravity as the other acts prohibited as crimes against humanity’.<sup>33</sup>

In an armed conflict, particularly serious breaches of the ILAC can amount to international crimes, and fall to be dealt with under ICL. They are described in many ways, including ‘War Crimes’, ‘Grave Breaches of the Geneva Conventions 1949’, ‘Violations of Common Article 3’ and ‘Violations of the Laws and Customs of War’. They do not always concern the human person, and there are differences between them. In understanding some of the concepts that are included, such as torture, the courts and tribunals dealing with international criminal law do look to ILAC as well as IHRL. For example, in relation to understanding torture as a war crime, Trial Chambers of the International Criminal Tribunal for the former Yugoslavia in *Delalić*, *Furundžija* and *Kunarac* have examined international jurisprudence on torture in IHRL.<sup>34</sup> The *Kunarac* Trial Chamber observed how the tribunal had often relied on human rights law:

Because of their resemblance, in terms of goals, values and terminology, such recourse is generally a welcome and needed assistance to determine the content of customary international law in the field of humanitarian law. With regard to certain of its aspects, international humanitarian law can be said to have fused with human rights law.<sup>35</sup>

### ***Obligations arising outside of Treaties – Customary International Law and Obligations owed erga omnes***

Many of the norms in the ILAC, IHRL and ICL are recognised as being ‘customary’. This is a reference to one of the classical sources of international law, which is ‘international custom, as evidence of a general practice accepted as law’.<sup>36</sup> Customary international law is the result of constant and uniform usage accepted as law.<sup>37</sup> It looks at what States say and do, and exists outside of treaty obligations although not entirely in isolation. Customary international law is derived from the consistent practice of States accompanied by *opinio juris* (a belief that there is a legal obligation to do or not to do the act in question). The International Court of Justice’s *North Sea Continental Shelf*

case sets out the modern standard, where to identify if such a rule exists, we look for two elements: State practice and *opinio juris*.<sup>38</sup> The process of identification is of course far more difficult than that brief statement suggests, but that is the approach that is used. It must be underlined that customary international law is law. It is binding regardless of whether a State has given explicit consent to be bound.

In some cases, rules may be so fundamental to the international order that they go beyond custom. They are called ‘peremptory norms’.<sup>39</sup> Such norms will impose obligations *erga omnes*, which means that each and every State owes the international community as a whole the obligation to respect the norm.<sup>40</sup> The International Court of Justice prefers to use the term ‘intransgressible norms’. This emphasises that such norms must not be broken in any circumstances, unlike customary rules which can be ousted by entering into a treaty or through persistent objection. For example, the prohibition against genocide is a peremptory norm. It is an obligation that is owed *erga omnes* and it is intransgressible. A State can never escape the prohibition against genocide by way of treaty or persistently objecting to the rule.

There is a core of norms widely accepted as being of such significance:

- The International Court of Justice in the *Barcelona Traction* case famously observed that obligations *erga omnes* are owed to all States and that they derived for example, ‘from the outlawing of acts of aggression and of genocide, and also from the principles and rules concerning the protection of the human person, including protection from slavery and racial discrimination’.<sup>41</sup>
- In 2008, the Court of Final Instance of the European Court of Justice referred to the ‘superior rules of international law falling within the ambit of *jus cogens*’, singling out for the purposes of that case, ‘the mandatory provisions concerning the universal protection of human rights, from which neither the Member States nor the bodies of the United Nations derogate because they constitute ‘intransgressible principles of international customary law’.<sup>42</sup>
- Other decisions of the International Court of Justice in *Namibia*,<sup>43</sup> *Western Sahara*<sup>44</sup> and *East Timor* (here the court specifically stated that self-determination is one of the essential principles of contemporary law, is *erga omnes*, that is, owed to all and that the East Timorese had a right to self-determination)<sup>45</sup> have elevated the right to self-determination to this level.
- In the *Barcelona Traction* case, the International Court of Justice confirmed the prohibition of genocide as a peremptory norm of international law,<sup>46</sup> apparently going beyond its finding in the *Advisory Opinion on Reservations to the Genocide Convention*, where it held that the principles underlying the Convention are principles that are recognised by civilised nations binding on States, even without any conventional obligation (in other words, customary international law).<sup>47</sup> The intransgressible nature of the prohibition was most recently confirmed in *Bosnia v. Serbia*.<sup>48</sup>
- Several international and domestic courts recognise the prohibition against torture as being customary, peremptory in nature, or an obligation owed *erga omnes*.<sup>49</sup>
- Domestic courts, such as in the USA, have recognised prohibitions of certain acts as

*jus cogens* or peremptory. For example, in *Doe v. UNOCAL*, the Court of Appeals for the Ninth Circuit held that forced labour, torture, murder and slavery were violations of *jus cogens*;<sup>50</sup> and in *Xuncax v. Gramajo*, the District Court of Massachusetts held that summary execution, disappearance, torture and arbitrary detention were prohibited as peremptory norms.<sup>51</sup>

- Fair trial and due process norms are subject to some controversy. It is often argued that they are peremptory, given that even if they can be derogated from in an emergency under IHRL, there is a minimum core that is preserved in the ILAC, including in Common Article 3 which the International Court of Justice has held in *Nicaragua* to be the minimum standard in any armed conflict.<sup>52</sup> Advisory Opinions of the Inter-American Court of Human Rights affirm the fundamental nature of fair trial and due process guarantees, even in emergency.<sup>53</sup> The *Tadić* Trial Chamber at the International Criminal Tribunal for the former Yugoslavia and the *Norman* Trial Chamber at the Special Court for Sierra Leone considered Article 14(5) of the ICCPR to be part of *jus cogens*.<sup>54</sup> Going down the scale, the European Court of Justice – in the *Kadi* First Instance case – considered procedural due process guarantees to be not quite *jus cogens*, but a ‘lesser norm’ of significance.<sup>55</sup> Most controversial of these cases is the finding of the *Gbao* Trial Chamber at the Special Court for Sierra Leone. In an unappealed decision, it held that ‘it has not been established that the right of the Accused to a fair trial has become part of customary international law’.<sup>56</sup>
- *There is international jurisprudence*, such as in the *Nuclear Weapons Advisory Opinion*<sup>57</sup> and the ICTY’s *Kupreskić*<sup>58</sup> case, that ‘humanitarian law’ is peremptory. In 1963, the International Law Commission suggested that examples of such norms would include the principles of the UN Charter prohibiting unlawful use of force, international laws that prohibit the performance of any other criminal act under International Law and international laws that require States to cooperate in the suppression of certain acts such as slavery, piracy or genocide.<sup>59</sup> In fact, the International Law Commission in its 2001 report confirms that it has treated ‘humanitarian law’ as peremptory.<sup>60</sup>

## Conclusion

Conceptual clarity is essential to effective understanding of the substantive rules that protect the human person in armed conflict, as well mastering how to use the different systems effectively. The author hopes that this brief introduction to the different terminology employed in the various humanitarian approaches will have made a small contribution in that respect.

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The author thanks Ernest Ng for helping with the footnotes.

<sup>1</sup> *Prosecutor v Kunarac et al.*, 22 February 2001, Case No. IT-96-23-T&IT-96-23/1-T, Judgment, (hereafter ‘*Kunarac et al.* Trial Judgement’) [465].

<sup>2</sup> Cordelia Droege, ‘Elective Affinities? Human Rights and Humanitarian Law’, (2008) 90 *International Review of the Red Cross*, 501-548, 503.

<sup>3</sup> Jean-Marie Henckaerts and Louise Doswald-Beck (eds), (2005) 1 *Customary International Humanitarian Law* Vol. 1 at 359. The authors claim, not without challenge, that the rules in NIAC and IAC are now almost the same, with most of the 161 alleged customary rules also said to apply in NIAC.

<sup>4</sup> *Hague Convention (IV) Respecting the Laws and Customs of War on Land* (with annexed Regulations), Oct. 19, 1907, [1910] U.K.T.S. 9, [1907] Cmd. 5030.

- <sup>5</sup> *Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Mines and on Their Destruction* 1342 U.N.T.S. 137, 19 I.L.M. 1523, (entered into force 1 March 1999).
- <sup>6</sup> *Convention Relative to the Treatment of Prisoners of War*, 118 L.N.T.S. 343, (entered into force 19 June 1931).
- <sup>7</sup> *Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* 75 U.N.T.S. 31; *Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* 75 U.N.T.S. 81; *Convention (III) relative to the Treatment of Prisoners of War* 75 U.N.T.S. 135 and *Convention (IV) relative to the Protection of Civilian Persons in Time of War* 75 U.N.T.S. 287; opened for signature 12 August 1949 (entered into force 21 October 1950).
- <sup>8</sup> *Charter of the United Nations*, adopted 26 June 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153 (entered into force 24 October 1945).
- <sup>9</sup> *Universal Declaration of Human Rights*, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (1948).
- <sup>10</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 U.N.T.S. 171 (entered into force 23 March 1976).
- <sup>11</sup> *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 U.N.T.S. 3, (entered into force 3 January 1976).
- <sup>12</sup> *Convention Against Torture and Other Cruel, Inhuman Or Degrading Treatment Or Punishment*, art 15, opened for signature 10 December 1984, 1465 U.N.T.S. 85 (entered into force 26 June 1987).
- <sup>13</sup> *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 U.N.T.S. 222 (entered into force 3 September 1953), amended by 14 protocols.
- <sup>14</sup> *American Convention on Human Rights*, opened for signature 22 November 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (entered into force 18 July 1978).
- <sup>15</sup> Droege, above note 2.
- <sup>16</sup> There is, however, an evolving discussion on ‘transformative’ occupations in Adam Roberts, ‘What is Military Occupation?’ (1984) 55 *British Year Book of International Law* 249; Adam Roberts, ‘Transformative Military Occupations: Applying the Laws of War and Human Rights’, 100 *American Journal of International Law*. Roberts has scrutinised what is described as ‘transformative occupations’, meaning those occupations which go beyond the parameters of the ILAC’s Hague regulations (which require minimal tampering with the underlying system, and maintenance of the status quo) in their impact on the existing system applied in the occupied territory, but which do not go so far as annexation into the occupying State. In this process of transformation of the occupied territory, IHRL plays an active role. Eyal Benvenisti has also found that in practice, States that have occupied territory have expanded their powers over time to cover ‘almost all the areas in which modern governments assert legitimacy to police, a far cry from the turn of the century laissez-faire conception of minimal governmental intervention’. See Eyal Benvenisti, *The International Law of Occupation* (2004), 6.
- <sup>17</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. Rep. 225, (8 July 1996) [25]; *Legal Consequences of the Construction of a Wall*, Advisory Opinion, 2004 I.C.J. Rep. 136, (9 July 2005) [106]; *Protection of the human rights of civilians in armed conflicts*, Comm. H.R. Res. 2005/63, U.N. Doc. E/CN.4/RES/2005/63 (20 April 2005).
- <sup>18</sup> It should also be noted that not all human rights bodies are as dogged as the European Court, and there is also a debate on whether these bodies can look outside, at the rules contained in the ILAC, to determine if States have behaved lawfully in armed conflict.
- <sup>19</sup> See, for example, Human Rights Committee, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Third Periodic Reports of States Parties due in 2003 – United States of America*, e.g. at 15, 20, U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (28 November 2005); and Human Rights Committee, *Concluding Observations on Israel*, at 10, U.N. Doc. CCPR/C/79/Add.93 (18 August 1998).
- <sup>20</sup> See, for example, *Guantanamo Bay Precautionary Measures Communication of March 12, 2002 from IACHR President Juan E. Méndez to US Secretary of State Colin Powell*, Ann. Rep. of the Inter-Am. C.H.R., OEA/Ser.L/V/II.117 Doc. 1 rev. 1 (Mar. 7, 2003), reprinted in 96 *American Journal of International Law* 730 (2002) and United States Government, *United States (U.S.): Response of the United States to Request for Precautionary Measures – Detainees in Guantanamo Bay, Cuba*, (15 April 2002), 41 I.L.M. 1015 (2002).
- <sup>21</sup> *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts* 1125 U.N.T.S. 3, opened for signature 8 June 1977 (entered into force 7 December 1978).
- <sup>22</sup> *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims*

of *Non-International Armed Conflicts* 1125 U.N.T.S. 609 opened for signature 8 June 1977 (entered into force 7 December 1978).

- <sup>23</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 U.N.T.S. 3 (entered into force 2 September 1990); Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts, opened for signature 25 May 2000, G.A. Res. 54/263, Annex I, 54 U.N. GAOR Supp. (No. 49) at 7, U.N. Doc. A/54/49, Vol. III (2000) (entered into force 12 February 2002)
- <sup>24</sup> *International Convention for the Protection of All Persons from Enforced Disappearance*, opened for signature 20 December 2006, G.A. res. 61/177, U.N. Doc. A/RES/61/177 (2006) (not yet in force).
- <sup>25</sup> See, for example, *International Convention for the Suppression of Terrorist Bombings*, opened for signature 15 December 1997, G.A. Res. 164, U.N. GAOR, 52nd Sess., Supp. No. 49, at 389, U.N. Doc. A/52/49 (1998) (entered into force 23 May 2001).
- <sup>26</sup> See, for example, *International Convention for the Suppression of the Financing of Terrorism*, opened for signature 9 December 1999, G.A. Res. 109, U.N. GAOR, 54th Sess., Supp. No. 49, U.N. Doc A/54/49 (Vol. I) (1999) (entered into force 10 April 2002).
- <sup>27</sup> See, for example, *International Convention Against the Taking of Hostages*, opened for signature 17 December 1979, 1316 U.N.T.S. (entered into force 3 June 1983).
- <sup>28</sup> See, for example, *Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention*, opened for signature 15 September 1926, 60 L.N.T.S. 253 (entered into force 9 March 1927); as amended by Protocol amending the Slavery Convention, opened for signature 23 October 1953, 182 U.N.T.S. 51 (entered into force 7 July 1955).
- <sup>29</sup> See, for example, *United Nations Convention against Corruption*, Adopted October 31, 2003, U.N. Doc A/58/422 (entered in force 14 December 2005)
- <sup>30</sup> See, for example, *United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, opened for signature 20 December 1990, U.N. Doc. E/CONF.82/15, 28 I.L.M. 797 (1989) (entered into force 11 November 1990).
- <sup>31</sup> *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature 9 December 1948, 78 U.N.T.S. 277 (entered into force 12 January 1951).
- <sup>32</sup> *Reservations to the Convention on the Prevention and Punishment of Genocide (Advisory Opinion)*, 1951 I.C.J. Rep. 15, 23 (28 May).
- <sup>33</sup> *Kunarac et al*, Trial Judgement, above note 1.
- <sup>34</sup> *Prosecutor v Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo*, 16 November 1998, Case No. IT-96-21-T, Trial Chamber Judgment, 21 July 2000, Case No. I IT-95-17/1-T; *Prosecutor v Furundžija*, Trial Chamber Judgment; *Kunarac et al*, Trial Chamber Judgement, above note 1.
- <sup>35</sup> *Kunarac et al*. Trial Chamber Judgement, above note 1. The Chamber noted that this does not equal interchangeability, and that human rights notions could only be transposed if they took into consideration the specificities of the IHL [471].
- <sup>36</sup> *Statute of the International Court of Justice*, Art. 38(1), annexed to the United Nations Charter.
- <sup>37</sup> *Asylum Case (Colombia / Peru)* [1950] I.C.J. Rep. 266, at 276-277.
- <sup>38</sup> *North Sea Continental Shelf (F.R.G./Den.; F.R.G./Neth.)*, [1969] ICJ Rep. 3.
- <sup>39</sup> *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, art 53, 1155 U.N.T.S. 331 (entered into force 27 January 1980). Peremptory norms are norms accepted and recognised by States as norms from which no derogation is permitted and which can be modified only by subsequent norms of general International Law having the same character. This means that all States therefore have a legitimate interest in the adherence to such norms. See, Lauri Hannikainen, *Peremptory Norms in International Law: Historical Development, Criteria, Present Status* (1988) 4 (The peremptory norm protects ‘overriding interests and values of the international community of States’). This concept is preserved in the Articles on Responsibility of States for Internationally Wrongful Acts, [2001] II *Year Book of International Law Commission* 26, noted by and annexed to G.A. Res. 56/83, U.N. Doc. A/REA/56/83 (12 December 2001). See also Aleksander Orakhelashvili, *Peremptory Norms in International Law* (2006).
- <sup>40</sup> *Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium v Spain)*, Second Phrase, 1970 I.C.J. Rep. 3, [33] (hereafter ‘*Barcelona Traction Judgement*’).
- <sup>41</sup> *Ibid*. See also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v U.S.A.)*, 1986 I.C.J. Rep. 13, [218] (hereafter ‘*Nicaragua Judgement*’).
- <sup>42</sup> *Kadi v Council of the European and Commission of the European Communities*, (2005) Case T-315/01, E.C.R. II-3649, [231].

- <sup>43</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion)*, 1971 I.C.J. Rep. 16, 31.
- <sup>44</sup> *Western Sahara (Advisory Opinion)*, [1975] I.C.J. Rep. 12.
- <sup>45</sup> *East Timor (Portugal v Australia)*, [1995] I.C.J. Rep. 90.
- <sup>46</sup> *Barcelona Traction Judgement*, above note 40, 32.
- <sup>47</sup> *Reservations to the Convention on Genocide (Advisory Opinion)*, [1951] I.C.J. Rep. 15, 23.
- <sup>48</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzegovina v. Serbia & Montenegro)* (Judgment of 26 February 2007) I.C.J. Rep. 91.
- <sup>49</sup> See, *Prosecutor v Furundžija*, Trial Chamber Judgment, 134; *Kunarac et al* Trial Chamber Judgement, above note 1, 454. See also; *Filártiga v Peña-Irala*, 630 F.2d 876, text accompanying notes 16-17 (2d Cir. 1980) ('we conclude that official torture is now prohibited by the law of nations. The prohibition is clear and unambiguous, and admits of no distinction between treatment of aliens and citizens'); *R. v Bow Street Metropolitan Stipendiary Magistrate Ex p. Pinochet Ugarte* (No.3), [2000] 1 A.C. 147, 198 (Lord Browne-Wilkinson), 246 (Lord Hope), 261 (Lord Hutton) (H.L.); *Al-Adsani v United Kingdom*, (2002) App. No. 35763/97, 34 Eur. H.R. Rep. 11, [30]; *Maritza Urrutia Case*, (2003) Inter-Am. Ct. H.R. (Ser. C) No. 103, [92].
- <sup>50</sup> *John Doe I, et al., v UNOCAL Corp., et al.*, 395 F.3d 932 (9 Cir. 2002).
- <sup>51</sup> *Xuncax v Gramajo*, 886 F.Supp. 162 (D.Mass., 1995).
- <sup>52</sup> *Nicaragua Judgement*, above note 41, [218].
- <sup>53</sup> *Habeas Corpus in Emergency Situations* (Articles 27(2), 25(1) and 7(6) of the American Convention on Human Rights), 96 I.L.R. 392, 27-29 (Inter-Am. C.H.R., 1987); *Judicial Guarantees in the States of Emergency* (Articles 27(2), 25 and 8 of the American Convention on Human Rights), 96 I.L.R. 405, [23-25] (Inter-Am. C.H.R., 1987).
- <sup>54</sup> See e.g. *Prosecutor v Tadić*, (2001), Case No. IT-94-1-AR77, Appeal Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, 27 February 2001, 3 ('Considering moreover that Article 14 of the International Covenant reflects an imperative norm of international law to which the Tribunal must adhere' (emphasis added)); *Prosecutor v Sam Hinga Norman, Morris Kallon and August Gbao*, (2003) Case Nos. SCSL-2003-07-PT, SCSL-2003-08-PT & SCSL&2003-09-PT, Appeal Decision on the Application for a Stay of Proceeding and Denial of Right to Appeal, (4 November 2003) 19 ('...the very agreement by the UN to the terms of Article 20 of the Special Court Statute affords some evidence that [Article 14(5) of the ICCPR] has indeed reached the status termed by international lawyers 'jus cogens'').
- <sup>55</sup> CFI, Case T-315/01, *Kadi v Council and Commission* [2005] ECR II-3649; CFI, Case T-306/01, *Yusuf and Al Barakaat International Foundation v Council and Commission* [2005] ECR II-3533; *Kadi and Al Barakaat International Foundation v. Council of the European and Commission of the European Communities*, [2008] ECR I-6351.
- <sup>56</sup> *Prosecutor v Gbao*, (2003), Case No. SCSL-03-09-PT, Decision on the Prosecution Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 10 October 2003, 41.
- <sup>57</sup> *Nuclear Weapons Advisory Opinion*, above note 17, [79].
- <sup>58</sup> *Prosecutor v. Kupreskić et al*, (2000), Case No. IT-95-16-T, Judgment, 14 January 2000, [520].
- <sup>59</sup> U.N. International Law Commission, 'Second Report on the Law of Treaties', Sir Humphrey Waldock, Special Rapporteur, U.N. Doc. A/CN.4/156; A/CN.4/156 Add.1-3, reprinted in [1963] II Year Book of International Law Commission 36, 52-3.
- <sup>60</sup> U.N. International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, [2001] II Year Book International Law Commission 26, 113 ('In the light of the description by ICJ of the basic rules of international humanitarian law applicable in armed conflict as 'intransgressible' in character, it would also seem justified to treat these as peremptory').

# EVOLVING INTERNATIONAL APPROACHES TO HUMAN RIGHTS IN ARMED CONFLICT

*Professor Suzannah Linton*

## **Introduction**

As international law evolves towards becoming a more advanced system of regulation of international society, it is widely recognised that unregulated growth is creating a situation of fragmentation.<sup>1</sup> This is a structural problem, stemming from the fact that there is no hierarchy in the international system, that there is no central lawmaker or law enforcer, and from the anarchic way in which international law develops and changes. The discipline should in fact be unified by fundamental principles that cut across the growing sub-sectors, drawn from the common discipline of general international law. But the experience is that there is invariably mutation, even of rules such as treaty interpretation, as the rules adjust to being used in a particular framework.

This contribution studies one area where the rules were once regarded as distinct, but which are now recognised as being clearly intertwined although not entirely, and not always. The system is not yet settled and remains in evolution. Before there was international human rights law (IHRL), there was the international law of armed conflict (ILAC), which only came into play in situations of armed conflict (which in those days, meant international armed conflict). After 1945, the brave new world of the United Nations introduced human rights as a central issue in international affairs, and the Universal Declaration of Human Rights (UDHR)<sup>2</sup> set out a vision of rights applicable to all persons, without including any distinction of peace or armed conflict. Over the years, the debate has evolved from the question of whether IHRL can apply in armed conflict, which has clearly been answered in the affirmative. The current uncertainties concern the precise nature of the interaction between IHRL and ILAC, how to manage that interaction, the degree to which the complex web of human rights supervisory bodies can actually engage with matters of armed conflict and whether the human person is actually better protected by maintaining different bodies of law, or promoting merged approaches, and using IHRL in armed conflict. There is also the complication of international criminal law (ICL), which is distinct from, yet in some areas rooted in the ILAC, as well as being closely linked to IHRL. But, the mere fact of overlap does not mean that there is a ‘clash of norms’; that only occurs when the norms lay down incompatible standards.

There are different types of situations to which the ILAC can apply. It includes many levels of nuance and distinction within umbrella categories. There is a scale of violence from whence ILAC can apply, ranging from non-international armed conflicts (NIAC) situations described as ‘Common Article 3’ to ‘Additional Protocol II’ to NIACs that are internationalised by the involvement of another State to classic international armed conflicts between sovereign States to national liberation struggles to which the rules of international armed conflict apply, to military occupations of subjugated territory. It is at



the outermost edges that IHRL becomes most relevant, that is, in those situations which most closely resemble situations of ‘peace’, where civilian life is closest to normality. This means the ‘Common Article 3’, ‘Additional Protocol II’ and military occupation situations. As will be seen shortly, these are in fact the situations where there is the most scrutiny by human rights bodies and the most significant jurisprudence. One finds examples in the work of the European Court of Human Rights in the Cyprus cases<sup>3</sup>, the Southeast-Turkey cases<sup>4</sup> and the Chechnya cases.<sup>5</sup> There is also, for example, the approach of the Inter-American Commission on Human Rights in the *Tablada* case<sup>6</sup> and in the matter of the US detention centre at Guantanamo Bay<sup>7</sup>.

Purely for reasons of lack of space, the following overview of the international evolution of human rights in armed conflict is limited. It is unable to consider the complex and critical issue of what body of law States actually instruct their officials, agents and those under their control in armed conflict situations to follow, and also national jurisprudence developed by domestic courts, both of which are major indicators of State practice. Nor is it able to enter into substantive consideration of the many ongoing debates and the important jurisprudence being developed by international human rights treaty bodies and the regional human rights courts, as well as international criminal courts and tribunals, on protection of the human person in armed conflict.

### *Evolutions in Approach: Towards the Applicability of Human Rights in Armed Conflict*



Armed conflict has traditionally been governed by the ILAC and the protection of human rights has traditionally been regarded as a doctrine applicable in peacetime, even though the UDHR makes no such distinction. The philosophical approach is different, the rules are structured differently, and the protections are differently implemented. There are actions that can be done under the ILAC that are not

lawful under IHRL. An example is detention of prisoners of war in an armed conflict until the close of hostilities. As the joint United Nations special procedures report on the detainees at Guantanamo Bay observed, in IHRL, this would be arbitrary detention, but it is lawful under the ILAC.<sup>8</sup>

But, the IHRL-ILAC distinction has been eroded over the years, with the recognition that people continue to have human rights in armed conflict, and that IHRL protects those rights. Conceptually, both bodies of law are recognised as aimed at protection of the human person. Both, for example, are concerned with non-discrimination, due process and judicial guarantees, security of person and freedom from torture or cruel, inhumane and degrading treatment, prohibition of slavery and protection of children and the family. Today, the IHRL-ILAC distinction still exists, but there is evolution in the practice. International and domestic courts and tribunals now apply both bodies of law concurrently or just one of them in cases concerned with armed conflict. The

International Court of Justice in its Advisory Opinion on the *Consequences of the Construction of a Wall* used both bodies of law, sometimes concurrently and sometimes separately.<sup>9</sup> The recent United Nations report into the Gaza Conflict used both as complementary bodies of law.<sup>10</sup>

### **Standard setting**

The international community's concern for the human person can be seen from the earliest attempts to regulate the inhumanity of war, which go back hundreds of years. But that does not mean at all that the ILAC is about 'human rights'. The drafting of the UDHR and the Geneva Conventions of 1949<sup>11</sup> proceeded on parallel and mutually exclusive tracks. The European Convention on Human Rights<sup>12</sup> and the American Declaration on the Rights and Duties of Man<sup>13</sup> (eventually leading to the American Convention on Human Rights<sup>14</sup>) were drafted in the same period and both provide for individualised rights protection. All regional human rights systems, whether in Latin America, Europe or Africa, allow access to complain to an international adjudicative body. They, the African system being an exception, allow for derogations from regular treaty obligations in times of a legitimate and declared state of emergency, which could include a state of armed conflict. In these situations, States can take measures that limit or suspend (derogate from) the enjoyment of certain rights under the treaty. The concept of derogation in times of emergency does not exist in the ILAC treaties. All the human rights treaties allowing for derogations regard them as exceptional and temporary measures that should be limited to 'a threat to the life of the Nation'.<sup>15</sup> Most importantly, derogation measures must be 'strictly required' by the particular emergency situation. This is the requirement of proportionality, which implies that derogations cannot be justified when the same aim could be achieved through less intrusive means.<sup>16</sup> Derogation measures must be ended as soon as the public emergency or armed conflict ceases to exist.

There are, however, a number of core rights which may never be derogated from, even in emergency situations. Here is where the potential cross-over with ILAC really comes into play. The list varies slightly between the treaties –and there is no provision for derogation at all in the African system. Using the International Covenant on Civil and Political Rights (ICCPR)<sup>17</sup> as an example, Article 4(2) prohibits derogation from the right to life and the prohibition of torture or cruel, inhuman or degrading treatment or punishment. The Human Rights Committee has indicated that although Article 9 on the right to liberty and its corresponding procedural safeguards, and Article 14 on the right to a fair trial are not among the listed non-derogable rights, 'procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights'.<sup>18</sup> The fact that certain rights are non-derogable means they must be respected at all times, even in armed conflict. It indicates that they may be *jus cogens* or at the top of the hierarchy of legal norms in the international order. There is judicial confirmation that some of these certainly carry obligations *erga omnes* – such as the prohibition against torture.<sup>19</sup> However, rights that are derogated do not simply cease to be applicable, but must be respected in so far as this is possible in the circumstances and full protection should be returned as soon as possible.

Running parallel to the standard setting through treaties, relevant ‘soft law’ was also adopted in the international arena, for example, on use of force by regular police as well as the military engaged in policing operations, something that could happen in an occupied territory.<sup>20</sup> The concept of ‘human rights in armed conflict’ was specifically addressed in the unanimously adopted General Assembly Resolution 2444 (XXII) on Respect for Human Rights in Armed Conflict, which came out of the 1968 International Conference on Human Rights in Tehran. It affirmed three principles, all fundamentals in the ILAC, for maximizing human rights protection in armed conflict:

1. the right of parties to a conflict to adopt means of injuring the enemy is not unlimited;
2. it is prohibited to launch attacks on civilian populations as such;
3. a distinction must be made at all times between persons taking part in hostilities and members of the civilian population so that the latter are spared as much as possible.

General Assembly Resolution 2675 on Basic Principles for the Protection of Civilian Populations in Armed Conflicts of 1970 confirmed the ILAC-IHRL convergence when it ‘affirmed’ that ‘Fundamental human rights, as accepted in international law and laid down in international instruments, continue to apply fully in situations of armed conflict.’<sup>21</sup> In 1995 in Tadić, the International Criminal Tribunal for the former Yugoslavia’s Appeals Chamber considered General Assembly Resolutions 2444 (XXII) of 19 December 1968,<sup>22</sup> and 2674 (XXV) and 2675 (XXV) of 9 December 1970.<sup>23</sup> It found that they:

Played a twofold role: they were declaratory of the principles of customary international law regarding the protection of civilian populations and property in armed conflicts of any kind and, at the same time, were intended to promote the adoption of treaties on the matter, designed to specify and elaborate upon such principles.<sup>24</sup>

This evolution in approach continued throughout the 1970s and 1980s. In 1973, General Assembly Resolution (XXVIII) On Respect for Human Rights in Armed Conflicts called upon

all parties to armed conflicts to acknowledge and to comply with their obligations under the humanitarian instruments and to observe the international humanitarian law rules which are applicable, in particular the Hague Conventions of 1899 and 1907, the Geneva Protocol of 1925 and the Geneva Conventions of 1949.

The 1974 Declaration on the Protection of Women and Children in Emergency and Armed Conflict<sup>25</sup> continued the trajectory and drew from ‘relevant provisions contained in the instruments of international humanitarian law relative to the protection of women and children in time of peace and war’.

There then followed a diplomatic conference from 1973-1977, for the purpose of reaffirming and developing ILAC (which was starting to be called ‘international humanitarian law’). It culminated in the two Additional Protocols to the Geneva



Conventions of 1949.<sup>26</sup> Additional Protocol I is exceptional for being a treaty clearly located within the ILAC, but straddling Hague and Geneva law, and also referring expressly to certain ‘rights’. Some of those are not ‘human rights’ and others are. For example, the reference in Article 43(2) to the ‘right to participate directly in hostilities’, held by combatants, is not a ‘human right’ but an

entitlement in the ILAC. On the other hand, the ‘right’ to fair trial and due process in Article 75 clearly is a ‘human right’. There are now a number of other treaties that cover armed conflict situations, and draw in human rights concepts and approaches. Notable examples are the Convention on the Rights of the Child and its additional protocol on the participation of children in armed conflict<sup>27</sup> and the Convention against Enforced Disappearances<sup>28</sup>.

### *International practice at the United Nations*

United Nations bodies have been making an intellectual connection between human rights and armed conflict for decades. Already in the Korean War in 1953, the General Assembly raised the issue of human rights in the then ongoing armed conflict.<sup>29</sup> The Security Council also started to refer to human rights, for example in the occupied Palestinian territories.<sup>30</sup> The Vienna World Conference on Human Rights called upon States ‘and all parties to armed conflicts to strictly observe international humanitarian law, as set forth in the Geneva Conventions of 1949 and other rules and principles of international law, as well as minimum standards for protection of human rights, as laid down in international conventions.’<sup>31</sup>

The engagement of the Charter-based institutions on ‘human rights in armed conflict’ can be illustrated through the case of occupied East Timor. In 1993, the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities saw not just ILAC but also human rights issues arising from the ongoing conduct of Indonesia in the occupied territory, the Sub-Commission urged:

the Indonesian authorities to honour the provisions of the Geneva Convention Relative to the Protection of the Civilian Persons in Time of War, of 12 August 1949, regarding the prohibition on removing prisoners from their original place of residence.<sup>32</sup>

It is also significant to note how on 15 September 1999, at the height of the post-ballot carnage in East Timor, Security Council Resolution 1264 (1999) stressed the importance of respect for ‘humanitarian law’ and ‘human rights’ in the occupied territory.<sup>33</sup>

The pattern of linking ILAC and IHRL, sometimes ICL as well, can also be traced in United Nations action in relation to the Occupied Palestinian territories,<sup>34</sup> the occupation of Kuwait by Iraq,<sup>35</sup> Chechnya,<sup>36</sup> the Democratic Republic of Congo<sup>37</sup> and Iraq.<sup>38</sup> It has been observed that the cumulative application of both IHRL and the ILAC during the

armed conflict in Kuwait was ‘feasible and meaningful’ and that it also clarified the practical meaning of the convergence theory applied to the occupying regime in Kuwait in 1990/91.<sup>39</sup> Hampson and Salama claim important precedent-setting in this area by Security Council resolution 1591 (2005), which addressed the responsibilities of the Sudan in IHRL and the ILAC, as well as particular identified individuals said to impede the peace process, constitute a threat to stability in Darfur and the region and commit violations of international humanitarian or human rights law or other atrocities.<sup>40</sup> More recently, there have been special investigations into the situation at Guantanamo Bay,<sup>41</sup> Afghanistan,<sup>42</sup> Palestine<sup>43</sup> and into the Gaza Conflict<sup>44</sup> as well as regular scrutiny by UN Special Rapporteurs covering armed conflict situations.<sup>45</sup> They have all relied on ILAC, IHRL and ICL.

Confirming the evolving state of affairs, in 2005, the Commission on Human Rights adopted a resolution on the matter of protection of human rights in armed conflict, pointing out, *inter alia*, that conduct that violates humanitarian law (ILAC) may also constitute a gross violation of human rights.<sup>46</sup> It has also adopted several resolutions acknowledging that IHRL and ILAC (international humanitarian law) are complementary and mutually reinforcing.<sup>47</sup>

### ***International treaty bodies, courts and tribunals***

International treaty bodies monitoring compliance with the human rights treaties have been examining situations of armed conflict for many years. Through the periodic reporting procedure as well as through the petitions system (where such exists in relation to a State facing an armed conflict situation), the treaty bodies have been actively engaged.

For example, early in its existence, the Human Rights Committee was seized of issues concerning extraterritorial applications of the ICCPR, which contains an unusually restrictive application clause that refers to State obligations to respect and ensure human rights ‘within its territory and subject to its jurisdiction’ (Article 2(1)). The robust position of the Committee can be discerned in cases such as *Lopez Burgos v Uruguay*, concerning extra-territorial activities of State agents. This was not an armed conflict situation, but the approach of the Committee was already clear: ‘it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State Party to perpetrate violations of the Covenant on the territory of another state, which violations it could not perpetrate on its own territory’.<sup>48</sup>

The Committee has regularly taken up the issue of the applicability of the ICCPR in armed conflict and occupation situations. Examples include, Turkish-occupied North Cyprus,<sup>49</sup> Israel and the Occupied Territories,<sup>50</sup> and the USA’s treatment of detainees in Guantanamo Bay and elsewhere.<sup>51</sup> The Committee’s position in this area is explained in some detail in its General Comment #29 on derogations and General Comment #31,<sup>52</sup> robustly challenged by States such as Israel and the USA.<sup>53</sup>

At a later stage, the extra-territorial applicability of the ICCPR in times of armed conflict, including occupations, came to be very controversial. In General Comment #31,

the Committee interpreted Article 2(1) providing for ‘within its territory and subject to its jurisdiction’ to mean that States parties are obliged to respect the ICCPR to anyone within their territory or within their ‘effective control’. This interpretation, in 2004, justified the exercise of scrutiny of the Committee over extra-territorial human rights violations, whether through control of territory such as in an occupation, or because a person is in the ‘effective control’ of the State or its agents abroad. While the USA and Israel have been particularly opposed to this approach, in its *Advisory Opinion on the Wall in the Occupied Palestinian territory*, the International Court of Justice examined the *travaux préparatoires* and affirmed the correctness of the Committee’s views.<sup>54</sup>

Other human rights treaty monitoring bodies have also been addressing issues of human rights in armed conflict, notably the Committee on the Elimination of Racial Discrimination, the Committee on the Elimination of Discrimination against Women and the Committee on the Rights of the Child.<sup>55</sup> The Committee monitoring the Convention against Torture (CAT) has also pursued torture in armed conflict: in recent years, it has engaged with the USA and other participants in the wars in Iraq and Afghanistan.<sup>56</sup> In its 2005 interaction with the Committee, the USA did not challenge the extra-territorial application of the CAT, instead explaining the steps it had taken to give effect to its obligations, including in relation to its detainees in Iraq.<sup>57</sup>

The International Court of Justice first addressed the issue of the applicability of the ICCPR in armed conflict in its *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*.<sup>58</sup> It observed that the protections of the ICCPR do not cease in times of war, except for those provisions that may be derogated from in emergency and within the limits set out in the treaties. It introduced the notion of *lex specialis derogat legi generali* as a solution in a situation of overlapping bodies of law. It has applied both ILAC and IHRL in the *Advisory Opinion on the Wall in the Occupied Palestinian territory*<sup>59</sup> and in *Congo v. Uganda*<sup>60</sup>, going beyond the ICCPR into other international human rights treaties, as well as the standard ILAC normative framework involving the Geneva Conventions of 1949. As noted earlier, the court has also affirmed the correctness of the ‘extra-territorial application of human rights treaties’ approach of the Human Rights Committee.

International human rights courts in Europe and the Americas have for years been seized with situations of armed conflict. There are generally two issues arising, as with the treaty monitoring bodies: extra-territorial application of the relevant treaty, and whether the court is to apply its controlling treaty (IHRL) or rules which it is not expressly mandated to apply (ILAC). The practice of the Inter-American human rights system is illustrative of how human rights in armed conflict continues to evolve through the practice of international courts and tribunals. Two landmark cases in this area are *Abella* case (also known as *Tablada*)<sup>61</sup> and *Las Palmeras*.<sup>62</sup> Since the establishment of Camp X-Ray at Guantanamo Bay in 2002, the Inter-American Commission has been pressuring the USA to conduct itself in accordance with the American Declaration<sup>63</sup> (the USA is not a party to the American Convention on Human Rights). Even more striking has been the remarkable jurisprudence developed at the European Court of

Human Rights (ECHR), where the court insists on applying the ECHR to armed conflict situations. It uses human rights standards to assess military operations, including consideration of the means and methods in the use of force. This court is now seized with an inter-State case in the matter of the Georgia-Russia war as well as hundreds of individual complaints about human rights violations during that armed conflict. It has already had extensive experience in dealing with cases of terrorism (Northern Ireland), low intensity armed conflict (Southeastern Turkey), military occupation (Northern Cyprus), civil war (Chechnya) and international armed conflict (NATO bombing of Yugoslavia).<sup>64</sup>



### **Concluding Observations**

The international system is clearly concerned to maximise protection of the human person at all times. But that is still subject to the interests of the State and the values of international society. In this matter of ‘human rights in armed conflict’, there are still many unanswered questions. But, let us begin with what this brief review reveals. We do know

that ILAC applies in armed conflict. ICL applies too. We know too that subject to the rules of derogation, IHRL also applies in armed conflict. This is particularly important for affording protection in those violent situations not reaching the level of NIAC, and for padding out the inadequate protections in a NIAC and occupations. We know that IHRL applies extraterritorially. We also know that domestic law will apply, subject to any national rules on states of emergency.

When different bodies of law apply to the same situation, there is obviously a risk of overlap and conflict between norms. This is about fragmentation. There are several approaches that can be taken to deal with or manage the co-applicable legal regimes in armed conflict. One approach is the European Court of Human Rights approach – it does not see any conflict and only applies the ECHR, sometimes supplemented with soft law, such as the UN guidelines on use of force and firearms. It is an ‘we only apply our own treaty’ approach. Then, there is the complementarity approach, favoured by the United Nations bodies such as the Human Rights Committee. Under this approach, one looks at other international legal obligations but the treaty granting the decision-maker jurisdiction will be the benchmark for assessment. Probably the most discussed approach is that of the International Court of Justice. In its *Advisory Opinion on the Use or Threat of Use of Nuclear Weapons*, the court introduced the notion of *lex specialis derogat legi generali* as a solution in a situation of overlapping bodies of law. The court underlined that:

In principle, the right not arbitrarily to be deprived of one’s life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, falls to be determined by the applicable *lex specialis*, namely the law applicable in armed conflict, which is designed to regulate the conduct of hostilities.<sup>65</sup>

The Court's 2005 *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* also provides very general guidance:

As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.<sup>66</sup>

The approach remains in the conceptual realm, and is rather impractical. It has been observed that the court's *lex specialis* approach is not being used to displace IHRL; it is instead an indication that human rights bodies should interpret a human rights norm in the light of the ILAC. It is not always the case, as Louise Doswald-Beck points out, that the provisions of ILAC, prima facie the *lex specialis* in armed conflict, are actually clear on matters as elementary as when and how force can be used.<sup>67</sup> Another commentator points out that even if it is *lex specialis*, in NIAC, the rules are 'vanishingly slight and seldom specific'.<sup>68</sup> Further guidance may be derived from the cases, to make these Delphic proclamations more practical. In relation to the right to life, the International Court of Justice has made it clear that the *lex specialis* is the ILAC, and that is the standard to be used. However, the relevant paragraph in the *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* actually suggests that this may depend on the circumstance, for the dicta actually uses the examples of engagement in hostilities and use of certain weapons on warfare.<sup>69</sup> These are situations regulated specifically by the ILAC. Likewise, as Doswald-Beck rightly points out, the specific rules on when a combatant may be treated as *hors de combat* are *lex specialis* to IHRL.<sup>70</sup> In the *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the court relied on human rights treaty provisions as the appropriate law in relation to a number of rights: the right to freedom of movement (ICCPR) and the rights to work, health, education and to an adequate standard of living (ICESCR), indicating that for these matters, IHRL is either *lex specialis* or contains the only applicable normative provisions. In *Congo v. Uganda*, the court affirmed the extraterritorial application of relevant human rights treaties and particularly in occupied territories, in case of the armed conflict/occupation on the territory of the DRC. What is notable here is that the situation of interest to both ILAC and IHRL only lasted relatively briefly, i.e. it was not a long-lasting or lengthy situation such as in the Palestinian territory.<sup>71</sup>

Perhaps there is a single system in evolution. Do we really want the different bodies of law to merge? Hampson and Salama argue that enhancing the effectiveness of IHL and its institutional complementarity with IHRL does not necessarily require amending existing norms nor setting new standards; if properly used and fully implemented, existing instruments can achieve that goal.<sup>72</sup> Gasser has argued against merging the two bodies, and favours a complementarity approach.<sup>73</sup> There continues to be much discussion about complementarity as a tool for managing the overlap of IHL and



ILAC in armed conflict, specifically using Article 31(3) of the Vienna Convention on the Law of Treaties. This provides that when interpreting treaties ‘any relevant rules of international law applicable in the relations between parties’ shall be taken into account. A more practical approach has been suggested by Heintze, arguing that, by way of example that the duties arising from Article 55 of Geneva Convention IV and pertaining to health care have to be applied in the light of the right to health contained in the ICESCR.<sup>74</sup> He argues that the separation of rape as a method of war in the ILAC and under ICL, from torture, the human rights law provisions of the Torture Convention must be resorted to.<sup>75</sup> Many authors have pointed out that IHRL is very useful for filling the many gaps that exist in the ILAC.<sup>76</sup> One commentator suggests that the innovation of the European Court of Human Rights is to fill the ‘gap in humanitarian law by beginning to develop a human rights law of the conduct of hostilities in internal armed conflicts’.<sup>77</sup> He is optimistic that this approach:

has the potential to induce greater compliance, because it applies the same rules to fight with common criminals, bandits, and terrorists as to fights with rebels, insurgents, and liberation movements. To apply human rights law does not entail admitting that the situation is ‘out of control’ or even out of the ordinary.<sup>78</sup>

The cumulative approach – as presented by the Secretary-General in his report on ‘On the Protection of Civilians in Armed Conflict’ in 1999<sup>79</sup> - argues for maximum participation in the ILAC and IHRL treaties. This recommendation was made in the awareness of the overall weakness of the regimes for implementation, especially in the ILAC. Multiple uses of the existing procedures, as suggested by Heintze, should certainly increase the pressure on States to comply with their legal obligations. There is, for example, no reason why armed conflict arbitrary detention cases cannot also be pursued to the Working Group on Arbitrary Detention, which is *prima facie* not bound by the formal divisions between IHRL and ILAC.<sup>80</sup> Hampson and Salama argue that protection of the human person across the board is strengthened by full participation in the international human rights system, and through engagement of all the special procedures and mechanisms that exist:

What needs to be done to ensure respect for human rights in all countries and all circumstances is to request relevant human rights mechanisms to monitor all cases of armed conflicts, of both national and international character, in order to detect and deter all possible violations of HRSL and IHL.<sup>81</sup>

They suggest that it would probably not be possible to merge the two bodies of rules; nor would it be desirable, on account of the loss of the advantages of legal regimes specifically designed for their particular purposes.<sup>82</sup> But, if we proceed down this line, it is possible to see that at some stage, IHRL will subsume all ILAC and the rules of peacetime will apply in armed conflict. It is, at this stage, not clear that the project of the humanization of war will be achieved by pretending that the rules of peace are properly suited for application in armed conflict.

If we follow the complementarity approach, we would need to have a clear rule for dealing with normative clashes. As suggested below, a ‘most-favorable-to-the-individual’ approach would seem to be entirely consistent with the ethos of both IHRL and ILAC, unlike the mechanical *lex specialis* rule.

But for now, the main issue seems to be what to do when different bodies of law apply in armed conflict, and they are not compatible. Does the doctrine of *lex specialis* actually lead to better protection of the human person in armed conflict? It is, after all, simply a technical device by which conflicts of laws are resolved. It is the submission of this author that we should in fact be applying, as an alternative to *lex specialis*, an approach that is more consonant with the aims and objectives of minimising the carnage of war and maximising the protection for the human person in armed conflict. In criminal law, an accused will always have the benefit of the doubt because the presumption of innocence operates in his or her favour. In this area of managing overlapping legal regimes, we should be applying the law that most protects the human person. Article 29(b) of the American Convention, as applied by the Inter-American Commission in *Abella* provides an example of the most-favorable-to-the-individual-clause.<sup>83</sup> It provides that no provision of the American Convention shall be interpreted as ‘restricting the enforcement or exercise of any right or freedom recognized by virtue of the laws of any State Party of another convention which one of the said states is a party.’ Article 4(1) of the ICCPR requires that measures of derogation be compatible with a State’s other obligations under international law. In view of the object and purpose of both IHRL and ILAC, it is submitted that this is more compelling than the mechanical *lex specialis* approach. Treaty bodies, courts and tribunals should be able, where two bodies of law apply equally to a situation and differ in their approach and protections, to choose to apply the rule that offers greater protection to the human person.

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<sup>1</sup> Since 2000, the International Law Commission has been examining the issue of Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, leading to a final study in 2006 - see International Law Commission [ILC], *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi*, U.N. Doc A/CN.4/L.682 (13 April 2006).

A great deal has been written in this area of fragmentation over recent years. See generally Alexander Orakhelashvili, ‘The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?’, (2008) 19 *European Journal of International Law* 161; Eyal Benvenisti & George W. Downs, ‘The Empire’s New Clothes: Political Economy and the Fragmentation of International Law’, (2007) 60 *Stanford Law Review* 595; Bruno Simma, ‘Fragmentation in a Positive Light’, (2004) 25 *Michigan Journal of International Law* 845; Martti Koskenniemi and Päivi Leino, ‘Fragmentation of International Law? Postmodern Anxieties’, (2002) 15 *Leiden Journal of International Law* 553; Georges Abi-Saab, ‘Fragmentation or Unification: Some Concluding Remarks’, (1999) 31 *New York University Journal of International Law and Politics*, 919; Pierre-Marie Dupuy, ‘The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice’, (1999) 31 *New York University Journal of International Law and Politics*, 790.

<sup>2</sup> *Universal Declaration of Human Rights*, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (12 December 1948).

- <sup>3</sup> *Loizidou v Turkey* (Preliminary Objections), App. No. 15318/89, 20 Eur. H.R. Rep. 99, [62] (1995) (Commission Report); and *Cyprus v Turkey*, App. No. 25781/94, 35 Eur. H.R. Rep. 30 (2002).
- <sup>4</sup> See, for example, *Issa v Turkey*, App. No. 31821/96, 41 Eur. H.R. Rep. 27 (2005); *Ergi v Turkey*, App. No. 23818/94, 32 Eur. H.R. Rep. 18 (2001); *Güleç v Turkey*, App. No. 21593/93, 28 Eur. H.R. Rep. 121 (1999).
- <sup>5</sup> See, for example, *Isayeva v Russia*, App. No. 57950/00, 41 Eur. H.R. Rep. 39, [180] (2005). See also *Isayeva v Russia*; *Yusupova v Russia*; *Bazayeva v Russia*, App. No. 57947/00; 57948/00; 57949/00, 41 Eur. H.R. Rep. 39, [178] (2005); *Khashiyev and Akayeva v Russia*, App. No. 57942/00; 57945/00, 42 E.H.R.R. 20 (2006). For a helpful overview of the European Court's Chechnya cases, see Philip Leach, 'The Chechen Conflict: Analyzing the Oversight of the European Court of Human Rights', 6 *European Human Rights Law Review* 732 (2008).
- <sup>6</sup> *Juan Carlos Abella v Argentina*, Case 11/137, Inter-Am. C.H.R., Report No. 55/97, 160 (1997) where it was noted 'It is, moreover, during situations of internal armed conflict that these two branches of international law most converge and reinforce each other. Indeed, the authors of one of the authoritative commentaries on the two 1977 Protocols Additional to the 1949 Geneva Conventions state in this regard: "Though it is true that every legal instrument specifies its own field of application, it cannot be denied that the general rules contained in international instruments relating to human rights apply to non-international armed conflicts as well as the more specific rules of humanitarian law".'
- <sup>7</sup> Almost from the start of the practice of holding detainees from the so-called 'War on Terror', the Commission has been acting on complaints from the Centre for Constitutional Rights. It has been engaged with the United States in long running exchanges of correspondence and has held hearings. It has, *inter alia*, called for adherence to IHRL and ILAC, and the closure of the camp.
- <sup>8</sup> Commission on Human Rights, Leila Zerrougui, *Report of the Chairperson of the Working Group on Arbitrary Detention: Situation of Detainees at Guantanamo Bay*; Leandro Despouy, *Report of the Special Rapporteur on the independence of judges and lawyers*; Manfred Nowak, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*; Asma Jahangir, *Report of the Special Rapporteur on freedom of religion or belief*; and, Paul Hunt, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*. [19] U.N. Doc.E/CN.4/2006/120 (27 February 2006) [*hereafter* UN Special Procedures Report on Guantanamo Bay]. It should be noted that in its responses to the Inter-American Commission on Human Rights in relation to Guantanamo Bay, the USA has argued that ILAC applied as the *lex specialis* to the exclusion of IHRL in respect of the status and treatment of persons detained during an armed conflict.
- <sup>9</sup> *Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)*, (2004) I.C.J. 136 (Advisory Opinion on the Wall).
- <sup>10</sup> Human Rights Council, *Human Rights in Palestine and Other Occupied Palestinian Territories: Report of the United Nations Fact Finding Mission on the Gaza Conflict*, UN Doc. A/HRC/12/48, 25 September 2009 (UN Gaza Report).
- <sup>11</sup> Including the Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 75 U.N.T.S. 31 (Geneva Convention I); Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea 75 U.N.T.S. 81 (Geneva Convention II); Convention (III) relative to the Treatment of Prisoners of War 75 U.N.T.S. 135 (Geneva Convention III) and Convention (IV) relative to the Protection of Civilian Persons in Time of War 75 U.N.T.S. 287; opened for signature 12 August 1949 (entered into force 21 October 1950) (Geneva Convention IV); (Geneva Conventions).
- <sup>12</sup> *European Convention for the Protection of Human Rights and Fundamental Freedoms*, article 19 est. seq., opened for signature 4 November 1950, 213 U.N.T.S. 222 (entered into force 3 September 1953, as amended by Protocols Nos 3, 5 (entered into force 21 September 1970), and 8 (entered into force 1 January 1990) (ECHR).
- <sup>13</sup> *American Declaration on the Rights and Duties of Man*, Adopted by the Ninth International Conference of American States, Bogotá, Colombia, 1948).
- <sup>14</sup> *American Convention on Human Rights*, opened for signature 22 November 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (entered into force 18 July 1978).
- <sup>15</sup> Human Rights Committee, *General Comment No. 29 - States of Emergency (Article 4)*, [3], U.N. Doc. HRI/GEN/1/Rev.6 at 186; U.N. Doc. CCPR/C/21/Rev.1/Add.11 (31 August 2001) (General Comment 29).
- <sup>16</sup> *Ibid.*
- <sup>17</sup> *International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 171 (entered into force 23 March 1976) (ICCPR).

<sup>18</sup> Ibid.

<sup>19</sup> See, *Prosecutor v Furundžija*, (1998) Case No. IT-95-17/1-T, Judgment, at 147-155; *Prosecutor v Zejnil Delalić et al* (1998) Case No. IT-96-21-T, Judgment, 454; *Kunarac et. al.*, (2001) Case No. IT-96-23-T&IT-96-23/1-T, Judgment, 454. See also; *Filártiga v Peña-Irala*, 630 F.2d 876, text accompanying notes 16-17 (2d Cir. 1980) ('we conclude that official torture is now prohibited by the law of nations. The prohibition is clear and unambiguous, and admits of no distinction between treatment of aliens and citizens'); *R. v Bow Street Metropolitan Stipendiary Magistrate Ex p. Pinochet Ugarte* (No.3), [2000] 1 A.C. 147, 198 (Lord Browne-Wilkinson), 246 (Lord Hope), 261 (Lord Hutton) (H.L.); *Al-Adani v United Kingdom*, (2002) App. No. 35763/97, 34 Eur. H.R. Rep. 11, 30; *Maritza Urrutia Case*, (2003) Inter-Am. Ct. H.R. (Ser. C) No. 103, 92.

<sup>20</sup> See for example, *United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, Havana, 27 August to 7 September 1990, U.N. Doc. A/CONF.144/28/Rev.1 at 112 (18 December 1990).

<sup>21</sup> *Basic Principles for the Protection of Civilian Populations in Armed Conflicts*, G.A. Res. 2675 (XXV), U.N. Doc. A/RES/2675 (9 December 1970).

<sup>22</sup> G.A. Res. 2444 (XXIII), U.N. Doc. A/RES/2444 (19 December 1968).

<sup>23</sup> G.A. Res. 2674 (XXV), U.N. Doc. A/RES/2674 (Dec. 9, 1970); G.A. Res. 2675 (XXV), U.N. Doc. A/RES/2675 (9 December 1970).

<sup>24</sup> *Prosecutor v Tadić* (1995) Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, [112] (2 October 1995).

<sup>25</sup> *Declaration on the Protection of Women and Children in Emergency and Armed Conflict*, G.A. Res. 3318 (XXIX), U.N. Doc. A/RES/3318 (15 December 1974).

<sup>26</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 U.N.T.S. 3 (Additional Protocol I) and Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, 1125 U.N.T.S. 609 (Additional Protocol II).

<sup>27</sup> Convention on the Rights of the Child, 20 November 1989, 1577 U.N.T.S. 3 (entered into force 2 September 1990); Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts, 25 May 2000, G.A. Res. 54/263, Annex I, 54 U.N. GAOR Supp. (No. 49) at 7, U.N. Doc. A/54/49, Vol. III (2000) (entered into force 12 February 2002).

<sup>28</sup> International Convention for the Protection of All Persons from Enforced Disappearance, Dec. 20, 2006, G.A. res. 61/177, U.N. Doc. A/RES/61/177 (2006) (not yet in force).

<sup>29</sup> Cordelia Droege, 'Elective Affinities? Human Rights and Humanitarian Law', (2008) 90 *International Review of the Red Cross* 501, 504 (Citing G.A. Res. 804 (VIII), U.N. Doc. A/804/VIII (3 December 1953) in relation to the treatment of captured combatants and civilians).

<sup>30</sup> S.C. Res. 237, U.N. Doc. S/RES/237 (14 June 1967).

<sup>31</sup> *Vienna Declaration and Programme of Action*, 29, U.N. Doc. A/CONF.157/23 (12 July 1993).

<sup>32</sup> *Situation in East Timor, Sub-Comm. on Prevention Discrimination and Protection of Minorities Res.* 1993/12, U.N. Doc. E/CN.4/Sub.2/1993/45 at 41 (25 October 1993).

<sup>33</sup> S.C. Res. 1264, U.N. Doc. S/RES/1264 (15 September 1999).

<sup>34</sup> See for example, G.A. Res. 3525 (XXX), U.N. Doc. A/RES/3525/XXX (15 December 1975).

<sup>35</sup> See for example, G.A. Res. 46/135, U.N. Doc. A/RES/46/135 (19 December 1991).

<sup>36</sup> See for example, Committee Against Torture, *Conclusion and Recommendation of the Committee Against Torture – Russian Federation*, U.N. Doc. CAT/C/RUS/CO/4 (6 February 2007); Commission on Human Rights, *Civil and Political Rights, Including the Questions of Disappearances and Summary Executions: Report of the Working Group on Enforced or Involuntary Disappearances*, [452], U.N. Doc. E/CN.4/2006/56 (27 December 2005).

<sup>37</sup> See for example, U.N. Res. 1279, U.N. Doc. S/RES/1279 (30 November 1999); S.C. Res. 1291, U.N. Doc. S/RES/1291 (24 February 2000) (Both establishing the United Nations Mission in the Republic of Congo).

<sup>38</sup> See for example, S.C. Res. 1483, U.N. Doc. S/RES/1483 (22 May 2003) (Formally recognizing the United States and United Kingdom as occupying power); S.C. Res. 1500, U.N. Doc. S/RES/1500 (14 August 2003) (Establishing the United Nations Assistance Mission for Iraq); S.C. Res 1723, U.N. Doc. S/RES/1723 (18 November 2006) (Extending the mandate of the multinational force) and S.C. Res 1790, U.N. Doc. S/RES/1790 (18 December 2007) (Extending the mandate of the multinational force).

<sup>39</sup> Walter Kälin (ed), *Human Rights in Times of Occupation: The Case of Kuwait*, 27 (1994).

<sup>40</sup> Sub-Commission on the Promotion and Protection of Human Rights, Commission on Human Rights,

*Working paper on the relationship between human rights law and international humanitarian law by Françoise Hampson and Ibrahim Salama*, [26], U.N. Doc. E/CN.4/Sub.2/2005/14 (21 June 2005) (Hampson and Salama, Working paper on the relationship between human rights law and international humanitarian law).

<sup>41</sup> UN Special Procedures Report on Guantanamo Bay, above note 8.

<sup>42</sup> Commission on Human Rights, Cherif Bassiouni, *Report of the Independent Expert on the situation of human rights in Afghanistan*, U.N. Doc. E/CN.4/2005/122 (11 March 2005).

<sup>43</sup> Commission on Human Rights, John Dugard, *Report of the Special Rapporteur on the Question of Violations of Human Rights in the Occupied Arab Territories, including Palestine*, U.N. Doc. E/CN.4/2004/6 (8 September 2003).

<sup>44</sup> UN Gaza Report, above note 10.

<sup>45</sup> See for example, Commission on Human Rights, Asma Jahangir, *Report of Special Rapporteur on Extrajudicial, Summary or Arbitrary Disappearances*, U.N. Doc. E/CN.4/2004/7 (22 December 2003).

<sup>46</sup> *Protection of the human rights of civilians in armed conflicts*, Comm. H.R. Res. 2005/63, U.N. Doc. E/CN.4/RES/2005/63 (20 April 2005).

<sup>47</sup> See for example, Protection of the human rights of civilians in armed conflict, UN Human Rights Council Resolution 9/9, 21 September 2008.

<sup>48</sup> *Delia Saldías de Lopez v Uruguay*, Communication (No. 52/1979), [12.3], U.N. Doc. CCPR/C/OP/1, 88 (29 July 1981).

<sup>49</sup> Human Rights Committee, *Concluding Observations on Cyprus*, [3], U.N. Doc. CCPR/C/79/Add.39 (21 September 1994).

<sup>50</sup> Human Rights Committee, *Concluding Observations on Israel*, [10], U.N. Doc. CCPR/C/79/Add.93 (18 August 1998).

<sup>51</sup> Human Rights Committee, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Third Periodic Reports of States Parties due in 2003 – United States of America*, e.g. [15], 20, U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (28 November 2005).

<sup>52</sup> Human Rights Committee, *General Comment No. 31 – Nature of the General Legal Obligation Imposed on State Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (26 May 2004).

<sup>53</sup> See, Human Rights Committee, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Third Periodic Reports of States Parties due in 2003 – United States of America*, U.N. Doc. CCPR/C/USA/3 (28 November 2005) (Specifically on the submission made by the United States throughout the Report).

<sup>54</sup> Advisory Opinion on the Wall, above note 9, [108-111] (9 July) See also, Droege, above note 29, 501, 511-513; M. Dennis, 'Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation' (2005) 99 *American Journal of International Law* 119.

<sup>55</sup> Droege, above note 29, 501, 508, notes 40-42.

<sup>56</sup> See for example, Committee Against Torture, *Considerations of Reports Submitted by States Parties Under Article 19 of the Convention: Conclusion and Recommendations of the Committee Against Torture – United States of America*, at [26-27], U.N. Doc. CAT/C/USE/CO/2 (25 July 2006).

<sup>57</sup> See, Human Rights Committee, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Third Periodic Reports of States Parties due in 2003 – United States of America*, U.N. Doc. CCPR/C/USA/3 (28 November 2005) (Specifically on the Second Report submitted on 6 May 2005).

<sup>58</sup> Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 225 (8 July 1996) (Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons).

<sup>59</sup> Advisory Opinion on the Wall, above note 9.

<sup>60</sup> *Armed Activities on the Territory of the Congo (Congo v Uganda)* (Judgement of 19 December 2005), [216], available at < <http://www.icj-cij.org/docket/files/116/10455.pdf> > (10 December 2009).

<sup>61</sup> *Juan Carlos Abella v Argentina*, Case 11/137, Inter-Am. C.H.R., Report No. 55/97 (1997).

<sup>62</sup> *Las Palmeras Case*, 2000, Inter-Am. Ct. H.R. (Ser. C) No. 67, [28] (4 February 2000).

<sup>63</sup> See for example, Guantanamo Bay Precautionary Measures Communication of March 12, 2002 from IACHR President Juan E. Méndez to US Secretary of State Colin Powell, Ann. Rep. of the Inter-Am. C.H.R., OEA/Ser.L/V/II.117 Doc. 1 rev. 1 (7 March 2003), reprinted in 96 *American Journal of International Law* 730 (2002) and United States Government, *United States (U.S.): Response of the United States to Request for Precautionary Measures – Detainees in Guantanamo Bay, Cuba*, (15 April 2002), 41 I.L.M. 1015 (2002).

<sup>64</sup> See above notes 3, 4 and 5 for some of the leading cases.

<sup>65</sup> Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, above note 58.

- <sup>66</sup> Advisory Opinion on the Wall, above note 9, 106.
- <sup>67</sup> Louise Doswald-Beck, 'The right to life in armed conflict: does international humanitarian law provide all the answers', (2006) 88 *International Review of the Red Cross* 881, 882 (For example, there is still lack of agreement over when civilians who 'take a direct part in hostilities' can be attacked, as well as which rules apply to seriously violent situations in an occupation).
- <sup>68</sup> W. Abresch, 'A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya', (2005) 16 *European Journal of International Law* 741, 767.
- <sup>69</sup> Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, above note 58, 25.
- <sup>70</sup> See for example, Convention (III) relative to the Treatment of Prisoners of War, article 12, 12 August 1949, 75 U.N.T.S. 135; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, articles 41-42, 8 June 1977, 1125 U.N.T.S. 3.
- <sup>71</sup> *Armed Activities on the Territory of the Congo (Congo v. Uganda)* (Judgement of 19 December 2005), [216], available at <<http://www.icj-cij.org/docket/files/116/10455.pdf>> (10 December 2009).
- <sup>72</sup> Hampson & Salama, Working paper on the relationship between human rights law and international humanitarian law, above note 40, 12.
- <sup>73</sup> Hans-Peter Gasser, 'International humanitarian law and human rights law in non-international armed conflict: Joint venture or mutual exclusion?' (2002) 45 *German Year Book of International Law*, 162.
- <sup>74</sup> Heintze Hans-Hoachim, 'On the relationship between human rights law protection and international humanitarian law', (2004) 86 *International Review of the Red Cross*, 798, 795.
- <sup>75</sup> *Ibid.*
- <sup>76</sup> See for example, Judith Gardam, 'The contribution of the International Court of Justice to international humanitarian law', (2001) 14 *Leiden Journal of International Law* 353.
- <sup>77</sup> Abresch, above note 68, 748.
- <sup>78</sup> *Ibid.*, 757.
- <sup>79</sup> Secretary General, *Report of the Secretary-General To The Security Council On The Protection of Civilians in Armed Conflict*, U.N. Doc. S/1999/957 (8 September 1999).
- <sup>80</sup> It has actually been seized with Guantanamo Bay cases, see for example, Commission on Human Rights, *Report of the Working Group on Arbitrary Detention*, [61-64], U.N. Doc. E/CN.4/2003/8 16 December 2002; Opinion 5/2003 (United States of America), Opinions adopted by the Working Group on Arbitrary Detention, [12], U.N. Doc. E/CN.4/2004/3/Add.1, 33 (26 November 2003). It has also been seized with British cases from Iraq, see for example, Commission on Human Rights, *Report of the Working Group on Arbitrary Detention*, at [6-9], U.N. Doc. E/CN.4/2005/6 (1 December 2004).
- <sup>81</sup> Hampson & Salama, Working paper on the relationship between human rights law and international humanitarian law, above note 40, [23].
- <sup>82</sup> *Ibid.*, 45.
- <sup>83</sup> *Juan Carlos Abella v Argentina*, (1997) Case 11/137, Inter-Am. C.H.R., Report No. 55/97, [164].

# RELIGION AND INTERNATIONAL HUMANITARIAN LAW

*Roderick O'Brien*

## ***Religious Personnel under International Humanitarian Law***

International Humanitarian Law has as its prime concern the protection of victims of armed conflict. From the time of the first Geneva Convention of 1864<sup>1</sup>, International Humanitarian Law has sought holistic care for the victims of armed conflicts. The Convention sought to provide for material care, for medical care, and for spiritual care. Thus article 2 of the 1864 Convention included chaplains (later called 'religious personnel') with medical, transport, and supply personnel as specially protected under international humanitarian law.

The Rules relating to Religious Personnel in the modern Geneva Conventions<sup>2</sup> and Protocols<sup>3</sup> are not as complex as those relating to medical personnel. But they follow the same pattern. There is a definition of Religious Personnel. These personnel have obligations:

- Attachment
- Identification
- Non-Combatant

If they fulfil their obligations, Religious Personnel have certain rights under the Conventions:

- Protection from Conflict
- The Right to Repatriation
- Exemption from Capture in Hospital Ships
- Special Rights if they are Retained for Religious Duties
- A Right to Participate in Conciliation
- Rights in places of Internment of Civilians.

It should be noted that the Conventions and Protocols do not seek to define religion, and which personnel may properly be called religious personnel. These questions are left to the States Party to the Conventions, who decide what personnel are to be included.

In a Moot problem, Counsel might find that the problem has been written to raise the following questions:

Have religious personnel met their obligations so that they are entitled to special protection under international humanitarian law? For example, what does it mean to refrain from any combatant activities?

Have the rights of religious personnel been abused by others? For example, have they been made a military target? For example, has the identification used by religious personnel or their transport or their places of worship been abused?

### *Places of Worship and International Humanitarian Law*

There are two separate Conventions that would serve to provide protection for Places of Worship: The Hague Convention for the Protection of Cultural Property in the Event of an Armed Conflict (1954)<sup>4</sup>; and the Geneva Conventions and Additional Protocols.

The Hague Convention is not directly concerned with the protection of ordinary worship, but only those that are of great importance to the cultural heritage of the peoples concerned. These places of worship, along with other places such as monuments, archaeological sites, museums, and so on, are entitled to special protection. These places are entitled to protection in international and internal armed conflict – but that protection is qualified by the requirements of military necessity. There is a special blue and white symbol used for such places. Personnel engaged in the protection of these sites may also use the symbol for identification.

The 1977 Additional Protocols<sup>5</sup> to the Geneva Conventions were particularly concerned with the protection of civilians and civilian property during international and internal armed conflict. Separate regimes apply.

Additional Protocol I applies to international armed conflict. Civilian objects, including places of worship, are not to be the subject of attack or reprisals. No special marking is required. Special places of worship which are part of the cultural heritage of peoples are entitled to a higher level of protection. (Here the Additional Protocol seek to incorporate the concepts already contained in the 1954 Hague Convention.)

Additional Protocol II applies to internal armed conflicts. The Protocol was intended to achieve a minimum of protection for civilians in cases of internal armed conflict. This Protocol is written in broad terms, and lacks the detail of the 1949 Conventions or of Additional Protocol I. The protection extends only to those places of worship that constitute the cultural or spiritual heritage of peoples. This would seem to imply some particular status, not just that of an ordinary place of worship. Such places are not to be the subject of acts of hostility, and are not to be used in support of the military effort.

In a Moot problem, involving places of worship, Counsel may find that the following issues are raised:

What kind of a place of worship is included? Which category of protection, if any, applies to the building or other facility?

Is a direct attack on a place of worship justified by the military necessity of the occasion?

Is an indirect attack, causing collateral damage, proportionate to the military necessity of the occasion?

In some religious traditions, places of worship may be regarded as places of sanctuary, where military or other armed personnel are excluded. This concept of sanctuary is not included in the Geneva Conventions and their Protocols.



### *The Emblems*

The foundation of the Red Cross and Red Crescent Movement, and the acceptance of the Geneva Conventions and Additional Protocols are historically linked. The moving spirit was a Swiss banker, Henry Dunant. The first international conference of experts to promote Dunant's proposal was held in the Swiss city of Geneva. And the first Geneva Convention of 1864 was accepted at an international conference hosted by the government of Switzerland. At that time, the symbol of the Movement was adopted: a red cross on a white ground. This symbol is the reverse of the Swiss flag, and does not have a religious significance. Nevertheless, historically other symbols (the Red Crescent, the Red Lion and Sun, and the Red Crystal) have been adopted in subsequent years.

### *Suggested readings and websites:*

Jean-Marie Hanckaerts and Louise Doswald-Beck: (2005) *Customary International Humanitarian Law*, Volume 1: *Rules*; Cambridge University Press, Cambridge, Rules 27 and 30.

Stefan Lunze: "Serving God and Ceasar: Religious Personnel and their Protection in Armed Conflict" (2004) *International Review of the Red Cross*, 183, 69-91. The review can be obtained through the ICRC website <[www.icrc.org/](http://www.icrc.org/)>.

Roderick O'Brien, (1995) *A Manual of International Humanitarian Law for Religious Personnel*, Adelaide, Australian Red Cross Society.

<sup>1</sup> In 1864 a Diplomatic Conference was convened by the Swiss government. Twelve governments sent representatives and a treaty was prepared by an International Committee and subsequently adopted. The treaty was entitled the 'Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field'. This was the first treaty of international humanitarian law. Conferences developing the theme of international humanitarian law were held, leading to conventions and additional protocols dated 1899, 1907, 1929, 1949, 1977 and 2005. See: <<http://www.redcross.lv/en/conventions.htm>>

<sup>2</sup> Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 75 U.N.T.S. 31 (Geneva Convention I); Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea 75 U.N.T.S. 81(Geneva Convention II); Convention (III) relative to the Treatment of Prisoners of War 75 U.N.T.S. 135 (Geneva Convention III) and Convention (IV) relative to the Protection of Civilian Persons in Time of War 75 U.N.T.S. 287; opened for signature 12 August, 1949 (entered into force 21 October 1950) (Geneva Convention IV); (Geneva Conventions).

<sup>3</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 U.N.T.S. 3 (Additional Protocol I). Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, 1125 U.N.T.S. 609 (Additional Protocol II). Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Adoption of an Additional Distinctive Emblem, 8 December 2005 (Additional Protocol III), (Additional Protocols).

<sup>4</sup> *Convention for the Protection of Cultural Property in the Event of Armed Conflict*, opened for signature 14 May 1954 (entered into force 7 August 1956), (1954 Hague Convention).

<sup>5</sup> Additional Protocols, above note 3.

# A TASTE OF HISTORY: THE HEINRICH WAGNER STORY

*John Nader QC*

## ***Introduction***

This chapter tells a true story. It contains some confronting events and actions which illustrate why International Humanitarian Law (IHL) has become an important and necessary pillar of international justice. The story also demonstrates why it is important to publicise such events and bring the accused before appropriate courts as soon as possible. Justice delayed is more than justice denied. As this story demonstrates States need to prosecute alleged breaches of IHL promptly. States also need to enact domestic legislation that gives effect to international conventions on genocide and crimes against humanity. The passage of time can also have the effect of reducing not only the impact of crimes against humanity and war crimes but delays the deterrent effect of prosecutions.

## ***Background***

The event leading to evidence implicating Heinrich Wagner was the discovery of a mass grave in the Kirovograd Region of the Ukraine where the remains of many men, women and children were buried. This was the place that had been pointed out to investigators at the conclusion of the Second World War by Ukrainian witnesses to the alleged murders.

It was alleged that in some villages in this region during the summer months of 1942 Heinrich Fredichovich Wagner had taken part in the killing of men, women and children of Jewish origins as part of a planned extermination of non-German racial groups by the German Government during the Second World War.

In this case, approximately 104 Jews of the village of Izraylovka were herded together and led to a recently dug pit some 2.5 kilometres from Izraylovka where they were shot and buried. Later on the same day, 19 children of Jewish fathers and non-Jewish, Ukrainian mothers were gathered in Izraylovka. They were taken by horse-drawn cart to the pit where the earlier killings had taken place. There, some of them were shot and some were bludgeoned to death: all were buried in the pit as part of a program of ethnic cleansing.

Heinrich Wagner was seen participating in the round-up of the adults in the village and he was later seen at the pit when the children were delivered there by other members of police units and militias. Heinrich Wagner was seen to personally throw the youngest child into the pit, shooting the child in flight. One eye-witness has stated that along with others he was ordered to form a guard cordon around a cart containing children next to a pit. The witness went on to describe the killing of these children by, among others, Heinrich Wagner.

These, and related killings, existed from the early days of the war. For example, an

extract from 'Armee-Oberkommando' 6 War Diary dated 10 October 1941 signed by Commander-in-Chief v. Reichmann stated:

The most essential aim of the campaign against the Jewish-Bolshevik System is the complete destruction of the means of power and the elimination of the Asian influence from the European culture group.

This attitude crystallised into formal Nazi policy on 20 January 1942 at what is now known as 'the Wannsee Conference' held at Wannsee, a suburb of Berlin. This conference was chaired by Reinhard Heydrich, SS-Obergruppenfuhrer and General der Polizei, chief of the Reich Security Main Office (including the Gestapo, SD and Kripo Nazi police agencies) and Reich Protector of Bohemia and Moravia. Hitler himself was not present at the conference but there is no doubt that he knew of and fully supported Heydrich's plan.

The purpose of the conference was to inform heads of departments, responsible for policies concerning Jews, of Heydrich's plan which would be known as the 'Final solution of the Jewish question'. The policy followed Germany's conquests. In the Ukraine it was implemented by specialist SS units and German established police forces or militias.

The Germans, with that attention to detail for which they are renowned, documented their activities, military and political, very thoroughly. The distribution of documents generated by the Germans went far and wide with the result that, notwithstanding efforts made to destroy incriminating material at the end of the war; they were unable to destroy it all. Their very thoroughness strengthened the case against those subsequently accused of war crimes.

### ***Who was Heinrich Wagner?***

Heinrich Wagner was a *Volksdeutscher*, namely, an ethnic German living outside Germany. In June 1941 he lived in a small *Volksdeutsche* colony or settlement, Springfield, in the Kirovograd region of Ukraine, about 22 kilometres from Ustinovka. He was apparently, up to the events recounted here, a good man.

On 21 February 1950, Wagner arrived in Australia from a displaced persons' camp (near Fallingbosten) in Germany with a woman named Erna, who he said was his wife, and his son, Heinrich. He entered using the name 'Andrej Woijsenko', the name of a deceased colleague. After his naturalisation as an Australian citizen in 1957, he changed his name to Heinrich Wagner. During the course of criminal proceedings in Australia, Wagner denied any involvement with the above events, in effect pleading the defence of alibi.

### ***The Proceedings in Australia***

On 29 April 1964 the Australian Embassy in Moscow wrote to the Secretary of the Department of External Affairs, Canberra, enclosing a translation of an article by the eminent Soviet journalist, V. Mikhailov, published in the Soviet newspaper *Trud* (Labour)

on 20 April 1964. *Trud* was, and throughout the life of the Union Socialist Soviet Republics (USSR) remained, the newspaper for the Soviet Labour Unions, having been established on 19 February 1921. At the relevant time it was a major newspaper in the USSR and, without making a value judgment as to its reliability, it at least merited being taken seriously by any responsible government.

The *Trud* article alleged that a war criminal named 'Heinrich Vagner' (*sic*) had found sanctuary in Australia. The allegation was examined by the Australian Government but little happened, the policy at the time being to forgive and forget and allow displaced persons to start a new life. Having regard to the status of the newspaper, *Trud*, the article should have been given the most serious consideration by the Australian government. But those allegations were not investigated. The failure to investigate, for failure it was, had the ultimate effect of letting Wagner off the hook. He escaped the consequences of his crimes.

Many years later during April and May 1986, the Australian Broadcasting Commission's (ABC) radio program 'Background Briefing' broadcast a series of programs called 'Nazis in Australia'. They were produced and narrated by Mark Aarons then of the ABC, investigative journalist, and John Loftus, formerly a lawyer with the Office of Special Investigations in the United States Department of Justice. On 22 April 1986 the ABC televised a related program called 'Don't Mention the War'. In these programs it was alleged that shortly after World War II many Nazi war criminals entered Australia.

Immediately following the broadcast of the first ABC program, the New South Wales Parliament<sup>1</sup> passed a motion expressing its deep concern that the United States of America State Department, British Foreign Office and Australian Security Intelligence Organisation files revealed that large numbers of Nazi war criminals had been knowingly admitted into Australia and revealed that federal government ministers in the 1950s had knowingly allowed these people to stay in Australia.

On 25 June 1986, the Special Minister of State requested A C Menzies, a former senior bureaucrat, to review the material relating to the entry of suspected war criminals into Australia.

On 28 November 1986, having conducted his review, Mr Menzies reported that it was 'more likely than not that a significant number of persons who committed serious war crimes in World War II (had) entered Australia and that some of these' were then still living in Australia. Menzies expressed the opinion that action was needed and made a number of recommendations. However, it was not until 5 September 1991, following the decision of the High Court of Australia in *Polyukhovich v The Commonwealth of Australia and Another; (1991) 172 CLR 501* with respect to the constitutional validity of the *War Crimes Amendment Act 1988*<sup>2</sup>, that Wagner was arrested and charged on three counts of war crimes.

Earlier on 11 July 1991 Wagner had been interviewed at the Goolwa Police Station in South Australia and his home was searched by the Special Investigation Unit (SIU)<sup>3</sup> pursuant to search warrant. In his interview, which was videotaped and later admitted into evidence, Wagner agreed that much of the information in his immigration papers was false.

In early 1992, I had recently retired as a Northern Territory Supreme Court Judge and was approached by the Commonwealth Director of Public Prosecutions (the CDPP) to represent the CDPP on the prosecution of Heinrich Wagner for war crimes. Later I travelled overseas with a CDPP legal officer in order to familiarise himself with the Wagner case. We visited the United States of America, Ukraine, Germany and Austria. My role included confirming with witnesses the contents of previously made statements, interviewing expert witnesses and visiting places connected to the alleged war crimes.

The committal proceedings were mentioned on 1 June 1992 in the Adelaide Magistrates Court. The proceedings were stood over to 10 August 1992 for hearing.

Between 24 August and 15 September, 1992, twenty-one Ukrainian witnesses gave evidence. The Directors of two German archives testified on 17 August and 21 September respectively. Evidence was given by eight Australian witnesses, including Professor Richard Wright, archaeologist, and Sonia Wright, a field archaeologist, concerning the exhumation of human remains, which Professor Wright had carried out at the grave site near Izraylovka where the war crimes were committed.

Historical evidence was given by two historians, Professor Konrad Kwiet and Professor Christopher Browning. The latter testified by video conferencing link on 21 September, 1992, from the United States of America. It is understood that this was the first occasion in Australia that a witness had given evidence in a criminal prosecution by video link. Evidence was also given by two witnesses from Austria and one from France. Thirty-six witnesses in total gave evidence at the committal proceedings.

Professor Browning also said that Gendarmerie posts throughout the occupied east were involved in executions carried out on behalf of the German Security Police. He also gave evidence that one of the roles of the Schutzmannschaft was to relieve the Reich Gendarmes of “dirty work”. Professor Browning also explained the structure and role of the Ordnungspolizei in occupied Ukraine with particular regard to the special position of Volksdeutsche (Ethnic Germans). By 1943 – by contrast with the situation in early 1942 – there was a clear distinction between the Volksdeutsche Hilfspolizei (Ethnic German Order Police) and the Schutzmannschaft (Indigenous Order Police). The Volksdeutsche Hilfspolizei were required to wear decently tailored green uniforms. Because the uniforms of the German Ordnungspolizei, of which the German Gendarmes formed part, were also green, this requirement signified a conscious decision to symbolise visually that the Volksdeutsche Hilfspolizei were closely connected to the German Ordnungspolizei.

Early in the occupation, Wagner had joined the local *Ordnungspolizei* (Order police). As an ethnic German, his status was higher than that of the indigenous, Ukrainian police. By virtue of his ethnic background and his ability to speak both German and Ukrainian, he became closely associated with, and attached to the *Gendarmerie*<sup>4</sup> (Rural German police) in the area.

A considerable body of evidence was called by the prosecution to negate Wagner's version of his wartime history to rebut his alibi. The evidence established that his version was a mixture of fact and falsehood. He had indeed been a member of the 38th Schutzen Regiment and fought in the countries he nominated. However, he had been conscripted into that Regiment not from a Police School in Vienna but from his position as a *Hilfspolizei* attached to the *Gendarmerie* in Ustinovka when he and other collaborators had retreated with the Germans in late 1943/1944 in the face of advancing Soviet troops. One witness Nikolay Danilovich Velikiy, who was born in 1923 and was 68 years old at the time of testifying in Adelaide in the course of giving evidence identified Wagner in court as the man he had referred to as 'Wagner' in evidence. Wagner was seated in the body of the court amongst other persons, male and female. He was not seated in a dock or other place where a witness might expect accused person to be. Velikiy pointed at Wagner and said, 'This is Wagner'.

The committal hearing concluded on 20 November 1992 when the Magistrate found that Heinrich Wagner had a case to answer on all three counts and committed him for trial to the South Australian Supreme Court in Adelaide on 11 January 1993.

The trial was fixed to commence on 3 August 1993 but did not start because of various applications to stay proceedings by Wagner's lawyers.

On Thursday 9 December 1993, however, Michael Rozenes QC, the Commonwealth Director of Public Prosecutions (DPP), entered a *nolle prosequi* with respect to the Wagner indictment having regard to his state of health.

Earlier in that week medical evidence had been given that Wagner had recently suffered a heart attack and as a result had sustained significant and permanent damage to his heart function. The evidence suggested that to put him on trial would substantially increase the 50% risk that he then had of suffering a fatal heart attack within the following four years.

Having made the decision to stop the prosecution, the DPP informed the defence lawyers that it remained of the firm opinion that the evidence established a *prima facie* case against Wagner and that there existed reasonable prospects of conviction. He noted that prior to the recent medical developments, both the Supreme Court of South Australia and the High Court had determined that the trial should proceed. However, the DPP had formed the opinion that, in accordance with the prosecution policy of the Commonwealth, the public interest would not have been served by the continuation of the prosecution.

The DPP continued:

I have come to this conclusion by adding to the various other public interest considerations to which I had already had regard, the medical evidence presented in court this week. The risk of Mr Wagner dying in the course of his trial is in my opinion too great. I should make the point that but for the medical evidence it would have been my view that the public interest warranted the trial proceeding. These are very serious charges and the legislature has made clear that the effluxion of time and the age of the accused do not carry the weight that such factors ordinarily bear in other cases. Nevertheless the special combination of features now attending this case has led to my decision to enter a *nolle prosequi* with respect to the indictment.

Recent newspaper report noted evidence existed that Heinrich Wagner's health improved significantly following the end of the prosecution.<sup>5</sup>

### ***Why Tell the Story Now?***

The story about the alleged war criminal Heinrich Wagner is a powerful illustration of the truth of the maxim that justice delayed is justice denied. The story also reminds us that even good men and women are capable of doing bad things. Sometimes stories need to be told to remind individuals, governments and States that a failure to act on verifiable evidence of alleged war crimes and crimes against humanity is an injustice to the living, the victims and those who, while accused, deny culpability. Although I came to the conclusion that the evidence against Heinrich Wagner was overwhelming, the fact remains he never stood trial.

It would not seem unreasonable to suggest that in the aftermath of the Second World War there was a willingness to forgive, forget and move onwards especially when the alleged offences took place in remote faraway lands. There may also be good political and economic reasons to turn a blind eye to alleged war crimes and crimes against humanity. But allowing alleged war criminals to start a new life freed of accountability for past events is wrong. Today it is easier if governments or States want to take action. The world now has the Geneva Conventions and additional protocols, the Rome Statute and the ICC, together with the legacy of the International Criminal Tribunals.

### ***Conclusion***

It is important lawyers confront factual circumstances as recounted above. It is too easy to read about IHL and agree that it is important and necessary. But occasionally, reading about what actually happened in another time reminds communities of the need to be ever vigilant because as demonstrated in recent years in the Former Yugoslavia and Rwanda people these types of crimes continue to be committed.

I conclude that when the conditions to prosecute exist, but we fail to do so, a number of consequences follow:

1. The offender goes unpunished; he does not receive what is justly due to him.
2. We devalue ourselves as human beings by asserting inferentially to our fellow human beings, that no matter that shocking crimes were committed against you, we do not think it is worth the trouble of bringing the offender to justice.
3. We leave like-minded persons with the belief that they can commit similar crimes with impunity. We leave them undeterred from committing similar crimes.

This last consequence is arguably the most serious. Notwithstanding much opinion to the contrary, I believe that the most powerful deterrent from committing certain classes of crimes is the inevitability of capture, disgrace and punishment.

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<sup>1</sup> Australia is a federation of states, one of which is called New South Wales.

<sup>2</sup> *The War Crimes Amendment Act* 1988 overcame the inadequacies of the *War Crimes Act 1945*.

<sup>3</sup> The SIU was set up by the Australian Government to investigate persons suspected of having committed war crimes. It examined some 834 cases between 1987 to 1992. It had little success. See for example: <<http://www.smh.com.au/national/how-australia-became-a-haven-for-war-criminals-20100409-ryx2.html>> (27 May 2010).

<sup>4</sup> This term is apparently left over from the Napoleonic era.

<sup>5</sup> David Humphries, 'How Australia became a haven for war criminals', *Sydney Morning Herald*, 10 April 2010, available at: <<http://www.smh.com.au/national/how-australia-became-a-haven-for-war-criminals-20100409-ryx2.html>>



# BRIDGING THE GAP, OR WIDENING IT? LESSONS LEARNED FROM CAMBODIA'S EXTRAORDINARY CHAMBERS ABOUT VICTIMS' PARTICIPATION IN INTERNATIONALIZED CRIMINAL TRIALS

*Michelle Staggs Kelsall*

## **Introduction**

Over the past sixty years, the recognition of victims' rights under international humanitarian law (IHL) has increased exponentially.<sup>1</sup> To some extent, this recognition has been mirrored by the growing significance placed on the obligation to prosecute violations of IHL,<sup>2</sup> and the international judicial fora that have spawned as a result.<sup>3</sup> What seemingly began as 'victor's justice' with the establishment of the Nuremberg and Tokyo tribunals, has largely been proclaimed as 'victim's justice' since the establishment of the *ad hoc* tribunals in the early 1990s.<sup>4</sup> At the apex of this trend was the founding of a victims' participation scheme at the International Criminal Court (ICC), which allows victims to apply for legal standing to formally participate throughout the trial, as well as to claim reparations.<sup>5</sup>

In keeping with this trend, and paralleling the establishment of the ICC's participatory scheme, the judges of Cambodia's Extraordinary Chambers (CEC) determined to include a victims' participation process at their Court. Established to prosecute senior leaders and those most responsible for atrocities committed during the period of Democratic Kampuchea, the CEC is a hybrid tribunal that has been much-anticipated: although well-documented and largely considered some of the most heinous atrocities ever committed, the crimes of the Khmer Rouge regime have taken some 30 years to prosecute.<sup>6</sup> Assuring victims' participation at the CEC was believed both to increase the pedagogical impact of proceedings (by instituting a trial process that was more closely aligned to that envisaged by the newly enacted Code of Criminal Procedure) as well as to increase the relevance of trials for a largely rural population that for three decades has been denied justice. It was also meant to bring the needs and interests of victims closer to the tribunal, and to assure that victims were included in the justice process.

Yet the reality of victims' participation at the CEC has as much cast light upon the gulf between victims' rights and the justice process underway in Cambodia as it has bridged the gap between them. Despite 'redress and reparation for victims of violations of IHL' being 'an imperative demand of justice', the participatory system adopted at the CEC has done little to shift the emphasis away from the core prosecutorial function of the Court.<sup>7</sup> Much to the chagrin of some victims' lawyers as well as many victims themselves, the procedural imperatives of the trial have continued to usurp the authority of any claim that the victims' voice should be heard. Additionally, a lack of resources for instituting participation has meant that, despite having received a symbolic place at the bar table, many victims themselves have been precluded from attending proceedings because they simply cannot afford to come.<sup>8</sup> This somewhat dampened the initial wave

of enthusiasm brought about by achieving participatory rights and diminished the Court's claims to having orchestrated a process that was accessible to the majority of victims.

Perhaps affirming these failures in the system, the CEC's judges have recently made moves towards abolishing the civil party participation scheme altogether, in favor of a more streamlined victims' advocacy model - seemingly affirming their own doubts that the process they originally instated can achieve a meaningful outcome for victims in Cambodia.<sup>9</sup> In light of these recent measures, this Chapter looks at the victims' participation scheme at the CEC to date, with a view to highlighting some key 'lessons learned' from the Cambodian experience for both it and future international tribunals.

### ***Civil Party Participation at the CEC: Promises and Pitfalls of Victims' Participation***

Upon its inception, the CEC's victim participation scheme was hailed as unprecedented and groundbreaking, largely due to its capacity to afford victims with full participatory rights as civil parties to the trial.<sup>10</sup> Modelling its civil party scheme on the Western legal tradition most influential in Cambodia - that of French civil law - the CEC's judges determined that victims should have rights to act as complainants during the investigative stage, to support the prosecution's case at trial, and to submit civil actions alongside that case to claim moral and collective reparations from the accused persons.<sup>11</sup> The decision taken by the Court's judges to implement this scheme seemed bold, given the Court's foundational documents did not envisage a role for victims beyond testifying as simple witnesses.<sup>12</sup> Additionally, up until the time at which the judges took this decision, the Court had not budgeted for victims' participation - a process likely to be costly if civil party rights were to be meaningfully upheld.<sup>13</sup>

Despite hopes to the contrary, the desire to implement the full gamut of participatory rights for victims soon had to be pared down. Substantively, the original scheme - which included giving civil parties the right to make opening statements,<sup>14</sup> broad rights of appeal,<sup>15</sup> and the right to make representations in their personal capacity (as opposed to through their lawyers),<sup>16</sup> - did not even survive the start of the first trial (that of *Kaing Guek Eav alias 'Duch'*). This curtailment of rights took place largely behind closed doors: rather than systematically consulting civil parties, non-governmental intermediaries processing civil party claims (NGIs) and civil party lawyers, the judges determined instead to make most of these amendments arbitrarily and during plenary sessions. Additionally, civil parties' right to question witnesses, experts and the accused person on the accused's character, as well as to make submissions on sentencing, were abolished during the course of Duch's trial.<sup>17</sup> The Trial Chamber (Lavergne J dissenting) chose to implement this measure, despite the fact that recognition of this right has been granted to victim participants at the ICC and the Special Tribunal for Lebanon.<sup>18</sup>

Although the judges' actions appeared in keeping with assuring the expeditiousness of the trial process, these moves flew in the face of a growing recognition of victims' rights in the penal justice context, both at the national and international level. Several commentators have recognized the importance of both properly informing and including

victims in the decisions being made about the trial process, with proper consultation often considered key to ensuring victims remain satisfied about their involvement.<sup>19</sup> The inability to have their views considered substantively by the judges throughout the process at the CEC risked entrenching a sense of powerlessness among victims, and to some extent, this risk became a reality. Civil parties publicly evinced their frustration in having their rights to question the accused curtailed by boycotting the proceedings. Some victims interviewed about this issue expressed disappointment at the Court's actions, and stated that it had diminished their experience of participating in the justice process as a whole.<sup>20</sup> The bench justified their actions on the grounds that they needed to safeguard the rights of the accused in this instance, and that allowing victims to question character witnesses would fundamentally undermine his or her right to a fair trial. Yet ironically, the only judge on the bench with experience of the French civil law system seemed to empathize with the victims' frustrations. As Judge Lavergne noted in his dissenting opinion on the issue:

[C]ivil party participation in the review of all evidence, including evidence pertaining to character...has, to date, never been considered a violation of the equality of arms or as likely to affect, as a matter of principle, the fairness of the trial: quite the contrary. Moreover, in a difficult context in which the credibility of the Chambers is scrutinized and in which the administration of justice by the ECCC is supposed to serve as an example for other Cambodian courts, it is important to be able to obtain public trust; a goal which would be more easily attained if the Chambers ensure respect for the rights of victims who have applied as civil parties.<sup>21</sup>

### ***Reparations at the CEC***

Frustrations surrounding the curtailment of civil party's rights at trial have only been further exacerbated by the confusion surrounding the provisions for reparations in the Court's internal rules. Although the provisions assert that civil parties are able to claim 'moral and collective reparations' from the Court, this right is limited to claims that 'shall be awarded against, and borne by, the accused persons'.<sup>22</sup> Given all the accused persons have, to date, declared themselves indigent, it is difficult to see how this right will be meaningfully upheld without additional support from the Court or donors.<sup>23</sup>

Although to date, no proposal to amend the reparations provisions in the Court's internal rules has been adopted, the Court's Victims Unit has evinced a desire to expand the reparations mandate. Following on from a high level conference on the reparations issue, the Unit, together with the Cambodian Human Rights Action Committee, released a document in support of pursuing more comprehensive forms of reparations for victims. As was noted by the Unit in the conference paper released from the proceedings:

Taking into consideration the limitations of the [CEC's] reparations mandate, it seems likely that most expectations concerning reparations will not be fulfilled by the Court alone...[However] the [CEC] is in the position to provide a link to non-court based reparations through its judgment and reparations order.<sup>24</sup>

Further support for this claim can be found in the United Nations Basic Principles on the Rights of Victims, which states that in the event that parties liable for harm suffered are unwilling or unable to meet their reparations obligations, States should endeavour to establish national programs for reparations or other forms of assistance to victims.<sup>25</sup>

To date, the CEC's judges have been reluctant to consider amendments to the Court's internal rules that might allow them to consider making these kinds of orders or recommendations. In informal discussions with NGIs, some members of Chambers have noted that imposing obligations on the Cambodian government, which need to be implemented by domestic court order, are likely to only add to the frustrations of victims and entrench feelings of powerlessness, given the current short-comings embedded in the domestic system. Yet more innovative thinking on how best to assure the Court's reparations mandate is properly implemented is clearly required, if the CEC intends to claim it is taking its responsibility to victims seriously.

### ***'Lessons Learned' from the CEC for Future Internationalized Tribunals***

Implementing a credible victims' participation process at the CEC was never going to be an easy task. The fact that the Court's foundational documents did not provide for the process meant that from its inception, civil party participation would be subject to resource constraints and would be perceived as outside the CEC's core mandate. The key 'lesson learned' from the Cambodian experience to date is that meaningfully responding to the needs of victims requires concerted planning, ongoing dialogue with NGIs, victims' lawyers, and those working with victims in the field, and a consistent approach to the process. To some extent, the Court is now endeavouring to ensure that the process improves: recent measures undertaken by a sub-committee looking at the victims' participation process have included instituting an ongoing dialogue with key stakeholders to ensure that their concerns are taken into account by the judges.

Although the Court can claim to have had limited success in implementing a civil party process throughout its first trial, even in that instance, victims' rights were continuously curtailed, to the detriment of victims' experience of the process. To some extent, this undermined the credibility of the participatory process and led victims and their lawyers to feel marginalized at various points in the proceedings. Greater effort from an earlier stage to consider the needs and interests of victims would have allowed the Court to avoid this, and would have given more weight to the Court's claim to be implementing ground-breaking measures in support of victims' rights. The fact that the CEC's judges are now endeavouring to ensure an ongoing consultative process is implemented is a positive step in the right direction. Additionally, more concerted effort to conceptualize moral and collective reparations in an innovative manner is required by the judges and at the Court. Affording victims a real sense of redress is likely to mean that the CEC should allow actors other than the accused persons to engage in the reparations process. If the CEC wants to continue to be hailed as a court taking victims' rights seriously, further efforts in this regard will clearly be required.

- <sup>1</sup> See M. Cherif Bassiouni, 'International recognition of victims' rights' (2006) 6 *Human Rights Law Review*, 278.
- <sup>2</sup> The obligation to try alleged perpetrators of acts which contribute to mass atrocity when construed as war crimes in international armed conflict, or 'grave breaches' of the Geneva Conventions is contained in: Article 49 of Convention I for the Amelioration of the Condition of Wounded and Sick of Armed Forces in the Field (12 August 1949); Article 50 of Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva, 12 August 1949); Article 129 of Convention III relative to the Treatment of Prisoners of War (Geneva, 12 August 1949); Article 149 of Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949; Article 75(4) of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977. The obligation to try alleged perpetrators breaches of Common Article 3 of all four Geneva Conventions has now been established as a norm under customary international law. Under several human rights treaties, states are required to conduct 'an effective criminal investigation and prosecution with the aim of punishing those responsible for right to life and humane treatment violations, whether the crime was committed by state agents or private actors'. See Raquel Aldana-Pindell, 'An Emerging Universality of Justiciable Victims' Rights In the Criminal Process to Curtail State-Sponsored Crimes' (2004) 26 *Human Rights Quarterly*, 605-607. See also Diane F. Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime' (1991) 100 *Yale Law Journal*, 2537.
- <sup>3</sup> I borrow the term 'international judicial fora' from Kuhner, who provides the following definition: '...[A] range of courts, including *ad hoc*, regional and hybrid tribunals in addition to international courts in their strict sense, such as the International Criminal Court.' See Timothy K. Kuhner 'The status of victims in the enforcement of international criminal law' (2004) 6 *Oregon Review of International Law*, 95 at footnote 1.
- <sup>4</sup> There are still, however, several sceptics of this claim of a shift from victor's justice to victim's justice. See for example M.C. Bassiouni and P. Manikas, *The Law of the International Tribunal of the Former Yugoslavia* (1996), 238; and Ralph Henham 'Developing contextualized rationales for sentencing in international criminal trials' (2007) 5 *Journal of International Criminal Justice*, 758.
- <sup>5</sup> See in particular, Article 68(3) of the Rome Statute, which provides that: 'Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages in the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.'
- <sup>6</sup> The Khmer Rouge regime was in power in Cambodia from the 17 April 1975 to 6 January 1979, during which the leadership renamed the state Democratic Kampuchea. Approximately 1.7 million Cambodians are said to have died during this period, as a result of starvation, execution, torture or forced labour. The period has been the subject of several historical analyses. See for example Ben Kiernan *The Pol Pot Regime: Race, Power and Genocide in Cambodia Under the Khmer Rouge, 1975-1979* (2002); Philip Short, *Pol Pot: Anatomy of a Nightmare* (2005); and, Elizabeth Becker, *When the War was Over: Cambodia and the Khmer Rouge Revolution* (1986).
- <sup>7</sup> Liesbeth Zegveld, 'Remedies for victims of violations of international humanitarian law' (2003) 85 *International Review of the Red Cross* 851, 498. Some commentators, however, would argue it is naive to think the court can do anything other than focus on this core function. See Ralph Henham, 'Conceptualizing Access to Justice and Victim's Rights in International Sentencing' (2004) 13 *Social & Legal Studies*, 40. (noting that there appears to be 'no sense' in which the integration of victims into the international criminal trial process can move from form to substance without accepting that victims' human rights must be subject always to the exercise of 'judicial discretionary power' and 'the underlying dynamics of the trial process' itself); and Mina Rauschenbach and Damien Scalia 'Victims and international criminal justice: a vexed question?' (2008) 90 *International Review of the Red Cross* 870, 449 – 455. (noting the difficulties in attending to victims under international criminal law, and the failure of this form of justice as a remedy for victims' subjective needs) (Rauschenbach and Scalia).
- <sup>8</sup> See Michelle Staggs Kelsall et al, *Lessons Learned from the Duch trial: a comprehensive review of the first trial at the Extraordinary Chambers in the Courts of Cambodia* (2009), 28 - 37, available online at: <<http://www.eastwestcenter.org/ajji>> (8 January 2010) (Staggs Kelsall et al).
- <sup>9</sup> See Press Release, 'Sixth Plenary Session Concludes', 11 September 2009, available online at <<http://www.eccc.gov.kh/en/>> (8 January 2010).

- <sup>10</sup> A few examples of several articles in support of the CEC's victims' participation scheme are: 'Khmer Rouge Victims Participate in Historic Day', 5 February 2008 (Auckland: Scoop News, New Zealand); 'Khmer Rouge Victims Given a Voice in Cambodia Trials', Seth Mydans, 16 June 2008 (New York: New York Times); 'Cambodia: Justice in Sight for Khmer Rouge Victims', 13 February 2009, (Bangkok: IPS); 'For Former KR Victims, Reparations Key to Justice' 23 July 2009, Christian Kurczy, (Bangkok: Christian Science Monitor).
- <sup>11</sup> See in particular, Rules 23 and 49 of the Court's Internal Rules and the Practice Direction on Victims Participation (02/2007/Rev.1) available online at: <<http://www.eccc.gov.kh/en/>> (8 January 2010). Victims whose claims as complainants are recognized at the pre-trial phase can provide the prosecution with complaints upon which they are able to initiate an investigation (Rule 49). Additionally, victims whose claims as civil parties are recognized by the court can participate at trial (Rule 23(1)). Victims must show that the harm suffered was direct and actually came into being, as well as a nexus between the harm suffered and the crimes punishable under the Law. Cambodia was formerly a French protectorate from 1863 to the middle of the twentieth century. In July of 2007, Cambodia adopted its own Criminal Procedure Code, which is largely modelled on an early version of the French *Code du Procédure Criminal*. At the time the judges determined to include a victims' participation scheme, Cambodia about to adopt this code. Its provisions apply in conjunction with the Court's Internal Rules.
- <sup>12</sup> By 'foundational documents', I refer to the Agreement between the United Nations and the Royal Government of the Kingdom of Cambodia dated June 2003 (hereafter, the '*Agreement*') and the Law on the Establishment of the Extraordinary Chambers, with the inclusion of amendments, dated 27 October 2004 (hereafter the '*Law*'), both of which are available online at <[www.eccc.gov.kh/en/](http://www.eccc.gov.kh/en/)> (Last accessed 8 January 2010). Although both documents establish the proceedings as being modelled on a civil law process in several important respects (including the establishment of an Office of Co-Investigating Judges to conduct the primary investigation phase of proceedings) neither the Agreement nor the Law specifically refers to victim complainants being able to assist the prosecution with its initial investigation, nor do they refer to a civil party participation process at trial. However, rather confusingly, Article 35 of the Law states that victims have the right to appeal from judgments handed down by the trial chamber, tending to suggest that the possibility of victim participation was contemplated at some stage during negotiations for the Court. Informal discussions with certain judges has tended to suggest that the inclusion of this provision was what eventually led them to take the measures they did to implement the victims' participation process during the June 2007 plenary.
- <sup>13</sup> For further discussion on this issue within the context of the Court's first case, see Staggs Kelsall et al, above note 8.
- <sup>14</sup> Compare the Court's Internal Rules, Rev.2 (5 September 2008) with Internal Rules, Rev.3 (6 March 2009) available online at <<http://www.eccc.gov.kh/en/>> (8 January 2010). See the new Rule 89*bis* in the latter, which precludes civil parties from making opening statements. See also Press Release, 'CHRAC Again Urges ECCC To Uphold Victims' Rights' 23 March 2009 (Phnom Penh: Cambodian Human Rights Action Committee) (on file with the author).
- <sup>15</sup> See the changes made to rule 105(1) in Rev.3 when compared with Rev.2, which limits civil parties' right to appeal to matters raised by the prosecution; despite the fact that this limitation is not included in Cambodia's domestic criminal code (see Article 375 of the Code of Criminal Procedure, Khmer-English Translation, September 2008).
- <sup>16</sup> See the new addition to the Internal Rules in Rev.3 (Rule 23(7)(i)) when compared with Rev.2, which left civil parties without lawyers without the right to address the trial chamber.
- <sup>17</sup> See Andrew F. Diamond, 'Public Comment on Proposed Changes to Civil Party Participation before the ECCC' (Phnom Penh: Documentation Center of Cambodia), December 2009 (on file with the author hereafter, '*Diamond*'). See also *Prosecutor v Kaing Guek Eav alias 'Duch'* (Case No. 001/18-07-2007-ECCC/TC) (hereafter, '*Case 001*') 'Decision on Civil Party Co-Lawyers' Joint Request for a Ruling on the Standing of Civil Party Lawyers to Make Submissions on Sentencing and Directions Concerning Questioning of the Accused, Experts and Witnesses Testifying on Character', 9 October 2009, at paragraph 13 (noting that a restrictive interpretation of civil party rights is required) (hereafter, '*Submissions on Sentencing Decision*').
- <sup>18</sup> See Case 001, 'Decision on Civil Party Co-Lawyers' Joint Request for a Ruling on the Standing of Civil Party Lawyers to Make Submissions on Sentencing and Directions Concerning the Questioning of the Accused, Experts and Witnesses Testifying on Character', 9 October 2009.
- <sup>19</sup> As has been noted by Strang, victims have identified as fundamental needs: (i) making their voice heard;

(ii) participating in the handling of the case that concerns them; (iii) being treated with respect and fairness; and (iv) obtaining information on the progress and outcome of the case. See Heather Strang *Repair and Revenge: Victims and Restorative Justice* (2002) as quoted in Rauschenbach and Scalia, above note 7, 444.

<sup>20</sup> Staggs Kelsall et al, above note 8, 28-37.

<sup>21</sup> Submissions on Sentencing Decision, above note 11, 33.

<sup>22</sup> Rule 23(11) of the CEC's Internal Rules, Rev.4.

<sup>23</sup> The CEC's internal rules suggest that a reparations award could take the form of funding a not-for-profit activity for victims, but even this modest measure will require substantial resources to implement: to date, 93 civil parties participated in the Court's first case, and over 2,000 are likely to participate in its second, many of whom live outside Phnom Penh. Orchestrating any form of activity that involves all civil parties will require concerted planning, effort and resources that the Court cannot credibly expect will be conducted without external support.

<sup>24</sup> Christoph Sperfeldt and Vinesh Winodan (eds) *Conference on Reparations for the Victims of the Khmer Rouge Regime*, May 2009 (Phnom Penh: Cambodian Human Rights Action Committee / CEC's Victim's Unit).

<sup>25</sup> See, Basic Principles and Guidelines for a Right to a Remedy and Reparations for Victims of Gross Violations of Human Rights Law and Serious Violations of International Humanitarian Law (2006) (GA Res.147, 21 March 2006) A/Res/60/147, adopted without vote, at section IX, paragraph 16. Although the Basic Principles have non-binding authority on United Nations Member States, the fact that they have been increasingly utilized to inform precedent at the ICC as it relates to victims may give them added weight when considered in the context of the CEC. See for example, *Prosecutor v Thomas Lubanga Dyilo* (ICC-01/04-01/06) 'Decision on Victim's Participation' (18 January 2008).

# ETHICS FOR MOOT COUNSEL

*Roderick O'Brien*

International Courts and Tribunals rightly expect high ethical standards from all who participate in the work of the Courts and Tribunals, whether as judges, as prosecution or defence Counsel, or in other roles. Some Courts have developed ethical guidelines for judges and counsel. You can see an example of these at the website of the International Criminal Court.

The development of these ethical standards is important for the world's legal professionals. These standards have to summarize the best in ethical standards for judges and counsel from very different legal systems, including the common law, continental law, Islamic law, and soviet law systems.



In the same way, Moot Counsel should act ethically at all times. There is no written Code of Ethics to guide Counsel, and you should be guided by the best principles of ethics of your own jurisdiction. In addition, where your Moot is under the auspices of the Red Cross and Red Crescent movement, you should keep in the mind the seven fundamental principles: humanity; impartiality, neutrality; unity; independence; voluntary service; and universality.

There is no single key to ethics for Counsel in real-life Courts and Tribunals. Rather, there is a complex system of relationships, each of which has its own ethical and professional consequences. Of course, Counsel have their duties to their clients, but at the same time they also have their duties to the Court (or Tribunal), to other professionals such as prosecutors and lawyers, and to the principles of justice and equity which are themselves a source of international law. It is unethical to seek to 'win the case by any means'.

Similarly, all Counsel have a complex matrix of relationships in a Moot. Counsel must be familiar with the rules of the particular Moot, and comply not only with the letter of those rules, but also with the spirit of the rules. Counsel must work ethically with their team-mates, and with members of other teams. Counsel must work ethically with the Judges of the Moot Court, and with all the staff of the Court. A Moot has special characteristics because it is an educational project and a competition for students. It is unethical to seek to 'win the competition by any means'.



A series of examples may help you to identify your own ethical standards and implement them:

### ***As a Student, Do Your Own Research***

A Moot is an educational project, and Counsel are drawn from the ranks of students. One aim of the Moot is to help you to know International Humanitarian Law. Accordingly, all student Counsel have an ethical duty to do their own research, and to rely on the help of teachers only to the extent allowed by the rules.

It would be possible for a team to plagiarise in whole or in part the written submission of another team, prepared for a similar problem in the same or another competition. Plagiarism would be unethical behaviour, and may affect your future career.<sup>1</sup>

### ***Cite Honestly***

Because a Moot has limited time, it is not possible for the Judges to check your sources. It is possible to cheat by inventing citations which suit your case, or by deliberately mis-translating citations. To act ethically, Counsel should act honestly at all times, and never knowingly mislead the court.<sup>2</sup> It does not matter whether or not you can escape detection, act ethically at all times.

### ***Speak with Courtesy***

There is considerable pressure on all those taking part in a Moot. After all, it is a competition. Under pressure it is possible to act or speak without courtesy, even with your own team-mates. The pressure of the competition enables Counsel to practise your self-control and poise. Remain courteous even when Judges are trying, or when your team-mates let you down.<sup>3</sup>

### ***Accept the Imperfections of the Moot***

There are no professionals in Mooting. The Judges and the Moot organisers are mainly volunteers, who have given their valuable professional or organisational skills so that you might have a chance to advance your educational goals. Perhaps the Judges do not speak your language well, perhaps a timekeeper makes an honest error. Counsel should accept that the Judges and Organisers cannot provide a Moot, which is perfect in every detail, and Counsel must accept imperfections with poise and courtesy. Even if there is some kind of disaster, accept the disaster with equanimity. No-one intends such a problem.

### ***Respect the Roles of Judges and Organisers***

In order to preserve their impartiality and neutrality, Judges need to keep an ethical distance from Counsel. In a university setting it may not be possible for Judges to have separate elevators, or other facilities. Respect the distance, and do not attempt to chat with Judges before or during the competition. While it is naturally courteous to chat, Judges need to keep their distance. ‘Justice must not only be done, but also must be seen to be done’.<sup>4</sup>

In the same way, your relationship with the Organisers should be neutral as well as courteous. Do not ask for special attention that would not be available to all teams.



### ***Work as a Team***

Many Moot competitions have a prize for the best individual Moot Counsel. But one aspect of being the best individual is to be the best team member. This is not a contradiction. It is unethical to deliberately push aside your co-Counsel in order to draw attention to your own individual abilities. Show your abilities as a team member.<sup>5</sup>

### ***Act with Courtesy to Other Teams***

Your spirit of universality should extend to all the other Teams in the competition.<sup>6</sup> Perhaps a Team has come from a university with poor library resources, or perhaps they have left behind some resources. Be generous in your courtesy to other teams.

### ***Be a Good Ambassador for Your University***

Just as Counsel in international Courts and Tribunals should be a fine example for their home legal professions, so Mooters should be a fine example for their Universities. At a Moot, you have the opportunity to interact with your own team, then with other Mooters, and also with the Judges and Organisers. Enjoy these interactions, and be a good ambassador for your university.

None of these suggested guidelines should interfere your enjoyment of a good competition, and with your educational growth in understanding of International Humanitarian Law. Indeed the Moot can also provide you with a wonderful opportunity to get to know fine students from other universities, and experts from around the world.

### ***Suggested readings and websites:***

International Criminal Court: Code of Judicial Ethics ICC-BD/02-01-05

International Criminal Court: Code of Professional Conduct for Counsel ICC-ASP/4/Res1 Available at: <<http://www.icc-cpi.int>>

For a detailed presentation of the Fundamental Principles of the Red Cross and Red Crescent Movement, see: Jean Pictet, *The Fundamental Principles of the Red Cross: Commentary*, (1979). The text is available at: <<http://www.icrc.org/web/eng/siteeng0.nsf/html/fundamental-principles-commentary-010179>>

<sup>1</sup> Anita Jowitt, 'The Impact of Plagiarism on Admission to the Bar: *Re Liveri* [2006] QCA 152' (2007) *Journal of South Pacific Law*, 11, 213-217.

<sup>2</sup> See for example, Code of Conduct of the Hong Kong Bar Association, no 130. Available at <<http://www.hkba.org>>

- <sup>3</sup> See for example, Malaysia *Legal Profession (Practice and Etiquette) Rules 1978* rule 18. Available at: <[http://www.malaysianbar.org.my/legal\\_profession\\_practice\\_etiquette\\_rules\\_1978](http://www.malaysianbar.org.my/legal_profession_practice_etiquette_rules_1978)>
- <sup>4</sup> See for example, The Bangalore Principles of Judicial Conduct 2002; application 3.2 Available at: <[http://www.unodc.org/pdf/crime/corruption/judicial\\_group/Bangalore\\_principles.pdf](http://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf)>
- <sup>5</sup> See, for example, All-China Lawyers' Association: Lawyers' Professional Practice Standards (Provisional); 20 March 2004, article 11 <[www.law-lib.com/law/law\\_view.asp?id=82747](http://www.law-lib.com/law/law_view.asp?id=82747)> (available in Chinese only)
- <sup>6</sup> See for example, Code of Ethics for Lawyers Licensed with the Bar Association of the Kingdom of Cambodia, article 25. Available at: <[http://en.bakc.org.kh/Law\\_For\\_Lawyer/Code%20of%20Ethics\\_En.pdf](http://en.bakc.org.kh/Law_For_Lawyer/Code%20of%20Ethics_En.pdf)>

# HISTORY OF MOOT DEVELOPMENT IN THE ASIAN REGION

*Wilson Wong and Lucia Fan*

## **Background**

Dissemination of International Humanitarian Law (IHL) is an important part of work of the Red Cross Movement. IHL may look very fine in law books, but unless it is known, implemented and enforced, it will be of no effect. Through the years, the Red Cross Movement has disseminated to a variety of target groups, both military and civil, as well as to its own members. One of the target groups is academic circles. Mooting competitions are particularly useful for academic dissemination. Students generally enjoy mooting competitions, which give them a chance to improve and display their advocacy skills. At the same time, a carefully crafted moot problem can require students to delve deeply into aspects of IHL, increasing not only their knowledge but their understanding of the underlying purpose. The Hong Kong Red Cross IHL Moot (Asia-Pacific Region) aims to:

- Increase knowledge and understanding of IHL
- Raise awareness of law students on humanitarian issues
- Broaden the students' horizon on international humanitarian and social issues
- Promote spirit of humanity by enhancing understanding of IHL
- Enhance knowledge on roles and works of the Red Cross.

## ***The Origins of the Moot***

In 2003, the first moot took place in Hong Kong, organised by a Committee comprised of personnel from the Red Cross Society of China (Hong Kong branch) (Hong Kong Red Cross or HKRC thereafter), The University of Hong Kong and City University of Hong Kong. There were a number of universities in Hong Kong, but only these two had faculties teaching law at that time. The first moot was very successful, and the organisers in Hong Kong began to look beyond their boundaries for wider participation immediately.

Having started with only two local universities in Hong Kong in 2003, the Moot included both local and non-local universities and became an inter-university competition in the second moot. They found willing participants in east and south-east Asia, and extended invitations to four institutions from the Mainland, Singapore and Philippines to participate in the second moot. The 'snow-ball' effect started when the International Committee of the Red Cross (ICRC) joined as the co-organizer of the Moot in 2005. ICRC not only supported the event financially and with professional input; they also started organizing national mooting competitions in some of the countries in the region.

These national and regional IHL mooting competitions increased dissemination of IHL in a region where some areas are prone to armed conflict. The dissemination was aided by the ICRC joining hands with some national Red Cross Societies



and interested local academic associations and universities in the countries in organizing their national or territory-wide mooted competitions. National competitions were first organized in Indonesia and Malaysia with their champion teams participating in a regional competition held in Hong Kong in 2005. Gradually, Philippines, Mainland China, South Korea,

and Taiwan also had their national or territory-wide competitions. Throughout the past few years, apart from more champion teams from these competitions, universities in the region became increasingly interested in participating in the event. They included distinguished universities from major cities of Japan, Thailand, Australia, New Zealand, South Asia and Cambodia. With participation of all these teams, the moot in Hong Kong became a regional competition in the Asia-Pacific Region. The joining of The Chinese University of Hong Kong as the third collaborating university since 2008 had also marked the local dissemination of IHL to all law schools in Hong Kong. Since 2010, the number of participating teams increased to 20.

The expansion in the development of the mooted competition adopted a phrase-in approach. It first started with an invitation to interested universities to participate in the event. When more universities in a country became interested in participating in the mooted competition, a national or territory-wide competition was introduced, so as to encourage more local universities to participate in the competition with the aim of eventually winning the right to enter a regional competition for competing against other distinguished teams from other countries in the region. The ultimate goal of the HKRC mooted competition is to have all participating teams coming from national or territory-wide competitions, such that IHL could penetrate to more law students.

*Figure 15.1 Scope of Participation*

	By Invitation	From National / Territory-wide / Regional Competitions	Total
2003	2	-	2
2004	6	-	6
2005	9	2	11
2006	9	5	14
2007	10	6	16
2008	7	9	16
2009	7	9	16
2010	8	12	20
2011	6	14	20

### *Professional Assistance*

A mooted competition needs judges, and a regional one draws on a variety of sources for its judges. Some of them, of course, are real judges. All nine competitions so far organized have been supported by the Honourable Justice Patrick Chan, the Permanent Judge of the Hong Kong Court of Final Appeal. Other Hong Kong judges at all levels have also participated as judges. The Hong Kong High Court has been very co-operative in lending courtrooms for the competition, which gives student participants a taste of the world beyond their campuses. The support from the local judiciary is a symbol of the city's concern about IHL.

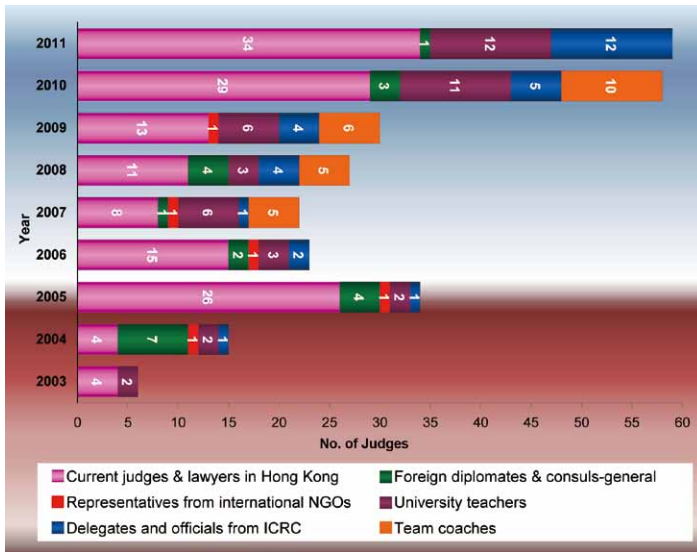
Lawyers in Hong Kong, both solicitors and barristers, have also been willing to give their help as judges. Many of these lawyers are very senior advocates, and are able to give good advice to students not only about the law, but also about their techniques. In 2010, the Hong Kong Bar Association gave substantial support to the competition by partnering with the HKRC in encouraging their members to participate in the event. In 2011, quite a number of senior associates from local legal firms were invited to join the pool of judges in the general rounds. This allowed not only an expansion of the judging panels to give even more objective judgment on the performance of students, but their participation is an obvious demonstration of local legal professionals' support of IHL issues.

The substantial group of diplomats in Hong Kong is another source of judges as many countries maintain consulates-general in Hong Kong. In addition, there are representatives of some international non-government organisations. Some of these diplomats and representatives are legally trained, and are able to bring their legal and practical experience in international law to the competition. For example, Medecins Sans Frontieres Hong Kong had representatives taking up a role as general rounds judges over the past years with their Former Executive Director Mr Dick van der Tak attending on three occasions.

University teachers who are specialised in IHL, or other relevant topics relating to law, are also bringing another dimension to the competition. Some of them are familiar with the law itself, while some from related disciplines in law will help broaden students' horizon and lead to consider issues from different perspectives. These academics are not limited to those who are residents in Hong Kong, but they sometimes come from nearby countries in the region.

Finally, the delegates and other officials of the ICRC have been able to bring specialised experience of the Red Cross Movement to judging in the competition. They included Head and Deputy Head of Regional Delegation for East Asia in Beijing, Legal Advisers from Geneva and from Asia-Pacific Region, as well as Legal Officers and other IHL experts from ICRC.

**Figure 15.2 Distributions of Judges**



### ***Mooting Competition***

The initial competition in 2003 involved only two universities, with four teams of two mooters. Until the 2005 competition, each university continued to provide both a prosecutor team and a defendant team. But the numbers have become so many that from the 2006 competition, universities were restricted to one team of two members. The teams were then randomly assigned the role of prosecutor or defendant.

The competition contains two parts: memorial and oral presentations. Prior to the oral presentation, each participating team submits a written memorial, which is made available to judges and is also exchanged with its opposing teams before each round in the competition.

In 2003 there were oral presentations in the general rounds and final round. Teams from each of the prosecutor side and defendant side with the highest scores from general rounds would enter the final round for the championship. In 2007, in order to allow more judging on the performance of participating teams from different judges before entering final, semi-final rounds were added. Three prosecutor teams and three defendant teams with the highest scores from general rounds meet in the semi-final rounds and compete once. Then the prosecutor or defendant team, which has the highest score in their oral presentations in the semi-final round, then proceed to the final round for the championship.

### ***Moot Problem***

Each year international law scholars prepare a moot problem for the competition. The moot problems always focus on a topical issue in IHL. These have included terrorist

attacks by means of deadly microbes (2003), committing genocide (2004 and 2009), recruitment of child soldiers (2005 and 2010), abuse of prisoners (2006 and 2007), killing of civilian populations (2007, 2009 and 2010), use of cluster bombs/munitions (2008 and 2011), attacks of protective premises (2010), wilful killing of civilians and wounded military personnel (2011), as well as unlawful confinement of civilians (2011).

At the same time, the competition gives the Red Cross Movement a particular opportunity to disseminate information about the work of the Red Cross. For many participants, it is a surprise to discover the breadth and difficulty of the work of the Movement with the victims of armed conflict. So the moot problems always include an issue related to the work of the Red Cross. In 2004 and 2007, these related to **abuse of the emblem in armed conflict**. In 2005, the issue related to the **humanitarian work of national societies**. In 2006, it's related to the work of the International Committee of the Red Cross in **visiting detainees**. In 2009, the use of a **Red Cross worker to protect from attack**. In 2010, the issue related to attack of **hospital displaying the Red Cross emblem** and in 2011 about the extent of ICRC in enjoying their privilege of confidentiality when the evidence they possess in the course of performing their official functions have great importance to a particular case.

At the beginning, the moot problems were borrowed and revised from the Australian national competition. Later, individual scholars were invited to prepare the moot problem. Usually one scholar prepared the problem, although in some cases it was done through teamwork, or even a relay as one scholar passed on a half-drafted problem to another. The draft problem would then be sent to IHL experts for comments prior to publishing before the competition.

### *The influence of the moot*

Part of the atmosphere of the competition is the opportunity for students and other participants to get together. One of the student participants shared that she had no real knowledge about IHL until she decided to try for the competition. Most of her fellow students studying international law were concentrating on areas like the World Trade Organisation, whereas she and her team-mates had gained knowledge of IHL and the resources available to students. In all the participating universities across the Asia Pacific region, the competition will have a similar effect at least on those who participate, and perhaps on a wider group of their friends and classmates.

The competition has also been reported in local publications in Hong Kong, especially the professional legal magazines, thus raising the profile of IHL among practising lawyers. One article from the 2005 edition of *Hong Kong Lawyer*, an official journal of the Law Society of Hong Kong reporting on the competition, noting:



Many of the ‘judges’ put in an admirable effort to familiarise themselves with this area of law. At least one senior counsel was up at four in the morning to ensure that he was really on top of the case before the moot court.

The guest speaker at the final session of the 2006 and 2007 competitions was the Honourable Wong Yan Lung, SC, JP, Secretary for Justice of HKSAR, indicating the importance given to IHL by the government of the Hong Kong Special Administrative Region. He encouraged participants noting:

The competition has given you some taste of what it is like to apply International Humanitarian Law in situations that cause deep human sufferings. You may find that the law might not hold all the answers to the atrocities and acts of violence that people commit against each other. But you could also find that the challenge of protecting human life and dignity is a calling that those of us in the law should never forget and forsake.

### ***The Future of the Moot***

Beginning as a competition with two local universities in Hong Kong, the Red Cross IHL Moot (Asia-Pacific Region) has rapidly expanded to include universities from east, south-east and South Asia, including Australia and New Zealand. It has become a regional mooting competition, with a truly international character. It is likely that the competition will continue to develop as a higher-level competition, universities in different areas or countries having preparatory competitions to decide on a team to go to Hong Kong. This has already happened in the Philippines, Indonesia, Malaysia, Australia, Japan, China, and South Korea.

In addition to the Mooting Competition itself, the co-organizer has actively added in new elements to provide spirit of humanity to participating students including organizing exploration activities and seminars on IHL delivered by IHL experts since 2011. Encouraging responses were received from participants and this further expands Red Cross knowledge dissemination to a new horizon.

# GENERAL RULES OF THE MOOTING COMPETITION

*Hong Kong Red Cross*

## **Introduction**

Mooting is a traditional training activity for law students. It is one kind of mock trial, with the students acting as advocates in a courtroom-like situation. A moot does not involve witnesses, but is restricted to questions of law. The facts form part of the problem. In some universities, mooting is an optional activity for students. However, in other universities, mooting is a part of the curriculum, and mooting work counts towards a student's credit for graduation. There are rules to guide students or organizing institutions in going through the mooting process. The Red Cross International Humanitarian Law (IHL) Moot (Asia-Pacific Region) will be used as an example for elaboration, and respective parties may take it for reference and adaptation subject to their needs and considerations.

## **Organizing Body**

The rules should specify the organizing body of the mooting competition, and its scope of responsibility, such that participants will know which parties are involved in organizing the moot, and where to seek for enquiry, interpretation of rules or for appeal whenever there is such need.

## **Composition and Eligibility**



The scope of a competition will need to be defined in the first place, which considerations may involve but not limited to, the geographical scope of participation, the number of participating institutions, and academic qualification of participants. Subject to interested and qualified institutions available to participate in the competition, as well as the resources and capacity of the organizing body, the competition can be confined to simply as an inter-university one involving only several institutions, or one involving more institutions as a national competition. It could be even cross-bordered to a territory-wide or expanded to a regional competition.

The geographical scope of the competition will affect the number of participating teams. When only several participating institutions are involved, the organizing body may consider having each participating institution to send two teams that play the roles of Prosecutor and Defendant. When the number of participating institution increases to involve more institutions that causes pressure on maintaining the quality standard of the event, then the organizing body may consider having each participating institution to send only one team, with the role of Prosecutor or Defendant to be randomly assigned.

Each participating team comprises 2 students as mooters, who are responsible for doing all the research, writing and editing the memorials, and later become the first counsel and second counsel in oral hearings of the competition. Apart from mooters, the organizing body may allow each team to opt for having another student to take up the role as a researcher, and perhaps also a teacher as the team coach or adviser. The researcher may provide assistance to the team in the research, writing and editing the memorial. The team coach is expected to restrict their advice to students on general matters, like suggestions to research sources, general commentary on structure, organization and flow or arguments.

To allow a fair competition, the academic qualification of participating students should better be well-defined. For example, in the IHL Moot (Asia-Pacific Region), participating students should be registered with the relevant participating institution as of a specific date, either for a first degree in law, or for any postgraduate qualification below a doctoral degree in law. They should not be holding any teaching post, regardless of full or part time, at any tertiary institution, or have been admitted or licensed to practise law in any jurisdiction. To maintain the fairness among all participating institutions, while minimizing administrative workloads at the same time, a delegation will normally not be allowed to make any substitution of its mooters and the researcher after they have become registered, unless with express prior approval of the organizing body in exceptional circumstances. With such exceptional approval, registered researcher may substitute a student registered as a member of its mooters for the oral hearings.

### ***Moot Problem and Clarifications***

The moot problem contains a limited set of facts in the dispute that constitutes the subject matter of the competition. In principle, no additional fact will be introduced into the moot problem, unless there exists a logical and necessary extension of the given facts.

Participating students may wish to raise requests for clarification on certain facts. Such requests, however, would only be entertained should they have material significance in the context of the moot problem. Clarifications issued will become part of the moot problem.

The organizing body should carefully schedule the dates to release moot problem and clarifications to participants, such that they could have sufficient time to study the problem, raise clarification requests, and get necessary information from clarification responses for memorials preparation.

### ***Memorials***

Each participating team should submit a memorial for the Prosecutor or Defendant side it is representing. The organizing body should set the word limit on the memorial to be submitted, where exceeding of words should be subject to mark deduction as defined by the organizing body. The purpose in setting word limit is to ensure all teams will confine the scope and content of their arguments to precise wordings within the

limit. For example, in the IHL Moot (Asia-Pacific Region), each memorial shall not exceed 2000 words in length, which should include everything like citations, footnotes and endnotes. Penalty can be imposed in scale form, such as deduction of 5 marks for every 50 words exceeding the limit to a maximum of 30 marks for over 200 words in excess. The organizing body may also consider and define other aspects of submission standard, such as form and date of submission, style and other writing specifications on memorials, and any penalty that may be in place on violation of specified requirements. In principle, a memorial may not be revised once it has been submitted.

Each participating team will be assigned a moot number. The purpose of such number is to protect the anonymity of the teams to ensure no prejudice or bias is shown in assessing performance of the team throughout the entire competition. Therefore, each memorial is suggested to have two cover sheets. The first cover sheet will indicate details of the team and memorials, namely the name of the participating institution, the mooters' name in the order of their oral hearings, whether they are on the Prosecutor or Defendant side, and the word count of the memorial, which information basically cater for administrative purpose. The second cover sheet should only contain the team's individual moot number. The first cover sheet could then be removed when the memorials are presented to judges and opposing teams for perusal, while addressing the anonymity reason just mentioned.

### ***Pairing of Opposing Teams***

The organizing body will determine how the Prosecutor and Defendant teams will compete with each other. The pairing mechanism can be determined by means of a random draw. In case of more than one general round, say two general rounds, it will be fairer to avoid a team to compete against the same team twice prior to gaining the eligibility to proceed to the subsequent round of the competition. According to such pairing results, all teams will receive the memorials of the opposing teams they will meet in both general rounds of the competition. Also, judges who will adjudicate those pair of teams in the oral hearings of the general rounds will receive their memorials before the competition. In case there is a semi-final round, the pairing of opposing teams could only be conducted after results of the general rounds are available.

### ***Oral Hearings***

The organizing body should define the mode of competition and mechanism for the championship. The followings will take the IHL Moot (Asia-Pacific Region) for illustration. In the IHL Moot (Asia-Pacific Region), there are two general rounds, one semi-final round and one final round. With the objectives of the competition focus on the application of IHL by arguing on the facts presented in moot problem, the use of scoring system throughout the entire competition might be a more appropriate mechanism, than knock-out system, to identify which team wins in a moot.

Prior to commencement of the oral hearing, the relevant court clerk needs to confirm the presence of both Prosecutor and Defendant in their full teams comprising a first counsel and a second counsel as designated by their relevant participating institutions.

In the event that a team fails to appear for a scheduled oral hearing, the round of the competition in concern will proceed as an *ex parte* hearing. The opposing team that present in the court will receive its score in accordance with the scoring system. In the event that only one counsel of a team presents for a scheduled oral hearing, the counsel of the team appearing alone shall speak in the oral hearing and receive an individual score from the judges. If this is a counsel of the Prosecutor team, he or she will speak first, or if from the Defendant team will then speak after the Prosecutor team. As normal to all courts, both the first and second counsel of the Prosecutor side will conduct their oral hearings first, followed by those of the Defendant side. The Prosecutor will then do the rebuttal, if any, followed by Defendant's surrebuttal.

The general rounds will take into account participating teams' aggregate scores from both memorial and oral hearing. Three teams with the highest scores in general rounds from each of the Prosecutor and Defendant side shall enter the semi-final round. Thereafter, the score from memorial will be dropped to avoid double counting of such score again on the performance of the relevant teams. In semi-final round, only eligible teams' scores from oral hearing will be considered, and the team with the highest scores from each of the Prosecutor and Defendant side shall enter the final round of the competition.

There is always a possibility of a tied situation where two or more teams get equal scores for eligibility for proceeding to the subsequent rounds of the competition. The organizing body will have to consider in advance on possible resolutions. In the example of the IHL Moot (Asia-Pacific Region), if there is a tie in the general rounds, the team with higher scores in its oral hearings in the general rounds will enter the semi-final round. In case such scores will tie again, the organizing body has adopted an arbitrary resolution whereby the team whose first counsel with a higher scoring will gain the eligibility. In event of a further tied situation, the respective judges will have to undergo a discussion and the decision made afterwards will be final.

Each team has a maximum duration to present their arguments in the oral hearings, including the use of rebuttal (in case of the Prosecutor team) and surrebuttal (in case of the Defendant team). In the IHL Moot (Asia-Pacific Region), each team has a maximum of 40 minutes, where both the first and second counsel of each team can speak individually for a minimum of 15 minutes, and opt for reserving the remaining 10 minutes for rebuttal or surrebuttal to be conducted by either the first or the second counsel. Each team should indicate such time allocation of oral hearings and rebuttal/surrebuttal at the beginning of the argument. If the court thinks it is appropriate and necessary it may extend the time for each counsel for a reasonable maximum time up to 5 minutes.

### ***Judging and Scoring***

The organizing body will be responsible for inviting appropriate judges to assess the participating teams' performance in terms of their knowledge of the application of the law, as well as presentation and techniques used. Although the organizing body may

determine how many judges assess memorials and oral hearings, there should always be at least two to avoid subjective assessment by a single judge. More judges in the judging panel will certainly facilitate a fairer scoring of the team's performance, but it would be subject to the availability of judges in the competition.

The performance of participating teams can be determined by two aspects: memorial and oral hearing, while the organizing body has to establish assessment criteria and mark allocation for each of these aspects. The assessment of memorial may be subject to teams' knowledge of the facts and legal principles applicable to the issues, proper and logical analysis of issues, correctness of grammar, format, and citation. As for oral hearings, the teams' ability to present content and development of argument, response to questions raised from the judge bench, and individual counsel's speaking ability and delivery can be taken into consideration.

In the example of the IHL Moot (Asia-Pacific Region), each memorial shall be assessed by two judges, with at least one of whom being a current or former judge, lawyer, or law teacher, or otherwise experienced in the field of international law. The score awarded to a memorial should be an averaged score among the two judges assessing that memorial. As for oral hearing, it shall be assessed by at least 2 judges in each oral hearing of the general rounds and by at least 3 judges in the oral hearing of semi-final and final rounds. At least one judge in each oral hearing of the general rounds and semi-final round, and at least two judges in the oral hearing of the final round, shall be a current or former judge, lawyer, or law teacher, or otherwise experienced in the field of international law. The score awarded to each oral hearing of a team is a summation of scores awarding to the first and the second counsel.

The organizing body may decide whether, how and to what extent in disclosing scores and distributing scoresheets back to the respective participating teams. It may also decide whether an appeal system will be appropriate and necessary. It is suggested that, in order to give respect to judges, their decision on giving score shall be final. Participating teams, however, may appeal if any arithmetic error is identified within a reasonable timeframe as imposed by the organizing body.

### ***Awards***

The organizing body could determine the type, form and number of awards to participating teams as an acknowledgement to their efforts and performance in the moot. Four basic awards are suggested: winning team, runner-up team, best mooter, and best memorial. In the IHL Moot (Asia-Pacific Region), the winning team shall be the team participating in the final round with the highest score, whereas the other team participating in the final round shall be the runner-up team. The best mooter is awarded to the counsel with the highest scores in the general rounds. The best memorial will be awarded to the memorial that acquires the highest scores. Subject to the number of participating teams and considerations of the organizing body, the runner-up to the best mooter may receive honourable mention, whereas the runner-up to the best memorial may receive honourable submission.

### ***Interpretation and Application of Rules***

In view that there may be disputes in interpreting and applying the rules, there should be a clause among the rules to determine the authoritative body who has the absolute discretion to resolve these disputes.

# MEMORIAL WRITING

Michael Crowley

## Introduction

Memorials are written pleadings submitted by a mooting team in support of their role in a mooting competition. In the Red Cross International Humanitarian Law (IHL) Moot (Asia-Pacific Region) as it presently stands, teams prepare one side of the case, either the prosecution or defendant. In other competitions, teams have to prepare both sides. Regardless of which side a team is writing for the rules of mooting competitions include strict guidelines on word length, format and content of memorials. These same rules also make it very clear that mooting team members should prepare their own memorials. Although coaches/academics/advisors should be available to answer questions and check the general structure, format and provide general comments as to whether or not the memorial contents make sense, team members must take sole responsibility for the legal content, legal argument and the final product. Experience demonstrates that a good memorial underpins and enhances subsequent oral submissions.

A good memorial preparation is also underpinned by effective reading in the area. Beyond the usual text books, there are a wide range of books<sup>1</sup>, journal articles<sup>2</sup> and web sites<sup>3</sup> that provide a rich source of information on aspects of International Humanitarian Law.

Memorial writing can be divided into three phrases, they are:

## Preparing the Memorial

As there are numerous approaches to memorial preparation, it is best to start with a detailed chronology. A good chronology is invaluable in mooting and in subsequent legal practice. One approach is to use a table something like:

Date	Event	Mooting problem paragraph	Parties involved	Relevant law/issue arising

Other columns can be added where necessary, for example; some mooters might like a column in which they can link the ‘event’ to the opposing team’s memorial. Teams might also highlight which ‘events’ are central to ‘indictments’ or ‘issues’ to be addressed in the problem. For example, in many International Humanitarian Law moots the defendant faces several indictments. These indictments contain facts which are linked to, or are, events in the moot problem. Whether a team uses a portrait or landscape layout depends on personal choice and the amount of information.



### **Structure**

Memorial structure is how you actually set out on paper your written submissions. It is like a scaffold or framework. Your structure will be determined by the requirements of the moot problem. In recent International Humanitarian Law moot problems, teams have been presented with an accused facing a number of indictments under the Rome Statute. Using each indictment as a heading is one approach but a more effective technique is to identify the issues raised by the moot problem. Issue identification is a key legal skill. In mooting, issues fall into several categories. The first are those issues that are additional to the indictments. In a typical moot problem, there could be four to six indictments and some additional issues like jurisdiction and immunity from prosecution. The second group of issues arise in the indictments; for example, superior responsibility.



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Whereas the structure of a memorial is more often a matter of personal choice, the use of headings has many advantages. Headings provide a structure allowing easier access to material during oral arguments. It also allows those who access memorials in competitions to better read and understand the memorial. A suggested set of headings for a recent International Humanitarian Law moot might have looked something like:

Introduction

Issue 1 – Jurisdiction.

Issue 2 – Status of the accused (minor issue).

Issue 3 – Use of militias (minor issue).

Indictment 1 – Key issue - Superior responsibility for use of child soldiers.

Indictment 2 – Key issue - When does free speech become a declaration of no quarter?

Indictment 3 – Key issue - Superior responsibility and intention.

Indictment 4 – Key issue - When does a hospital lose its immunity from attack?

Indictment 5 – Key issue - Superior responsibility in imparting knowledge of the Red Crystal.

Indictment 6 – Key issue - Superior responsibility for actions of subordinate in act amounting to murder.

Conclusion – Two or three key points that are linked to your introduction and support the essential theme of your case/argument.

### *Content*

Content is the substance of your memorial. It is your case or argument. Some authorities refer to this process as ‘developing your case theory’.<sup>4</sup> Another way to look at case theory is to use an analogy. Think about how you would tell a young child a bedtime story from memory. It would have a beginning followed by a theme or message with an ending. In moot problems, one side is seeking to demonstrate the guilt of the accused whereas the other side is seeking to establish the opposite. It is like a game with both sides seeking to win by persuading the judges through the strength, conviction and substance of their argument. The substance is your content. The strength and conviction flows from the substance of your memorial. This is what happens in real legal cases, only in mooting no one goes to prison or loses any money. Content is also limited by the rules of the competition, not unlike the formal rules courts apply to the filing of court documents.

Because there is a word limit, not all issues raised by the mooting problem can be covered in detail. Some issues are significant and some are not. The distinction arises on the facts. In the context of the moot problem, less significant issues are not very important when compared or contrasted against the significant issues. Therefore, it is necessary to decide the significance of identified issues. One way to determine significance is to consider how the issue impacts, or could decide, the outcome or result. In the structure above, a finding as to whether or not the accused possessed superior responsibility is fundamental to resolving the problem. Therefore, both sides of the argument need to address this issue.

Jurisdiction is always an important issue, however, in mooting it is not usually an issue justifying significant time unlike in real cases where a finding of no jurisdiction can terminate proceedings. In mooting, it is the argument that is crucial, not the legal outcome. Furthermore, although a review of case law often demonstrates the existence of a valid argument on jurisdiction for both teams the same case law usually favours the prosecution. What makes issues of jurisdiction interesting for moot problem writers is the fact that there is enough flexibility in the case law to require the prosecution to get their argument correct and the defendant the opportunity to pose an effective counter argument. The best team runs jurisdictional arguments precisely and concisely in as short a period of time the other facts will allow. This determines the number of words devoted to the issue in the memorial.

Another approach to identifying issues is to look at the elements of each indictment. Analyse how each element will need to be proved, that is, what evidence is there in the facts to support each element in an indictment. In each indictment the chances are that one fact will be in dispute. This will require an analysis of supporting and contradicting facts, witness statements and any other evidence before linking the resultant problem to the relevant law. Each side will find that they either have a strong argument, a weak argument or that there is a balanced argument. What is important in mooting is the argument you construct on the facts and law and how you deliver that argument.

Significance will indicate how much space or words should be allocated to an issue in the memorial. Experience will show that issues arising out of the indictments, like superior responsibility, are likely to be more significant than issues that arise independently of indictments. Once issues have been identified the relevant law is easier to identify. Relevant law in the International Humanitarian Law moot would include the Rome Statute<sup>5</sup>, Geneva Conventions<sup>6</sup> and other international instruments<sup>7</sup> followed by case law from international courts and tribunals<sup>8</sup>. Although it is tempting to refer to decisions of national courts these should only be used where they are leading decisions and highly relevant<sup>9</sup>.

Finally, a good memorial reads well, like a good story. The distinction between a good memorial and a good story lies in the use of supporting authorities in memorials. The best memorials prioritise their supporting authorities beginning, where appropriate; with international statute law, treaties and conventions, followed by decisions of international courts and tribunals. Good memorials also cover facts and scenarios in the problem that are against their case theory. The final step in memorial writing is effective editing. Editing is not just checking that a document looks alright. It means making sure the written document complies with the competition rules, including the correct use of citations.

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<sup>1</sup> For example: W. A. Schabas, *An Introduction to the International Criminal Court*, (3<sup>rd</sup> revised ed) (2007).

<sup>2</sup> For example: Gaeta, Paola, 'The Defence of Superior Orders: The Statute of the International Court Versus Customary International Law', (1999) 10 *European Journal of International Law* 172.

<sup>3</sup> For example: <<http://www.icrc.org>>

<sup>4</sup> T. A. Mauet and L. A. McCrimmon, *Fundamentals of Trial Techniques*, (Australian Edition) (1997), 8.

<sup>5</sup> *Rome Statute of the International Criminal Court*, adopted on 17 July 1998, UN Doc.A/CONF.183/9 (entered into force 1 July 2002).

<sup>6</sup> Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 75 U.N.T.S. 31 (Geneva Convention I); Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea 75 U.N.T.S. 81(Geneva Convention II); Convention (III) relative to the Treatment of Prisoners of War 75 U.N.T.S. 135 (Geneva Convention III) and Convention (IV) relative to the Protection of Civilian Persons in Time of War 75 U.N.T.S. 287; opened for signature 12 August, 1949 (entered into force 21 October 1950) (Geneva Convention IV); (Geneva Conventions).The text of the Conventions can be readily accessed through <<http://www.icrc.org>>.

<sup>7</sup> For example: International Covenant on Civil and Political Rights, Adopted at New York, 16 December 1966. Entered into force 23 March 1976. GA Res. 2200A (XXI) UN Doc a/6316 (1966) 999 UNTS 171, 6 I.L.M (1967) 368.

<sup>8</sup> For example: *Tadic* (IT-94-I-T), Opinion and Judgement, 7 May 1997, (1997) 36 ILM 908, 112 ILR 1.

<sup>9</sup> For example: *Attorney-General of the Government of Israel v Eichmann* (1961) 36 ILR 5 and *R. v Bow Street Metropolitan Stipendiary Magistrate Ex. P. Pinochet Ugarte* (No 3) (HL) 24 March 1999 [1999] 2 WLR 827.

# ADVOCACY IN MOOTING

*Michael Crowley*

## ***Introduction***

The essence of advocacy is persuasion. The most persuasive arguments are succinct, factually correct, focus on the key issue(s), can be supported by relevant authority and delivered with an appropriate degree of passion. A good advocate must also be a good communicator.

Mooting is about learning how to be an advocate in ‘safe circumstances’, about learning skills that are transferable to real courts and tribunals. This means that in mooting your client will not really go to prison or lose a lot of money. This means ‘mistakes’ in mooting are not necessarily fatal, but egos can be bruised. Mooting judges do not have to decide who wins the case and provide a judgment. They do decide which team wins – who are the best mooters – who have best expressed themselves and the relevant law, who have persuaded them that their argument is the best. Mooters should also remember that advocacy is also about exercising control over the flow of argument.

New advocates should not be deterred or worried about being nervous before a competition. Experienced trial lawyers still feel nervous/on edge before trials; the difference is their ability to hide their feelings. Many will tell you feeling nervous/on edge sharpens and focuses their mind on the task ahead.

## ***The Foundation***

A well drafted memorial provides a solid foundation for subsequent oral submissions. In many mooting competitions, memorial marks are a percentage of a team’s overall marks in general rounds. In a close competition, the memorial mark can be decisive as in determining which team’s progress. A good memorial also provides a good initial guide for advocates in allocating time to issues raised by the mooting problem. Before each moot it is helpful to prepare a file containing at the very least:

- An outline of proposed oral submissions by each team member
- Chronology
- Prepared outlines of answers to expected questions from the judges
- Copy of memorials
- Copy of opposing teams' memorials
- Copy of the Rome Statute
- Extracts of relevant sections of any other treaties or conventions that may be referred to in submissions
- Summaries of cases that may be referred to in submissions.

In practice before a competition, mooters should start to work as a team. The non speaking mooter should be alert and anticipated what materials, for example, case summary; treaty article, or chronological reference may be needed in response to questions from judges.

### ***Order of Mooters***

The present structure of the Red Cross International Humanitarian Law Moot (Asia-Pacific Region) means that teams have two mooters. The order becomes a decision based upon anticipated impact of each mooter. The aim should be to keep the strongest mooter on their feet the longest. This is best achieved by the strongest mooter going first and doing rebuttal or surrebuttal.

In competitions where teams moot both sides of the problem, for example; prosecution and defendant; other factors come into play such as team numbers and best mooter awards. This can result in one mooter mooting both sides, swapping arguments, in a competition. In these type of competitions, a strong mooter can really stand out as they not only moot all the time, but demonstrate an ability to effectively present alternative arguments.

### ***Announcing Appearances***

There is a simple formula in announcing appearances. After being asked by the bench you should stand and say something like:

#### *Prosecution:*

May it please your honours, my name in Mary Brown and I appear with Joe Chan for the Prosecution. I will be speaking for 20 minutes, co-counsel for 17 minutes and we reserve 3 minutes for rebuttal.

#### *Followed by the Defendant:*

May it please your honours, my name in Susie Chu and I appear with Max Smith for the Defendant. I will be speaking for 20 minutes, co-counsel for 18 minutes and we reserve 2 minutes for surrebuttal.

The above should be said confidently, clearly and slowly so judges can write down names and the court officer/time keeper can write down both names and allocated times. The difference in times between rebuttal and surrebuttal lies in the fact that with rebuttal, a team can cover anything raised by the opposing team, while in surrebuttal a team can only cover matters raised in rebuttal.

### ***Opening Submissions***

Opening submissions set the scene. They should be planned and delivered with confidence. The first mooter has a unique opportunity to outline the mooting problem and engage both judges and audiences. Many teams and trial lawyers overlook the importance of being the first to speak and the opportunity to possibly dictate subsequent proceedings.

In mooting the first mooter in each team should consider achieving three objectives with their opening submissions. How individual mooters do this should be a matter of personal preference and practice:



Prosecution:

1. Briefly outline the facts of the problem – set the scene, the framework in which oral argument will take place – concluding with a statement of the prosecutions' case theory.
2. In as few words as possible, succinctly inform the court what each counsel will focus upon in submissions, and;
3. Link the outline to the first issue to be covered in submissions.

Defendant:

1. If the prosecution has not outlined the facts – do so concluding with the case theory for the defendant. Otherwise, a brief statement of facts that supports the defendants' case theory.
2. In as few words as possible, succinctly inform the court what each counsel will focus upon in submissions, and;
3. Link the outline to the first issue to be covered in submissions.

The second mooter should also prepare an opening statement. In an ideal world, it will flow seamlessly from concluding statements by their first mooter, but questions from the judges can break this flow. Nonetheless, the second mooter should be able to link their first submission to the factual scenario and in as few words as possible remind judges of the other areas they will be covering.

Generally, opening statements by any advocate should be forceful, linked to the facts, in simple direct sentences, uncomplicated English, positive not argumentative, avoid personal opinions and lay the foundations of a case theory.

### ***Body of Submissions***

Submissions should ideally follow the facts in a chronological order. The best advocates focus on issues, including those issues that are against their case theory. In other words advocates deal with any facts that affect their case theory including facts that are adverse to their position. They also keep an eye on the time and regardless of questions from the bench control interactions so they can conclude their submissions. Good advocates answer all questions and see questions as their friend. This is because questions from judges enable advocates to assist the judges in following/understanding submissions while demonstrating the advocate's grasp of the facts and the relevant legal principles. What often distinguishes the best advocates from the rest is their composure and ability to answer questions while moving through their submissions.

### ***Concluding Submissions***

These should be distinguished from rebuttal and surrebuttal. A concluding statement is the words an advocate use to end or wind-up their submissions, not unlike a bookend. Ideally, it will be two and approximately six concise sentences that logically conclude your case theory. It needs to have a short version (two sentences) in case time runs out while an advocate is still answering questions from the judges. An advocate can ask if a very brief concluding statement can be made, an application that is usually granted. A good, effective closing submission requires preparation and should be prepared so that it flows logically from the opening submissions.

### ***Rebuttal and Surrebuttal***

These are an advocate's final chance to persuade. The rules of each are simple, namely rebuttal is an opportunity to counter/rebut submissions made by the respondents. Rebuttal should be brief, not more than three minutes, and address only key issues or factual and/or legal errors. Surrebuttal provides the respondent with an opportunity to counter any key issues, factual and/or legal errors by the applicant in rebuttal. In both cases, clever advocates manage to weave into their submissions the two or three key points that underpin their case theory.



### ***How to be Adversarial***

Advocacy is also adversarial. Adversarial means being appropriately critical and taking advantage of weaknesses in your opponents case/submissions while advancing your case/submissions. That means it is like a modified form of armed combat except words and speech are the weapons. However, because it is adversarial does not mean there are no rules

and protocols. Advocates should always remain in control, be absolutely polite and never ridicule opponents. If an opponent is wrong or has made a mistake, then simply say so. For example, “Your Honours, in their submissions on extradition opposing counsel cited the case of *Tadic* in support of their argument that... With respect we submit that the correct authority relevant to the facts in this case is *Eichmann* because...” or “Your Honours, in indictment one the key fact is the date at which the accused became the commander. Opposing counsel was mistaken (or in error) in saying that date was 11 May 2009. The correct date is 10 April 2009 and I refer the court to paragraph 21 on page 5 of the moot problem. The date of 10 April is significant because...”

Advocates should always remain in control and not speak over other advocates or judges. Finally, advocates, even very experienced trial lawyers make mistakes. Good advocates openly admit/accept or correct their mistake, apologise and move on with the case.

### ***Playing with Language***

Because words and speech are an advocate's only weapon, it does not mean an advocate is limited in presenting submissions. Advocates can use various techniques in language delivery and use of their voice to enhance submissions. Starting with voice, advocates can vary:

- Speed of delivery
- Pitch, volume and tone
- Pause and hesitation for effect/create suspense
- Emphasis for effect or to highlight or stress

In the use of words, advocates can:

- Use simple direct speech
- Paint a word picture/use imagery
- Compare and contrast
- Use analogies
- Refer to maps, diagrams and other documents

### ***Avoiding Mannerisms***

One of the advantages of practice moots is the opportunity for advocates to identify mannerisms that detract from their oral submissions. For example, unnecessary waving of arms and hands, continually touching the face, repetitive use of words like “okay” and “like”; and sounds like “hmm”. Mannerisms should, at the very least, be kept to a minimum.

### ***Use of Time***

Although advocates should ensure their submissions do not go over their time allocation this can be difficult when judges keep asking questions. Inexperienced advocates may find preparing two outlines of submissions helpful. The first outline takes up the 17, 18 or 20 minutes; they expect to be speaking less allowing about 5 minutes for questions and answers. The second outline allows for 10 minutes of questions and answers. The other method is to prepare the one outline of submissions but highlight the key or essential parts that must be covered so that if time is running out the advocate knows what has to be covered in the remaining time. Well prepared advocates should not be concerned about finishing early. It is better to finish completely and strongly than to waffle and scratch around filling in a couple of minutes that you had expected would be taken up by questions from judges.

### ***Conclusion***

While standing before a panel of judges and being watched by an audience can be a daunting and terrifying experience at first, most advocates cope reasonably well and get better with experience. Advocacy in mooting should, in the end, be enjoyable and worthwhile, leading to a more skilled and formidable lawyer. Mooting gives new advocates a safe environment in which to practise and groom oral legal skills in a setting similar to what they will face in real legal practice.



# HOW TO PREPARE FOR AN INTERNATIONAL HUMANITARIAN LAW MOOT

*Justice Patrick Chan*

## ***Mooting***

Mooting provides students with as nearly as possible a real life experience of a hearing in a court setting. A moot takes place in a courtroom; the bench consists of judges, lawyers and members of the academia; students argue over issues arising from a case modified from a real case; and they make submissions like counsel briefed for the prosecution and the defence. The only difference is that there are no losers in a moot: the unpleasant consequences of a real trial or appeal do not occur – nobody is sentenced to jail and nobody is visited by a court order. This alleviates part of the pressure on all those who take part in the moot. However, they are equally if not more serious in their efforts. On the other hand, all those who take part, not only the students but also the judges, lawyers and academics, benefit from the experience. In particular, a moot offers students a valuable opportunity to learn, develop and practise advocacy skills. In many law schools, mooting is a regular and very often a compulsory event.

## ***International Humanitarian Law Moots***

There is an additional purpose in holding International Humanitarian Law mooting. It is aimed at cultivating interest in this important area of the law for all involved, especially the students. Many universities do not offer a course in this subject, at least not for undergraduates. This is partly because it is sometimes regarded as a specialized subject that is not easy for students to master. Another reason is that there is a general perception that what is very often said to have happened in some countries does not concern one's own country and that International Humanitarian Law seldom, if at all, applies except in under-developed countries. Most unfortunately, this is quite an erroneous perception and a mistaken attitude. Even if there is to be any truth in this perception, it is plain that atrocious and horrible conduct and war activities are not only blatant infringements of basic human rights, sometimes on a massive scale, they are also an affront to the dignity of all humankind. They simply do not just happen inside our neighbour's home; they happen among all of us, the whole human race. It is the duty of all civilized communities to eliminate such conduct and activities and to condemn them whenever they happen. A better understanding of International Humanitarian Law helps to promote respect for human rights and to uphold human values. International Humanitarian Law mooting can foster greater awareness in these important objectives among our future generations of lawyers.

## ***How to Prepare for a IHL Moot***

Most students do not find International Humanitarian Law moots (IHL moots) easy, particularly in the midst of their heavy curriculum. However, those who have taken part in such moots never regret having taken the trouble and accepting the pain in doing so. It is an experience they will forever treasure.

To do well in an IHL Moot, in my view, three techniques are essential: preparation, presentation and persuasion.

### ***Preparation***

As in all mootings, preparation is the key to success in an IHL Moot. Many may think that this goes without saying. It is extremely rare that students take part in a moot without any preparation. Yet some do better than others. This is because the correct preparation and the extent to which effort is put into such preparation are equally important, lest unnecessary time and effort be wasted. As in real cases, a bad case may not be won even by the most thorough preparation, but a good case can be lost if it is poorly or inadequately prepared.

The first step in preparing for an IHL Moot is to master the facts, which are invariably complicated: lengthy periods of conflict, previous historical and political grudges, different ethnic or religious interests, influence and assistance from foreign powers. These are special features common in IHL cases. The moot problem is carefully designed and the facts are deliberately chosen to give rise to different arguable issues. Each fact relates to one of the issues involved and has to be considered; and no fact can be lightly ignored. Some facts are in favour of the prosecution and others support the defence case. They are evenly balanced. Usually, the prosecution has a stronger case in respect of some of the issues whereas the defence is quite arguable in respect of other issues.



It is thus essential to bear in mind that the facts must be properly and carefully analyzed. The mooter must know the strengths and weaknesses of his (or her) case. Having identified these aspects of the case, he (or she) must make the best out of the facts which are in his (or her) favour and try to find an answer or a way to distinguish the facts which are against him (or her). It is not enough just to focus on one's own case without knowing the case of the opponent and how to counter it. One should always ask this question: if I were on the other side, what are my strongest points? It is when the case is tested in such a way that one can really assess one's chances.

The second step in the preparation work is to familiarize yourself with the law that is relevant to the issues in the case. The starting point must be the charges contained in the indictment. What are the ingredients of each charge? What needs to be proved? Whether any defence is provided for? These questions lead to a consideration of the appropriate international conventions and statutes and the case law applying or explaining the relevant provisions. Although there are not too many conventions and statutes, there is an abundance of case law and academic materials. Many of them are not easy to understand, let alone distinguish from one another. But a study of these provisions and authorities will help one to focus on the right issues. An easily overlooked issue is the jurisdiction of the court over a particular defendant. This is because very often, the

defendant in the case is out of the country where the alleged crime occurred, enjoying some sort of amnesty or immunity. While this issue may not be raised in the moot problem, there is nothing to stop the court from raising it at the hearing. It is worthwhile getting ready for such a surprise question from the judges.

The next step is to see whether there are any authorities that support or are against the prosecution or defence case on any particular issue. A good mooter will make the best use out of cases in his favour. But it would be naïve to simply ignore or gloss over cases that are not so favourable or even detrimental to one's case. The opponent will inevitably come to know about them and they will be drawn to the attention to the court. It is good practice to grasp the kettle and face the problem. Study them carefully and try to distinguish them either on the legal issues involved or on the facts. If any case is on all fours of the case in question, it would be wise to consider conceding the point altogether. Fortunately, very few cases are exactly the same and there are always some distinguishing features.

Finally on preparation, a mooter should know how to apply the relevant legal principles to the facts. This is never easy, particularly with principles of international humanitarian law and partly because the facts are often not straightforward. As discussed below, a mooter does not have all the time in the world to present his or her arguments. Thus, it is of critical importance that he or she should be able to state and summarize the applicable principles precisely and succinctly, and to readily point to the particular facts in the case that are directly relevant so that no time is wasted.

### ***Presentation***

Having prepared the case thoroughly, it is equally important to plan carefully how to present it to the court. Allocation of the issues between team-mates is necessary. But there must be a logical sequence in the points to be presented to the court. The issues to be argued must not be divided merely as a matter of convenience. A good presentation requires the issues to be logically allocated between members of the team. Very often, if the issues are closely related, the court will raise with one counsel questions on issues that are supposed to be dealt with by the other counsel. In such a case, the court expects counsel to give at least some initial responses to its questions rather than being simply told that it will be dealt with by the team mate and that the court has to wait. Thus, a shrewd mooter should always be on the alert and be prepared to deal with issues, both law and facts, that may have been allocated to a team mate.

Keeping to the time given for presentation also requires great skill. Time constraints are not imposed merely to maintain order at the hearing and to be fair to all mooters. They are also imposed to help train mooters to organize their points and plan their presentation. Long arguments are not necessarily good arguments. Submissions, which are concise and precise, can be very effective and always win the attention of the judges. It is important to bear in mind that before the oral presentation, counsel would have filed memorials setting out written submissions in detail, which the judges have already studied. The oral presentation serves the function of elaborating on the written cases,

clarifying some ambiguities and providing an opportunity to persuade the judges. But good timing is usually beyond counsel's control. However well prepared he (or she) may be, interventions from the bench will make time keeping extremely difficult. A good mooter when planning his (or her) presentation should also take that into account and make his (or her) oral argument as flexible as possible. Such skill comes only with preparation and experience.

### ***Persuasion***

Advocacy is the art of persuasion. Counsel has the task of convincing the judges that both the law and the facts are on his (or her) side. So a good mooter speaks to the judges, makes them listen, tries to impress them, and convinces them that his (or her) argument is right and the opponent's argument is wrong. Eye contact is thus crucial. Do not read from any prepared speech because this is not advocacy. Prepared speeches are most of the time unhelpful since it will not be easy to follow the script after questions from the judges. One will do much better with short notes that help in the delivery and serve as a reminder of matters that may be omitted.

Questions from the bench are of different types: many of them are meant to test the mooter's propositions; some are asked to seek clarification; others are asked to offer assistance on a certain point, yet some are intended to make a mooter recognize arguments are not sound; and a few are deliberately put to entrap. So, listen to the questions carefully and answer them directly and clearly, always with a sensible answer and where necessary an explanation.

It is natural for a young mooter to be nervous when appearing before a court of three or even five judges. Questions from the judges are sometimes unfriendly, even hostile or intimidating and this may add to a mooter's anxiety. Nervousness and anxiety give the impression that one is not entirely confident with one's own arguments. It is thus important to keep one's manner and composure despite interventions from the bench. One of the main purposes of mooting is to enable students to acquire the necessary experience so as to overcome such common disposition. Ultimately, preparation and practice are the indispensable panacea.

I hope that the above suggestions are useful to students participating in IHL Moots. My advice is: work hard on the problem, learn through the process and enjoy the experience.

# **The 10<sup>th</sup> Red Cross International Humanitarian Law Moot (2012)** **(An Inter-University Competition for Asia-Pacific Region)**

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