

**THE CONTRIBUTION OF INTERNATIONAL BODIES  
TO THE DEVELOPMENT AND IMPLEMENTATION  
OF INTERNATIONAL HUMANITARIAN LAW (IHL)**

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## Introduction

International Humanitarian Law (IHL) is a branch of Public International Law which is intended to alleviate human pain and suffering resulting from armed conflicts<sup>1</sup>.

The expression humanitarian law was developed after World War II to focus attention on the protection of war victims (i.e. wounded and sick members of armed forces on land; wounded, sick, shipwrecked members of armed forces at sea; prisoners of war and civilians) and to establish a connection between the law of war, as it was then known, and human rights law<sup>2</sup>, which was then in its infancy. Indeed, both branches overlap in some respects. Both are informed by the same values since both are intended to protect human dignity. However, human rights law applies in time of peace as well as in time of war whereas humanitarian law applies only in the event of an armed conflict. Thus, according to article 1 (2) of Protocol II additional to the Geneva Conventions of 1949<sup>3</sup>, IHL does not apply « to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts ». These situations are not governed by IHL, but they are governed by human rights law. This being said, in practice, it may sometimes be difficult to distinguish a situation of internal violence from an armed conflict, as demonstrated in the *Abella* case<sup>4</sup>.

Because it is concerned with armed conflicts, humanitarian law is often confused with the law of armed conflicts (the law of war) which traditionally deals with the conduct of hostilities. Both branches largely overlap, although the law of armed conflicts includes rules which are not inspired by humanitarian concerns: those dealing with neutrality or with the protection of cultural property, for instance. This difference is reflected in the traditional distinction between the Law of Geneva, on one hand, and the Law of The Hague, on the other. The Law of Geneva is humanitarian law proper. It is made up of protection rules. The Law of The Hague is the law of war. It is made up of combat rules. However, the distinction is somewhat superficial and it has been blurred by the adoption of the

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<sup>1</sup> See J. Pictet, *Développement et principes du droit international humanitaire*, Genève, Institut Henry Dunant/Paris, Pédone, 1983, p.7; F. Kalshoven, *Constraints on the Waging of War*, Geneva, I.C.R.C., 1987, at 1.

<sup>2</sup> See D. Schindler, « The International Committee of the Red Cross and Human Rights », (1979) 715 *International Review of the Red Cross* 3.

<sup>3</sup> *Geneva Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts*, (1979) 1125 U.N.T.S. 609, A. Roberts/R. Guelff, *Documents on the Laws of War*, 3<sup>rd</sup> ed., Oxford University Press, 2000, at 481.

<sup>4</sup> *Juan Carlos Abella v. Argentina*, Report No. 55/97, Case 11.137, Inter-Am. C.H.R. 271, OEA ser. L/V/11.98, doc. 6 rev. (1998).

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additional Protocols of 1977<sup>5</sup>. Indeed, both instruments include protection rules as well as combat rules.

The main source of IHL consists of the four Geneva Conventions of 1949<sup>6</sup>. They deal primarily with international armed conflicts. However, they also include a common article 3 which deals with non international armed conflicts.

The Geneva Conventions were supplemented by two additional Protocols adopted in 1977. Protocol I applies to international armed conflicts<sup>7</sup>, while Protocol II applies to non- international armed conflicts<sup>8</sup>. It supplements article 3. More recently, a third additional protocol was adopted, which recognizes an additional distinctive emblem in the shape of a red crystal on a white background<sup>9</sup>.

The Geneva Conventions have been ratified virtually by all States<sup>10</sup>, so that most of their provisions, including article 3, are considered to be part of customary law<sup>11</sup>.

The situation is somewhat different with respect to the additional Protocols. So far, Protocol I was ratified by 166 States, and Protocol II was ratified by 162 States. However, according to a study completed by the International Committee of the Red Cross (ICRC) in 2005<sup>12</sup>, a large number of the rules included in both additional protocols are supposed to apply to all States as part of customary international law. In turn, Protocol III has, to this point in time, been ratified by 7 States.

Apart from the Geneva Conventions and their additional Protocols, other rules of IHL are found in several international instruments dealing with specialized

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<sup>5</sup> See G. Abi-Saab, « The specificities of humanitarian law », in C. Swinarski (ed.), *Studies and essays on international humanitarian law and Red Cross principles in honour of Jean Pictet*, Geneva, ICRC/The Hague, Martinus Nijhoff, at 265, fn. 1.

<sup>6</sup> *Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, (1950) 75 UNTS 31; *Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, (1950) 75 UNTS 85; *Geneva Convention III Relative to the Treatment of Prisoners of War*, (1950) 75 UNTS 135; *Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War*, (1950) UNTS 287; Roberts/Guelff, *op.cit.*, note 3, respectively at 195, 221, 243, 299.

<sup>7</sup> *Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Conflicts*, (1979) 1125 UNTS 3; Roberts/Guelff, *op.cit.*, note 3, at 419.

<sup>8</sup> *Supra*, note 3.

<sup>9</sup> *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, (2006) 861 *International Review of the Red Cross* 187. On line: [www.icrc.org](http://www.icrc.org).

<sup>10</sup> As to December 1<sup>st</sup>, 2006, the Geneva Conventions have been ratified by 194 States.

<sup>11</sup> See J.-M. Henckaerts/L. Doswald-Beck, *Customary International Humanitarian Law*, vol. 1: Rules, Cambridge University Press, 2005, at xxx.

<sup>12</sup> See the Study, *Id.*

topics such as the Convention on Genocide (1948)<sup>13</sup>, the Ottawa Convention on land mines (1997)<sup>14</sup>, or the 1998 Rome Statute of the International Criminal Court<sup>15</sup>. Some rules are also found in United Nations Security Council Resolutions dealing with armed conflicts<sup>16</sup>, as well as in decisions, judgments and advisory opinions rendered by international judicial bodies<sup>17</sup>.

Together, all these rules make up the body of IHL. However, they have different backgrounds. Also, their development as well as their implementation involves different international bodies. Some of these bodies are non-governmental organizations (NGOs) like the ICRC. Other bodies belong to the United Nations family.

### **1. The contribution of non-governmental international bodies to the development and implementation of IHL**

Three non-governmental international bodies are mainly involved in the development and the implementation of IHL:

- the ICRC;
- the International Red Cross and Red Crescent Movement;
- The International Institute of Humanitarian Law.

#### **A) The International Committee of the Red Cross (ICRC)**

##### 1) The international legal status of the ICRC<sup>18</sup>

The ICRC is a Swiss society governed by the Swiss Civil Code as well as by its own Statutes. Its governing body is made up exclusively of Swiss citizen who guarantees its neutral character. Neutrality is one of the fundamental principles the ICRC operates under<sup>19</sup>.

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<sup>13</sup> *UN Convention on the Prevention and Punishment of the Crime of Genocide*, (1951) 78 UNTS 277; Roberts/Guelff, *op.cit.*, note 3, at 179.

<sup>14</sup> *Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction*, (1997) 36 ILM 1507; Roberts/Guelff *op.cit.*, note 3, at 645.

<sup>15</sup> *Rome Statute of the International Criminal Court*, (1998) 37 ILM 999; Roberts/Guelff, *op.cit.*, note 3, at 667 (extracts).

<sup>16</sup> *Infra.*

<sup>17</sup> *Infra.*

<sup>18</sup> See F. Bugnion, *Le Comité international de la Croix-Rouge et la protection des victimes de la guerre*, Genève, C.I.C.R., at 1113 *et seq.*

<sup>19</sup> The other principles are: humanity, impartiality, independence, voluntary service, unity, universality.

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In spite of its domesticity, the ICRC has, through practice, acquired an international legal personality of a functional nature<sup>20</sup>. As a result, it can enter into some treaties, such as headquarters agreements, have diplomatic relations with States, extend its diplomatic protection to its delegates, etc. Moreover, since 1990, it has the status of an observer at the United Nations which allows the ICRC to contribute to the work of the Organization relating to IHL.

It should also be noted that the ICRC is the cornerstone of the International Red Cross and Red Crescent Movement, which also plays a role in the development of IHL.

#### 2) The ICRC and the development of IHL

The history of the ICRC is closely linked to that of IHL. As mentioned before, the expression IHL is recent. However, the modern origins of its rules can be traced back to the battle of Solferino and to one man: Henry Dunant<sup>21</sup>.

The battle of Solferino took place in 1859, in northern Italy between Austro-Hungarian armies on one side and the Franco-Sardinian Alliance on the other. The battle lasted 15 hours. The casualties were heavy: some 40,000 dead, wounded or missing. Most wounded were left to die without help for want of adequate medical resources.

It is at this point that Henry Dunant came into the picture. Henry Dunant was a Swiss businessman who was traveling back to Geneva through northern Italy when he arrived in Solferino just after the battle was over. Dunant, who was shocked by the agony of the wounded soldiers, interrupted his trip back to Geneva. For several days, with the help of women from a neighbouring village, he tended to the wounded and the dying without any distinction based on uniform.

Later on, back in Geneva, Dunant wrote a short book entitled « A Memory of Solferino »<sup>22</sup> in which he gives a vivid account of his experience in Solferino.

In his book, Dunant also developed two seminal ideas:

- a relief society for wounded soldiers should be created in each country in time of peace to supplement army medical services in time of war;
- an international treaty should be concluded to determine the role of national relief societies in time of war.

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<sup>20</sup> See C. Dominicé, « La personnalité juridique internationale du CICR », in Swinarski, *op.cit.*, note 5, at 663; P. Reuter, « La personnalité juridique internationale du Comité international de la Croix-Rouge », *Id.*, at 782; J. A. Barberis, « El Comité internacional de la Cruz Roja como sujeto del derecho de gentes », *Id.*, at 635.

<sup>21</sup> See Bugnion, *op.cit.*, note 18, at 6 et *seq.*

<sup>22</sup> Geneva, Imprimerie Jules-Guillaume Fick, 1862.

« A Memory of Solferino » was published in 1862. It was well received in Geneva as well as in the rest of Europe. Indeed, the times were right: in 19<sup>th</sup> century Europe, fed by liberal ideas, public opinion was more sensitive to human suffering than it ever was before. As a result, in 1863 an International Permanent Committee for the Relief of Wounded Soldiers was established by five citizens of Geneva, including H. Dunant. The purpose of this Committee of Geneva was to promote Dunant's program throughout Europe. To that end, the Committee of Geneva organized two conferences:

The first conference was held in Geneva in 1863. It led to the adoption of 10 resolutions which set up the foundations of national societies for the relief of wounded soldiers<sup>23</sup>. They were to become national societies of the Red Cross in 1872. The resolutions of 1863 also provided that the Committee of Geneva would temporarily serve as a link between the national societies. However, this role proved to be so important during the Franco-Prussian war of 1870 that eventually, the Committee of Geneva ended up acting as a permanent connection between national societies. It became the ICRC in 1880.

The second conference organized by the Committee of Geneva took place in 1864 under the auspices of the Swiss government. It led to the adoption of the first Geneva Convention (*Convention for the Amelioration of the Condition of the Wounded in Armies in the Field*)<sup>24</sup>.

This Convention included ten articles formulated around four basic principles which are still relevant today:

- army medical personnel are not combatants; if captured by the enemy, they must not be held prisoners;
- all wounded and sick soldiers must be cared for without any adverse distinction;
- civilians who tend to wounded soldiers must be respected;
- field hospitals and ambulances are neutral. They are identified by a red cross on a white background, an inversed version of the Swiss federal flag. At the time, this emblem was adopted in recognition of the role played by Switzerland in his adoption of this first Geneva Convention.

The Convention, which was ratified by twelve States, is a landmark. For one thing, it is the first multilateral treaty concluded in time of peace to govern future armed conflicts between the contracting parties. For another thing, it marks the beginning of IHL. Indeed, the Geneva Convention of 1864 was revised in 1906, 1929 and 1949 when it became Geneva Convention I<sup>25</sup>.

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<sup>23</sup> See Bugnion, *op.cit.*, note 18, at 21.

<sup>24</sup> *Id.*, at 27-28.

<sup>25</sup> See Roberts/Guelff, *op.cit.*, note 3, at 195.

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Moreover, the provisions of the Geneva Convention of 1864 were extended to the wounded, sick and shipwrecked at sea by Hague Convention III of 1899. Subsequently, the provisions of that Hague Convention were revised in 1907 (Hague Convention X). In 1949, both Hague Conventions were replaced by Geneva Convention II<sup>26</sup>.

In the meantime, other Hague Conventions adopted in 1899 (HCII) and in 1907 (HCIV)<sup>27</sup> identified the groups of combatants who are entitled, when captured, to prisoner of war status and defined how they should be treated during their captivity. The relevant provisions of these Conventions were supplemented by a Geneva Convention of 1929, and complemented in 1949 by Geneva Convention III<sup>28</sup>.

In 1949, a fourth Geneva Convention was adopted to deal with the protection of civilians<sup>29</sup>. Furthermore, as noted before, the four Geneva Conventions of 1949 were developed and supplemented by Additional Protocol I of 1977<sup>30</sup>. Thus, the Geneva Convention of 1864 was the starting point of a movement which led to the adoption of a whole body of rules of IHL applicable to international armed conflicts.

Furthermore, the four Geneva Conventions include a common article 3 which, for the first time, provided a basic framework of minimum standards applicable to non-international armed conflicts<sup>31</sup>. In turn, article 3 was developed and supplemented by Additional Protocol II of 1977<sup>32</sup>. Then, in 2005 an additional distinctive emblem (the red crystal) was recognized by Protocol III<sup>33</sup>.

Together, the four Geneva Conventions of 1949 and the three additional Protocols make up the body of what is known as Geneva Law because of the role which the Committee of Geneva (the ICRC) has played in its development since the beginning. Indeed, from the start, the ICRC has been leading efforts to develop IHL<sup>34</sup>. Thus, it started the process which ended up with the conclusion of the Geneva Conventions of 1864, 1906, 1929 and 1949<sup>35</sup>.

Also, it was involved in the extension of the 1864 and 1906 Geneva Conventions to maritime warfare, by way of Hague Conventions. As noted before, those were replaced by Geneva Convention II which was drafted by the ICRC<sup>36</sup>.

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<sup>26</sup> *Id.*, at 221.

<sup>27</sup> *Id.*, at 67.

<sup>28</sup> *Id.*, at 243.

<sup>29</sup> *Id.*, at 299.

<sup>30</sup> *Id.*, at 419.

<sup>31</sup> See Bugnion, note 18, at 374 *et seq.*

<sup>32</sup> *Id.*, at 385 *et seq.*; Roberts/Guelff, *op.cit.*, note 3, at 481.

<sup>33</sup> *Supra*, note 9.

<sup>34</sup> See Bugnion, *op.cit.*, note 18, at 22 *et seq.*

<sup>35</sup> See Roberts/Guelff, *op.cit.*, note 3, at 14-15.

<sup>36</sup> *Id.*, at 222.



Moreover, the ICRC initiated the move to supplement the Geneva Conventions of 1949 with the two additional Protocols of 1977. Those were negotiated on the basis of drafts prepared by the ICRC. Their provisions, as well as those of the Geneva Conventions, are exposed in the « Commentaries » prepared and published by the ICRC<sup>37</sup>. Furthermore, the ICRC was instrumental in the adoption of an additional distinctive emblem by way of Additional Protocol III. It should also be mentioned that in several instances the ICRC developed, on its own initiative, practices which later on were confirmed by conventional rules: for instance, the establishment in 1914 of the International Agency for Prisoners of War. The initiative gave rise to provisions found in the 1929 Geneva Convention on Prisoners of War (art. 79) and in Geneva Convention III of 1949 (art. 123)<sup>38</sup>.

The ICRC has also contributed to the adoption of other treaties, such as the 1980 U.N. Convention on Certain Conventional Weapons<sup>39</sup>, the 1997 Ottawa Convention on anti-personnel land mines<sup>40</sup>, the 1998 Rome Statute of the International Criminal Court<sup>41</sup>, etc.

Furthermore, the ICRC has recently endeavored to identify customary rules of humanitarian law to supplement the body of treaty rules.

The rationale behind this new development lies in the fact that non-international armed conflicts are not regulated in sufficient detail by treaty law. To be sure, far fewer treaty rules are applicable to non-international armed conflicts than to international armed conflicts. Besides, in practice, many non-international armed conflicts are only governed by article 3 common to the four Geneva Conventions. As noted before, article 3 merely provides a basic framework of minimum standards. On the other hand, international armed conflicts are regulated in more detail by treaty law. Yet, since the end of World War II, non-international armed conflicts have become proportionally more important than international armed conflicts<sup>42</sup>.

It is against this background that the ICRC undertook a study on customary international humanitarian law.

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<sup>37</sup> See J. Pictet (ed.), *The Geneva Conventions of 12 August 1949: Commentary*, 4 vols., Geneva, ICRC, 1952-60; Y. Sandoz/C. Swinarski/B. Zimmermann, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva, Martinus Nijhoff for International Committee of the Red Cross, 1987.

<sup>38</sup> See Bugnion, *op.cit.*, note 18, at 93, 200, 638 *et seq.*

<sup>39</sup> *Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects*, (1983) 1342 UNTS 137; Roberts/Guelff, *op.cit.*, note 3, at 515.

<sup>40</sup> *Supra*, note 14.

<sup>41</sup> *Supra*, note 15.

<sup>42</sup> See J.-M. Henckaerts/L. Doswald-Beck, *op. cit.*, note 11, at xxviii-xxix; J.M. Henckaerts, « A contribution to the understanding and respect for the rule of law in armed conflict », (2005) 857 *International Review of the Red Cross* 175, at 177-178.

The study was mandated in 1995 by the 26<sup>th</sup> International Conference of the Red Cross and Red Crescent Movement<sup>43</sup>. It took ten years to complete. After extensive research and several meetings of experts from various countries, the study led to a report which was published in 2005<sup>44</sup>.

In the study, the ICRC identifies 161 rules which are presented as part of customary international law. In many cases, these rules apply to both international and non-international armed conflicts. Some of the rules deal with the protection of victims, others deal with the conduct of hostilities, and others still deal with the implementation of IHL<sup>45</sup>. Most of the rules stem from treaties which, like both additional Protocols, have not been ratified by all States.

This raises the following question: on what basis did the ICRC justify its findings? Indeed, customary law, whether domestic or international, is supposed to reflect some social consensus<sup>46</sup>. Here, such a consensus seems to be missing. Indeed, several States have not consented to be bound by the treaties which gave rise to the rules identified in the study<sup>47</sup>.

To deal with this issue, an investigation into the method used by the ICRC to complete its study is necessary. This method is described in the study<sup>48</sup>. It turns around the application of article 38 (1) b) of the *Statute of the International Court of Justice* (ICJ). There lies one of the problems which affect the study. Indeed, it may be argued that the ICRC study is flawed for the following reasons<sup>49</sup>:

1) The study reduces the concept of international custom to its definition under article 38 (1) b) of the Statute of the ICJ. Article 38 (1) b) defines international custom « as evidence of a general practice accepted as law ». As a rule on evidence, article 38 (1) b) states the conditions required to establish the existence of a rule of customary law before the Court. Thus, article 38 (1) b) is fundamental when, in a concrete case brought before the ICJ in adversary proceedings, a party intends to prove the existence of some customary rule. The situation is quite different when the ICRC pretends, in the abstract, to establish the existence of a whole body of customary rules of humanitarian law. In such a

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<sup>43</sup> 26<sup>th</sup> International Conference of the Red Cross and Red Crescent, 1995, Resolution 1, International humanitarian law : From law to action, Report on the follow-up to the International Conference for the Protection of War Victims, (1996) 310 *International Review of the Red Cross* 58.

<sup>44</sup> See J.-M. Henckaerts/L. Doswald-Beck, *op.cit.*, note 11.

<sup>45</sup> See J.-M. Henckaerts, *loc. cit.*, note 42, at 187-197 (« Summary of Findings »).

<sup>46</sup> See J. Patrick Kelly, « The Twilight of Customary International Law », (2000) 40 *Virginia Journal of International Law* 449, at 453, 461-465.

<sup>47</sup> E.g., Eritrea, India, Indonesia, Iran, Iraq, Malaysia, Morocco, Myanmar, Nepal, Pakistan, The Philippines (bound only by Protocol II), Somalia, Sudan, Sri Lanka, Thailand.

<sup>48</sup> See Henckaerts/Doswald-Beck, *op.cit.*, note 11 at xxxi-xlv; Henckaerts, *loc.cit.*, note 42, at 178-184.

<sup>49</sup> See C. Emanuelli, « L'étude du CICR sur le droit humanitaire coutumier: la coutume en question », (2006) 110 *Revue Générale de Droit International Public* 435.

context resorting to article 38 (1) b) seems inappropriate. An investigation into the foundations of customary law seems necessary. Such an investigation goes beyond the terms of article 38 (1) b). The ICRC study ignores this question. As a result, it also fails to tell us what *opinio juris* consists of. Is it consent based or consensus based<sup>50</sup>? How do we determine the *opinio juris* of States? This issue is particularly relevant here because, as noted before, most of the rules identified in the study stem from treaties which have not been ratified by all States.

Moreover, as it relies heavily on article 38 (1) b) of the Statute of the ICJ, the approach adopted by the ICRC study creates other problems:

2) Indeed, the application of article 38 (1) b) raises practical issues to which the study gives superficial answers:

- What does State practice consist of? What are its components? Do they include judicial decisions, resolutions adopted by international organizations<sup>51</sup>?
- Do all the components of State practice have the same weight<sup>52</sup>? The issue is particularly important when State practice is not uniform, as it is the case with respect to IHL.
- How widespread must State practice be to give rise to a custom? To what extent is the concept of « specially affected State<sup>53</sup> » relevant in this respect?

3) Moreover, some of the positions adopted by the ICRC in its study are ambiguous and sometimes tendentious. For instance, the study tends to confuse the customary law making process with the common law making process, by emphasizing the importance of judicial precedents in establishing the existence of a custom<sup>54</sup>. Here, it must be remembered that customary law is not judge-made law<sup>55</sup>. It is derived from the practice and the *opinio juris* of States.

Furthermore, the study sets aside the practice of armed opposition groups because it does not constitute State practice as such<sup>56</sup>. On the other hand, the study finds the practice of the ICRC relevant because it has international legal personality<sup>57</sup>. Indeed, this is true. However, the ICRC is not a State. It has a more

<sup>50</sup> This is a controversial issue: see Kelly, *loc.cit.*, note 46, at 458, 508 *et seq.*

<sup>51</sup> Those are controversial issues: see Kelly, *loc.cit.*, note 46, at 500; Jack L. Goldsmith/Eric A. Posner, « Understanding the Resemblance Between Modern and Traditional Customary International Law », (2000) 40 *Virginia Journal of International Law* 639, at 660.

<sup>52</sup> Again, this is a controversial issue: see Kelly, *loc.cit.*, note 46, at 491-492, 503 *et seq.*

<sup>53</sup> See *North Sea Continental Shelf*, (FRG v. Denmark) (FRG v. Netherlands), 1969 ICJ Rep. 3, para. 74.

<sup>54</sup> See Henckaerts/Doswald-Beck, *op.cit.*, note 11, at xxxiv; Henckaerts, *loc.cit.*, note 42, at 179.

<sup>55</sup> See Kelly, *loc.cit.*, note 46, at 529-530.

<sup>56</sup> See Henckaerts/Doswald-Beck, *op.cit.*, note 11, at xxxvi ; Henckaerts, *loc.cit.*, note 42, at 179-180.

<sup>57</sup> See Henckaerts/Doswald-Beck, *op.cit.*, note 11, at xxxv.

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limited legal personality than States. Therefore, its practice should not have the same weight as that of States. Yet, the study puts the practice of the ICRC on an equal footing with the practice of States.

For these reasons, as well as others relating to the substance of the rules identified by the ICRC study, its results are controversial.

#### 3) The ICRC and the implementation of IHL

As a major contributor to the adoption and the interpretation of the Geneva Conventions, the I.C.R.C. is considered to be their custodian<sup>58</sup>. The tacit consequence of this characterization is that the ICRC has the authority to remind the parties to an armed conflict of their obligations under the Geneva Conventions.

In the same vein, the ICRC can reprimand the warring parties if, in the course of their military operations, they commit violations of the Geneva Conventions, and demand their immediate cessation<sup>59</sup>. In extreme cases, the ICRC can even publicly denounce these violations, if the following conditions are met:

- the violations are massive and repeated;
- other efforts have failed;
- it is felt to be in the interest of the victims to publicly denounce the violations;
- the violations have been established<sup>60</sup>.

However, the ICRC lacks the power to impose other types of sanctions to warring parties which do not comply with IHL.

The ICRC derives some of its implementing authority directly from the Geneva Conventions: for instance, under article 126 of Geneva Convention III, ICRC delegates can visit prisoners of war wherever they are being held and interview them without witnesses. Under article 143 of Geneva Convention IV, ICRC delegates enjoy the same power with respect to civilian internees.

Also, under article 3 common to the four Geneva Conventions, the ICRC enjoys a right of initiative which allows the Committee to offer its services to the parties to non-international armed conflicts<sup>61</sup>. If its offer is accepted, the ICRC can perform a number of humanitarian activities on the ground, to assist victims.

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<sup>58</sup> In this respect, see article 5 (2) c) of the Statutes of the Movement; Bugnion, *op.cit.*, note 18, at 416.

<sup>59</sup> See Bugnion, *Id.*, at 1077 *et seq.*

<sup>60</sup> *Id.*, at 1107.

<sup>61</sup> See Bugnion, *op. cit.*, note 18, at 459 *et seq.*

For instance, it can provide the civilian population with food, water, medical assistance, medicine, etc.<sup>62</sup>.

Moreover, the right of initiative enjoyed by the ICRC was extended to international armed conflicts when, in the *Nicaragua Case*<sup>63</sup>, the ICJ decided that art. 3 applies to all categories of armed conflicts. Furthermore, under the Statutes of the ICRC, and according to international practice, the right of initiative also extends to situations of internal violence. This being said, it must be emphasized that its right of initiative merely allows the ICRC to offer its services to the warring parties. To follow up on its offer and perform activities in favour of war victims, the ICRC needs the approval of the warring parties.

Finally, other rights and powers enjoyed by the ICRC in relation to the implementation of IHL are derived from its Statutes or were created on an empirical basis through practice. Thus, the ICRC helps national societies of the Red Cross and Red Crescent perform different tasks, such as train medical personnel to perform their duties in time of war, promote the implementation of IHL at the domestic level, and disseminate rules of IHL, etc.<sup>64</sup>

### **B) The international red cross and red crescent movement<sup>65</sup>**

The Movement is not an international organization. It is a network of humanitarian non-governmental organizations (ie. the ICRC, national societies of the Red Cross and the Red Crescent, as well as the Federation of national societies) which come together every four years when the Movement holds its international conference. The first Conference of the Movement took place in 1867 in Paris. Since then, the Conferences have actively contributed to the making of IHL in several ways. Thus, the Conference held in 1948 approved the draft Geneva Conventions prepared by the ICRC<sup>66</sup>, which were adopted one year later. Similarly, the draft protocols to the Geneva Conventions prepared by the ICRC were approved by the Conference held in Tehran in 1973<sup>67</sup>.

Moreover, the Conferences have often adopted resolutions which give the ICRC the authority to act. Thus, in 1912, the Conference held in Washington gave the ICRC the authority to provide prisoners of war with material as well as with moral relief. Also, the action of the ICRC during the Spanish Civil war was

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<sup>62</sup> See M. Harroff-Tavel, « Action taken by the International Committee of the Red Cross in situations of internal violence », (1993) 294 *International Review of the Red Cross* 211.

<sup>63</sup> See *Military and Paramilitary Activities in and against Nicaragua*, (*Nicaragua v. United States of America*), Merits, 1986 ICJ Rep. 14, para. 218.

<sup>64</sup> See Harroff-Tavel, *loc. cit.*, note 62, at 235.

<sup>65</sup> See Bugnion, *op. cit.*, note 18, at 413 *et seq.*

<sup>66</sup> *Id.*, at 355-356.

<sup>67</sup> *Id.*, at 368.

largely based on a resolution adopted by the Conference in 1921 (Resolution XIV)<sup>68</sup>.

Furthermore, international Conferences of the Movement can give the ICRC mandates to perform certain tasks. Thus, in 1995, the Conference asked the ICRC to undertake a study on customary international humanitarian law<sup>69</sup>.

### **C) The international institute of humanitarian law<sup>70</sup>**

The Institute was created in 1970 as a non-profit humanitarian association. Its headquarters are in San Remo, Italy. According to its Statutes, the main purpose of the Institute « is to promote the dissemination and development of international humanitarian law and to operate at all levels for its implementation » (article 1).

To these ends, the Institute organizes general as well as specialized courses on IHL, human rights law and refugee law, which are offered in different languages. Its military courses have become famous. Each year it also organizes a competition on IHL for military academies and a round table on current problems of IHL. Moreover in the past, it has organized various conferences and commissions related to IHL. Last but not least, it is responsible for the adoption in 1994 of the San Remo Manual on armed conflicts at sea<sup>71</sup>. Currently, the Institute is involved in the development of a Manual on the law applicable to non-international armed conflicts.

Other non-governmental organizations have also played a role in the development of IHL<sup>72</sup>. Thus, the Institute of International Law was responsible for the adoption of the 1880 Oxford Manual of Land War and the 1913 Oxford Manual of Naval War. More recently, the Institute adopted resolutions on the application of the law of armed conflicts to United Nations forces.

In turn, the International Law Association adopted in 1938 a draft convention dealing with the protection of civilians in time of war. However, these bodies are not specialized in IHL.

## **2. The contribution of United Nations bodies to the development and implementation of IHL**

The involvement of the United Nations in the development and the implementation of IHL can be divided in three different periods:

- A) 1945 to 1968
- B) 1968 to 1990

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<sup>68</sup> *Id.*, at 309.

<sup>69</sup> *Supra*, note 43.

<sup>70</sup> See Roberts/Guelff, *op.cit.*, note 3, at 14.

<sup>71</sup> *Id.*, at 573 *et seq.*

<sup>72</sup> *Id.*, at 14.

C) since 1990.

**A) 1945 to 1968<sup>73</sup>**

During this period, the United Nations showed little interest in the law of armed conflicts, because it believed that there was no need for it. Thus, in 1949, the International Law Commission struck the codification of the law of war from its agenda. This decision was made to avoid casting some doubt as to the ability of the United Nations to maintain international peace and security. To be sure, immediately after World War II, the United Nations' limited interest in IHL was focused on reaffirming the principles recognized in the Charter of the International Military Tribunal of Nuremberg and preparing the 1948 Genocide Convention<sup>74</sup>.

On the other hand, in 1949, the ICJ rendered its decision in the famous *Corfu Channel Case*<sup>75</sup>. In that case, the ICJ found that Albanian authorities were bound to warn approaching British warships of the dangers created by a minefield inside Albanian waters. According to the Court, this obligation was not based on Hague Convention VIII of 1907, which is not applicable in time of peace, but « on certain general and well-recognized principles », including « elementary considerations of humanity, even more exacting in peace than in war<sup>76</sup> ». This statement echoes the so-called Martens clause<sup>77</sup> which was first included in the Preamble of the 1899 Hague Convention on land warfare. Under this clause, in the absence of specific rules of IHL: « populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of public conscience »<sup>78</sup>.

So, while political organs of the United Nations played down the importance of IHL, the ICJ reaffirmed its application in a situation which, paradoxically, was not related to an armed conflict. The ICJ referred to its statement in the *Corfu Channel Case* in subsequent cases.

**B) 1968 to 1990<sup>79</sup>**

The situation changed in the wake of a conference on human rights which took place in 1968 in Tehran, under the auspices of the United Nations. Resolution

<sup>73</sup> *Id.*, at 15-16; Kalshoven, *op.cit.*, note 1, at 18-19.

<sup>74</sup> *Convention on the Prevention and Punishment of the Crime of Genocide*, (1951) 78. UNTS 277; Roberts/Guelff, *op.cit.*, note 1, at 179 *et seq.*

<sup>75</sup> (*United Kingdom v. Albania*), Merits, 1949 I.C.J. Rep. 4.

<sup>76</sup> *Id.*, at 22.

<sup>77</sup> See Roberts/Guelff, *op.cit.*, note 3, at 8-9; S. Miyazaki, « The Martens Clause and international humanitarian law », in Swinarski, *op.cit.*, note 5, at 433.

<sup>78</sup> A more modern version of the clause is found in article 1 (2) of Protocol I (1977), as well as in the Preamble of Protocol II (1977).

<sup>79</sup> See Kalshoven, *op.cit.*, note 1, at 19 *et seq.*; Roberts/Guelff, *op.cit.*, note 3, at 15-17.

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XXIII<sup>80</sup>, which was adopted by the Conference, requested the General Assembly of the United Nations to invite the Secretary General to study steps « to secure the better application of existing international humanitarian Conventions and rules in all armed conflicts ».

The Resolution also called for an enquiry into the « need for additional humanitarian international Conventions or for possible revision of existing Conventions to ensure the better protection of civilians, prisoners and combatants in all armed conflicts and the prohibition and limitation of the use of certain methods and means of warfare ». Resolution XXIII was endorsed by General Assembly Resolution 2444 (XXIII) (1968) entitled « Respect for Human Rights in Armed Conflicts ». So, it is through the promotion and protection of human rights, for which the United Nations is responsible under the Charter, that the Organization came to be involved in IHL.

In the 1960s, the United Nations involvement in IHL became focused on wars of national liberation. Indeed, newly independent States, socialist States as well as some western States supported these wars in the name of the right of self-determination of peoples. According to the United Nations, wars of national liberation were to be considered as international armed conflicts and captured fighters should be given prisoner of war status and treatment. This position is reflected in general Assembly resolutions adopted between 1968 and 1973<sup>81</sup>. It also made its way into articles 1 (4) and 44 of Protocol I.

So, according to article 1 (4):

« armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination » are international armed conflicts. As such, they are governed by the four Geneva Conventions as well as by additional Protocol I. The provisions of article 1 (4) set an important development. Indeed, without them, wars of national liberation are non-international armed conflicts governed only by article 3 common to the four Geneva Conventions.

Moreover, under article 44 (3) of Protocol I, a guerrilla fighter is considered to be a lawful combatant, entitled to prisoner of war status and treatment if captured by the enemy, « provided that [...] he carries his arms openly:

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<sup>80</sup> See Schindler, *loc.cit.*, note 2, at 8-9; A.H. Robertson, « Humanitarian law and Human rights », in Swinarski, *op.cit.*, note 5, at 793.

<sup>81</sup> See D. Schindler, « The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols », (1979) 163 *Recueil des Cours, Académie de droit international* 117, at 133; A. Cassese, « Wars of national liberation and humanitarian law », in Swinarski, *op.cit.*, note 5, 313, at 314.



- a) during each military engagement, and
- b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate ».

Furthermore, according to article 44 (4), a guerilla fighter who does not comply with the conditions set out in the preceding paragraph is not a lawful combatant. If captured by the enemy, he is not entitled to prisoner of war status. However, he is entitled to prisoner of war treatment.

Again, these provisions set an important development. Indeed, they are looser than those of article 4 (A) of Geneva Convention III, which traditionally identifies the categories of combatants who are entitled to prisoner of war status and treatment, if captured by the enemy.

Apart from setting important developments in terms of IHL, the provisions of articles I (4) and 44 (3) (4) are quite controversial. They explain to a large extent why some States are not parties to Protocol I. On a more positive note, it should also be mentioned that the provisions of Protocol I dealing with the protection of civilians reflect the « Basic principles for the Protection of Civilian Populations in Armed Conflicts » found in United Nations General Assembly Resolution 2675 (XXV) of 1970<sup>82</sup>. Unlike the provisions of articles 1 (4) and 44 (3) (4), they reflect the position of the international community as a whole.

In the 1970s, the United Nations also focused its attention on the conduct of hostilities. Thus, during that time, the United Nations General Assembly adopted several resolutions dealing with possible prohibitions or limitations on the use of certain specific conventional weapons. The diplomatic conference which adopted the two additional protocols was supposed to address the issue. However, in the end, the conference could only adopt some general provisions on this question<sup>83</sup>, such as those found in art. 36 of Protocol I, for example. As a result, a new United Nations conference was convened in 1979 and 1980. It saw the adoption of the 1980 United Nations *Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects*<sup>84</sup>. The types of weapons covered by the Convention as well as the limitations affecting their use, are described in three Protocols annexed to the Convention:

- Protocol I prohibits the use of any weapon the primary effect of which is to injure by fragments which are not detectable in the human body by x-rays;
- Protocol II regulates the use on land of mines, booby traps and other similar devices;
- Protocol III regulates the use of incendiary weapons, such as napalm.

<sup>82</sup> See Robert/Guelff, *op. cit.*, note 3, at 16; Bugnion, *op.cit.*, note 18, at 842 *et seq.*

<sup>83</sup> See Kalshoven, *op.cit.*, note 1, at 21, 23.

<sup>84</sup> See Roberts/Guelff, *op.cit.*, note 3, at 515 *et seq.*

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- A fourth protocol was added to the list in 1995. It prohibits the use and transfer of blinding laser weapons.

Also, amendments to Protocol II were adopted in 1996 to strengthen its application. Yet, some States, like Canada, consider that even as amended, Protocol II does not go far enough. They concluded the Ottawa Convention of 1997<sup>85</sup> which prohibits the manufacture, transfer, possession and use of anti-personnel land mines. Moreover, new amendments to Protocol II dealing with anti-vehicle mines (AVMs) are currently being considered by the United Nations.

Efforts by the United Nations to regulate the conduct of hostilities also led to the adoption of the 1976 United Nations *Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques* (the ENMOD Convention). Under its article 1, the Convention prohibits the use of military or other hostile environment modification techniques which have « wide-spread, long lasting or severe » effects. Its principles were reaffirmed by the Review Conference which was held in accordance with article 8 of the Convention.

During the same period, the ICJ reaffirmed and substantiated some principles of IHL in the *Nicaragua Case* (1986)<sup>86</sup>. In that case, the ICJ reaffirmed the fundamental character of article 3 common to the four Geneva Conventions which was described by the Court as a minimum yardstick of international standards applicable to all armed conflicts, including international armed conflicts (para. 218).

In the same case, the ICJ also reaffirmed the fundamental obligations resulting from article 1 common to the four Geneva Conventions. Under that article, States must respect and ensure respect for the Geneva Conventions in all circumstances. According to the Court, these obligations do « not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression » (para. 220). In view of these obligations, the Court held that the United States is under an obligation not to encourage violations of article 3 common to the four Geneva Conventions (para. 220). It also found that the United States had breached this obligation (para. 292).

The Court further held that « the provision of strictly humanitarian aid to persons or forces in another country, whatever their political affiliations or objectives, cannot be regarded as unlawful intervention, or as in any other way contrary to international law » (par. 242). However, the Court did not go as far as to recognize the existence of a right of humanitarian intervention.

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<sup>85</sup> See Roberts/Guelff, *op.cit.*, note 3, at 407 *et seq.*

<sup>86</sup> *Supra*, note 63.

**C) Since 1990**

Since the end of the Cold war, the Security Council has increased its role in the implementation of IHL, often acting under chapter VII of the United Nations Charter<sup>87</sup>. In so doing, the Security Council has also played a role in the development of IHL.

As to the implementation of IHL, the Security Council has adopted numerous resolutions reaffirming the obligation of the parties to an armed conflict to comply with IHL in general and with the Geneva Conventions in particular (for instance in Resolutions 764, 771, 780 (1992) ; 808, 815 (1993). All related to the conflicts in the former Yugoslavia).

Moreover, in several cases, the Security Council has identified violations of IHL and demanded their immediate cessation. Such was the case in Resolution 674 (1990) in which the Security Council condemned the taking of third-State nationals as hostages, their mistreatment as well as that of Kuwaiti nationals. Such was also the case in Resolution 681 (1990) in which the Security Council condemned the deportation of Palestinians from territories occupied by Israel in violation of Geneva Convention IV. In many resolutions relating to the conflicts in the former Yugoslavia, the Security Council condemned the practice of ethnic cleansing (Resolutions 787 (1992), 820 (1993), 836 (1993)) and warned the offenders of their individual responsibility.

In order to identify the applicable rules, the Security Council has characterized some situations. Thus, in Resolution 681 (1990), the Security Council urged Israel to recognize the *de jure* applicability of Geneva Convention IV to all territories occupied since 1967 and to comply with its provisions. In so doing, the Security Council characterized the situation in territories held by Israel since 1967 as one of military occupation. Also, the Security Council characterized the coalition presence in Iraq until June 2004 as military occupation and asked the occupying powers to comply with Geneva Convention IV (Resolutions 1472 (2003), 1546 (2004)) .

Moreover, in some cases, the Security Council took concrete measures to ensure the implementation of IHL. Thus, the Security Council authorized member States to take military sanctions against Iraq in part to respond to violations of IHL (Resolution 678 (1990)). In the same vein, the Security Council adopted sanctions against the Federal Republic of Yugoslavia (Serbia and Montenegro) (Resolutions 757 (1992), 820 (1993)). Also, during the armed conflict in Bosnia,

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<sup>87</sup> See M. Nabet, « Le rôle du Conseil de sécurité dans la mise en oeuvre du droit international humanitaire (notamment au travers de son pouvoir coercitif) », in International Institute of Humanitarian Law, *Application of International Humanitarian Law, Human Rights and Refugee Law: UN Security Council, Peacekeeping Forces, Protection of Human Beings in Disaster Situations*, International Conference, Sanremo, 8-10 September 2005, Proceedings, at 117.

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the Security Council established « safe areas » to ensure the protection of civilians and allowed UNPROFOR as well as other foreign forces to use force to defend those areas (Resolutions 819, 824, 836, 844 (1993)).

Furthermore, the Security Council established fact finding and investigative commissions on an *ad hoc* basis to deal with violations of IHL, of human rights law and with acts of genocide. Thus, by way of Resolution 446 (1979), the Security Council established a commission « to examine the situation relating to settlements in the Arab territories occupied since 1967, including Jerusalem ». Then, *ad hoc* commissions were established to investigate serious violations of IHL in the former Yugoslavia, in Rwanda (including possible acts of genocide in that case) and in Darfur (Resolutions 780 (1992), 935 (1994), 1564 (2004) respectively). In turn, a commission of inquiry was established by the Security Council to investigate possible violations of human rights following the presidential elections in Côte d'Ivoire (2000). Also, fact-finding missions were carried out in relation to events in Andijan, Uzbekistan and Togo under United Nations auspices.

Following the reports of the Commissions of Experts for the former Yugoslavia and for Rwanda, the Security Council established the ICTY in 1993 and the ICTR in 1994 to prosecute violations of IHL committed during the respective armed conflicts. More recently, it contributed to the establishment of the Special Court for Sierra Leone (Resolution 1315 (2000)). It also referred the situation in Darfur to the ICC (Resolution 1593 (2005)), which was established by a diplomatic conference prepared by the United Nations.

As it becomes more involved in the implementation of IHL, the Security Council also plays an active role in its development. Thus, the Security Council has repeatedly called for individual criminal responsibility for violations of IHL, including in non-international armed conflicts. In so doing, the Security Council has contributed to extend the concept of individual criminal responsibility for violations of IHL to this category of conflicts<sup>88</sup>. This is reflected in the Statute of the ICTR<sup>89</sup> and in particular in its article 4. Indeed, under this article, the Tribunal has jurisdiction over violations of article 3 common to the four Geneva Conventions and of Additional Protocol II which deal with non-international armed conflicts. In turn, the Statute of the Special Court for Sierra Leone confirms that serious violations of article 3 and of Protocol II give rise to individual criminal responsibility<sup>90</sup>. Finally, articles 6, 7 and parts of article 8 of the Statute of the International Criminal Court apply to non-international armed conflicts<sup>91</sup>.

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<sup>88</sup> See M. Sassoli, « Interpretation of International Humanitarian Law by the UN Security Council », *Id.*, at 98.

<sup>89</sup> See Roberts/Guelff, *op.cit.*, note 3, at 615 *et seq.*

<sup>90</sup> See A. Dieng, « Le Conseil de sécurité et la mise en place des tribunaux ad hoc pour l'Ex-Yougoslavie, le Rwanda et la Sierra Leone, in International Institute of Humanitarian Law », *op.cit.*, note 88 at 80, 84 *et seq.*

<sup>91</sup> See Roberts/Guelff, *op.cit.*, note 3.

On a different note, the Security Council has also moved away from the Hague Rules on military occupation and extended the authority of the powers occupying Iraq<sup>92</sup>. According to the Hague Rules of 1907, the rights of occupying powers are strictly limited. Thus, under article 43, the laws in force in the occupied country must be respected. Under article 55, the occupying party is merely an administrator and usufructuary of the natural resources of the occupied territories. However, Security Council Resolution 1483 (2003), adopted under Chapter VII of the United Nations Charter, provides that the sale of Iraqi oil and the use of proceeds by powers occupying Iraq are allowed to fund long-term economic reconstruction projects to benefit that country.

Also, Security Council Resolutions 1483, 1511 and 1546 have authorized occupying forces to promote political changes in Iraq, including the adoption of a new Constitution.

In view of article 103 of the United Nations Charter, the aforementioned resolutions override the relevant Hague Rules with which they conflict. However, they are exceptions to the Rules. As such, they are not intended to amend the Rules. Yet, they constitute precedents which can be followed in other situations.

Moreover, during the same period, the United Nations turned its attention to the rules applicable to United Nations military operation.

First, in 1994, it adopted the *Convention on the Safety of United Nations and Associated Personnel*<sup>93</sup>. The Convention was adopted as a response to the growing number of attacks against United Nations personnel. Under the Convention, such intentional attacks are criminal offences (art. 9)<sup>94</sup> which must be punished by the contracting parties under the formula « prosecute or extradite ». In other words, the contracting party on which territory a would-be offender is found must either prosecute the suspect or extradite him to another State, which has jurisdiction, and which is willing to prosecute (art. 14). However, the Convention does not apply to United Nations enforcement operations authorized by the Security Council under chapter VII, in which any of the personnel are involved as combatants against other organized armed forces (for example: Operation Desert Storm, 1991). These operations are governed by the law of armed conflicts (art. 2 (2)).

Moreover, in his 1999 Bulletin on Observance by United Nations forces of IHL<sup>95</sup>, the Secretary General recognized that IHL applies to United Nations forces

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<sup>92</sup> See J. Bellinger, « United Nations Security Council Resolutions and the Application of International Humanitarian Law, Human Rights and Refugee Law », in International Institute of Humanitarian Law, *op. cit.*, note 88 at 74, 78; Sassoli, *loc.cit.*, note 89 at 98-99.

<sup>93</sup> See Roberts/Guelff, *op.cit.*, note 3, at 623 *et seq.*

<sup>94</sup> See also article 8 (2) b) iii), e) iii) of the ICC Statute.

<sup>95</sup> See Roberts/Guelff, *op.cit.*, note 3, at 721 *et seq.*

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whenever they are involved in hostilities, in enforcement actions or in peacekeeping operations, when the use of force is allowed in self-defence (sect. 1.1).

The applicable principles and rules are informed by the four Geneva Conventions of 1949 as well as by Protocol I of 1977. They deal with:

- the protection of civilians against attacks (sect. 5);
- means and methods of combat (sect. 6);
- the treatment of civilians and persons hors de combat (sect. 7);
- the treatment of detained persons (sect. 8);
- the protection of the wounded, the sick and medical and relief personnel (sect. 9).

Violations of these rules and principles are subject to prosecution in national courts (sect. 4).

The adoption of this Bulletin is another important development. It tends to put an end to the controversy dating back to the Korean War as to whether the United Nations is bound by IHL<sup>96</sup>. Indeed, traditionally, the United Nations considered that it was only bound by the « principles and spirit » of the law of armed conflicts, whereas the ICRC insisted that rules of IHL apply to the United Nations *mutatis mutandis*. However, the Bulletin is criticized by some States, which disapprove of the unilateral adoption of specific humanitarian rules applicable to United Nations forces and which are not parties to Protocol I.

Within the same period, the ICJ has also been active in the field of IHL. Thus, in its *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*<sup>97</sup>, the Court distinguished the *jus in bello* from the *jus ad bellum* (para. 34 *et seq*) and from human rights law. In this respect, the Court said that, in the context of an armed conflict, rules of IHL trump rules of human rights law because they are the *lex specialis* (para. 25). The Court also found that the use of nuclear weapons cannot be considered as specifically prohibited by conventional rules prohibiting the use of poisoned weapons, since they were not adopted having this type of weapons in mind (para. 53-56). However, the Court stated that IHL applies to nuclear weapons (para. 85-87) and it reaffirmed the principle of distinction between combatants and non combatants as well as the prohibition of weapons causing superfluous and unnecessary suffering (pars. 78).

The Court further stated that many rules of IHL constitute « intransgressible principles of international customary law » (para. 79). It then proceeded to identify the conventional rules of IHL which have, beyond doubt, become part of

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<sup>96</sup> See D. Shraga, « The United Nations as an actor bound by international humanitarian law », in L. Condorelli (ed.), *The United Nations and International Humanitarian Law*, Paris, Pédone, 1996, at 319; C. Emanuelli, « Les forces des Nations Unies et le droit international humanitaire », *Id.*, at 345.

<sup>97</sup> 1996 ICJ Rep. 226.

customary international law. They include the provisions of the Geneva Conventions, Hague Convention IV, the 1948 Genocide Convention and the Charter of the International Military Tribunal of 8 August 1945 (para. 81). In the end, the ICJ said that the threat or use of nuclear weapons would « generally » be contrary to international law applicable in armed conflict. However, the Court could not « conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake » (para. 105 (2) E).

Then, in its *Advisory Opinion on the Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory*<sup>98</sup>, the ICJ reaffirmed that the Hague Rules of 1907 are part of customary international law (para. 89). It also recognized that Geneva Convention IV is applicable in any case of military occupation involving contracting parties (para. 95, 101) and found that under customary international law a « territory is considered occupied when it is actually placed under the authority of the hostile army, and the occupation extends only to the territory where such authority has been established and can be exercised » (para. 78). According to the Court, Geneva Convention IV applies to Palestinian territories occupied by Israel since 1967 (para. 101). The Court also « concluded that the Israeli settlements in occupied Palestinian Territory (including East Jerusalem) have been established in breach on international law » (para. 120). Moreover, the Court made a number of observations relating to the law of military occupation as it applies to occupied Palestinian territories. As a result, it found that the construction of the wall runs contrary to human rights law as well as to IHL (para. 134). As a consequence, the Court indicated that Israel's responsibility is engaged under international law (para. 147). It then proceeded to describe the practical consequence of its findings. Some of those consequences concern other States. In this respect, the Court stressed that some of the obligations violated by Israel are obligations *erga omnes*, such as the obligation to respect the right of the Palestinian people to self-determination and certain obligations arising from IHL (para. 155). The Court also reminded the parties that most rules of IHL are part of customary international law (para. 157) and that under article 1 common to the four Geneva Conventions, States must respect and ensure respect for the Conventions (para. 158). Therefore, the Court considered that « all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall » (para. 159).

In the case between Congo and Uganda<sup>99</sup>, the ICJ looked again at the rules governing military occupation (para. 172 *et seq.*). It found that Uganda had occupied part of the Democratic Republic of the Congo (D.R.C.). As such, Uganda was under an obligation to take all possible measures to restore and ensure public order and safety in the occupied territory, while respecting the laws in force in the D.R.C. This obligation included the duty to secure respect for

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<sup>98</sup> 2004 ICJ rep. 1017.

<sup>99</sup> *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, (2005) ICJ Rep. X.

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human rights law and IHL (para. 178). In this respect, the Court found that Uganda committed violations of human rights law and of IHL (para. 219). As a result, the Court concluded that Uganda was internationally responsible for those violations including the failure to comply with its obligations as an occupying power (para. 220).

It should also be noted that in the more recent case between Congo and Rwanda, the World Court recognized that the rule prohibiting genocide is a rule of *jus cogens*<sup>100</sup>.

Finally, the contribution of both the I.C.T.Y. and the I.C.T.R. to the development and the implementation of IHL should be emphasized<sup>101</sup>. Indeed, through the cases they dealt with, both *ad hoc* tribunals have developed and clarified the various crimes over which they have jurisdiction under their respective Statute. For instance, the I.C.T.R. found that rape is an act of genocide when it is committed against members of an ethnic group. They also contributed to extend the concept of individual criminal responsibility for violations of IHL to non-international armed conflicts. The I.C.T.Y. extended the concept of internationalized non-international armed conflicts, etc.<sup>102</sup>.

### Conclusion

Several international bodies are involved in the development and the implementation of IHL. However, they don't all have the same weight. The ICRC plays a traditional role in the development and the implementation of IHL. However, in this latter capacity the ICRC lacks teeth. It can only rely on its own credibility within the international community and on public opinion to secure respect for IHL. On the other hand, the United Nations involvement in the development and the implementation of IHL is more recent, but the Organization has the means of ensuring respect of IHL, if it so decides. Thus, the Security Council can impose sanctions on those States which commit violations of IHL, authorize military operations against them, establish *ad hoc* international criminal tribunals to prosecute violations of IHL, seize the International Criminal Court of violations of IHL, etc. Therefore, it is in a better position than the ICRC to ensure compliance with IHL. As it resorts to Chapter VII of the United Nations Charter to perform this task, the Security Council is bridging the gap between the *jus ad bellum* and the *jus in bello*. The Security Council is also capable of developing new rules and of extending the scope of existing ones by adopting decisions. In this respect, the Security Council can give new blood to IHL. However, on the downside, the Security Council is a political body. As such, it lacks the neutrality which is enjoyed by the I.C.R.C. In turn, this affects the credibility of some of its

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<sup>100</sup> *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction of the Court and Admissibility of the Application, (2006) ICJ Rep. X.

<sup>101</sup> See Roberts/Guelff, *op. cit.*, note 3, at 565 *et seq.*, 615 *et seq.*; C. Emanuelli, *Droit international public*, 2<sup>nd</sup> ed., Montreal, Wilson & Lafleur, 2004, at 713 *et seq.*

<sup>102</sup> See Emanuelli, *Id.*, at 689-690.



actions. In practice, there is a growing tendency for the Security Council to occupy the field when it comes to the implementation of IHL. This is reflected, for instance, in the fact that the Security Council prefers to establish its own *ad hoc* commissions to investigate violations of IHL rather than to resort to the fact finding Commission provided by article 90 of Additional Protocol I. Thus, even though the United Nations cooperates with the I.C.R.C. with respect to the development and the implementation of IHL, it also competes with the Committee in these areas.

Last but not least, international criminal tribunals play a major role in the development and the implementation of IHL, by enforcing the principle of individual criminal responsibility. Above all, it is clear that international body, and in particular the ones studied above, have defined IHL as it stands today. They now face new challenges as the nature of armed conflicts keeps evolving.

