

# Blurring the Lines between International and Non-International Armed Conflicts — The Evolution of Customary International Law Applicable in Internal Armed Conflicts

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## Abstract

This article looks at the emergence and evolution of the customary international humanitarian law applicable in situations of non-international armed conflict. In the years since the adoption of the Geneva Conventions and the Additional Protocols, a large number of rules relating to conduct in armed conflict have crystallised as customary international law, applicable in all instances of armed conflict. The significance of such development is that there are far fewer treaty rules regulating conduct in non-international armed conflict than in international armed conflict. Customary international humanitarian law has ‘stepped in’ to fill in many of the lacunae in the current treaty law of non-international armed conflict. It is now possible to speak of a comprehensive body of rules that are applicable in all instances of armed conflict. 21<sup>st</sup> century armed conflict continues to evolve and defy traditional definitions of armed conflict as mainly the preserve of sovereign States. Any harmonisation of the law relating to armed conflict can only be beneficial in ensuring that more of these non-traditional armed conflicts fall within the regulatory scope of the law of war.

## Introduction

When the 1974-1977 Diplomatic Conferences negotiated the draft of what would become Protocol II Additional to the Geneva Conventions of 1949,<sup>1</sup> the question arose as to where one of the enduring principles of the treaty law of International Humanitarian Law (‘IHL’), the Martens Clause,<sup>2</sup> would go.<sup>3</sup> The Clause had been included in the body of Protocol I Additional to the Geneva Conventions,<sup>4</sup> as well as the

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1 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, of 8 June 1977, 1125 UNTS 609 (hereinafter Protocol II). Reprinted in Schindler & Toman (eds), *The Laws of Armed Conflicts* (4<sup>th</sup> ed, 2004) at 775–830.

four Geneva Conventions of 1949.<sup>5</sup> When debate turned to the place of the Martens Clause in Protocol II, the Diplomatic Conferences inserted the Clause in the Preamble only and not in the main body of the Protocol. More significantly, however, the traditional formulation of the Martens Clause was amended. The Martens Clause, as included in Protocol II, states that ‘...in cases not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates of public conscience.’<sup>6</sup> Though the reformulation broadened the scope of the Martens Clause from the categories of ‘civilians’ and ‘belligerents/combatants’ to simply ‘the human person’, it was at the same time significantly limited by dropping the reference to ‘the law of nations/international law’ and ‘established custom.’ The Commentary to the Additional Protocols explains that the deliberate omission of any reference to ‘established custom’ is:

... justified by the fact that the attempt to establish rules for a non-international armed conflict only goes back to 1949 and that the application of common Art 3 in the practice of States has not developed in such a way that one could speak of ‘established custom’ regarding non-international armed conflicts.<sup>7</sup>

However, less than thirty years later, the United Nations (‘UN’) Commission of Enquiry on Darfur noted:

... that a body of customary rules regulating internal armed conflicts has thus evolved in the international community... some States in their military manuals

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2 Included in the preambles to both the 1899 and the 1907 Hague Regulations, the ‘Martens Clause’ emerged from debate at the 1899 Conference, over the status of resistance fighters who take up arms against an occupying authority. The larger European States wanted to brand such fighters as rebels and traitors; the smaller States felt that such fighters deserved recognition as legitimate combatants. The stalemate was not overcome until the Russian delegate, Fyodor Fyodorich von Martens, suggested a compromise position which decreed that, until a more complete set of laws of armed conflict could be decided upon, the community of nations should not assume the law was silent on matters that were not codified. Moreover, States were to consider themselves bound by certain minimum fundamental standards of behaviour, as understood by considerations of ‘humanity’ and ‘public conscience’.

3 See Sandoz, Swinarski & Zimmerman (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987) at 1341, [4432–4435] (hereinafter *AP Commentary*).

4 Article 1(2) of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflict of 8 June 1977, 1125 *UNTS* 3 (hereinafter Protocol I). Reprinted in Schindler & Toman (eds), *The Laws of Armed Conflicts* (2004) at 775–830.

5 The Geneva Conventions, as they are collectively known (and as they will be referred to in this article) are Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12 1949, 75 *UNTS* 31 (hereinafter Geneva Convention I or GCI); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12 1949, 75 *UNTS* 85 (hereinafter Geneva Convention II or GCII); Geneva Convention Relative to the Treatment of Prisoners of War of August 12 1949, 75 *UNTS* 135 (hereinafter Geneva Convention III, the POW Convention, or GCIII); and Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12 1949, 75 *UNTS* 287 (hereinafter Geneva Convention IV, the Civilians Convention, or GCIV). These are reprinted in Schindler & Toman (eds), *The Laws of Armed Conflicts* at 459–688. The Martens Clause is contained in the Geneva Conventions in Articles 62/62/142/158 of the four Conventions, respectively.

6 Roberts & Guelff, *Documents on the Laws of War* (3<sup>rd</sup> ed, 2000) at 484.

for their armed forces clearly have stated that the bulk of international humanitarian law also applied to internal conflicts. Other States have taken a similar attitude with regard to many rules of international humanitarian law.<sup>8</sup>

In this respect, the Commission was referring to the military manuals of Germany and Britain,<sup>9</sup> and to a number of comments made by the United States over the previous decades, regarding what it considers to be the general principles governing conduct in internal armed conflicts.<sup>10</sup> The Commission on Darfur also noted that the inclusion of internal violations of IHL in the International Criminal Court ('ICC') Statute 'proves that the general legal view evolved in the overwhelming majority of the international community... to the effect that (i) internal armed conflicts are governed by an extensive set of general rules of international humanitarian law; and (ii) serious violations of those rules may involve individual criminal liability.'<sup>11</sup>

The statements of the Darfur Commission present a significant reversal from the position in 1977 that there was no discernable customary international law regarding non-international armed conflicts. Over the past thirty years, there has been a general extension of rules of the law of international armed conflict to situations of non-international armed conflict. This is in addition to Common Article 3 and certain provisions of Additional Protocol II achieving customary status.

This article examines the development of customary international rules applicable in internal armed conflicts. In doing so, this article will demonstrate how customary international law has evolved to fill in most of the lacunae in the law regulating non-international armed conflicts, particularly those areas relating to the permissible means and methods of combat. It will be concluded that the law relating to non-international

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7 Michael Bothe, Karl Joseph Partsch & Waldemar Solf (eds), *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (1982) at 620 (hereinafter *New Rules*).

8 Report of the UN Commission of Enquiry on Darfur to the United Nations Secretary-General, Pursuant to Security Council Resolution 1564 of 18 September; Geneva, 25 January 2005; at [159]. Available at <<http://www.ohchr.org/english/darfur.htm>> (hereinafter 'Darfur Commission Report').

9 Dieter Fleck (ed), *The Handbook of Humanitarian Law in Armed Conflicts*, which states that German soldiers are required to comply with the rules of international humanitarian law in the conduct of military operations in all armed conflict 'however such conflicts are characterised' (Dieter Fleck (ed), *The Handbook of Humanitarian Law in Armed Conflicts* (1995) at 24, [211]). The *British Manual of the Law of Armed Conflict* (2004) at 384–398 sets out what the UK Government considers the 'principles of customary international law which are applicable to internal armed conflicts', which essentially reiterates the German position (at 382, [15.1]).

10 See generally statements made by US representatives regarding customary international law, and its reaffirmation in documents like UNGAR 2444; prior to the adoption of the resolution, the US representative noted that the principles outlined in Resolution 2444 'constituted a reaffirmation of existing law', see 23 UN GAOR, Supp (No 18), UN Doc A/7433 (19 December 1968); see also the statement by the US Department of Defence in 1973, where it was stated that Resolution 2444 was 'declaratory of existing customary international law': (1973) 67 *AJIL* 124.

11 Darfur Commission Report at [162]. See also Graditsky, 'Individual Criminal Responsibility for Violations of International Humanitarian Law Committed in Non-International Armed Conflicts' (1998) 322 *IRRC* 29; Plattner, 'The Penal Repression of Violations of International Humanitarian Law Applicable in Non-International Armed Conflicts' (1990) 278 *IRRC* 409; Bothe, 'War Crimes in Non-International Armed Conflicts' in Dinstein & Taborj (eds), *War Crimes in International Law* (1996); and Rowe, 'Liability for 'War Crimes' During a Non-International Armed Conflict' (1995) XXXIV (1–4) *Revue de Droit Militaire et de Droit de la Guerre* 151.

armed conflicts has evolved to the stage that there is considerable parity with the laws regulating international armed conflicts. The importance of this convergence will be examined in the final part of this article, where it will be concluded that this convergence in the law lays the groundwork for greater, if not universal, application of the laws applicable in international armed conflict to all armed conflicts.

## I. Preliminary Comments on Customary International Law

Before turning to the identification of the relevant customary rules, it is useful to briefly discuss the rules for the formation of customary international law, and some of the debate regarding the development of customary international law rules.<sup>12</sup>

### A. State Practice

In ascertaining whether a certain rule can be considered customary, two elements must exist — State practice and *opinio juris*. The Statute of the International Court of Justice (‘ICJ’)<sup>13</sup> defines custom as ‘evidence of a general practice accepted as law.’<sup>14</sup> State practice is the ‘actual’ or ‘physical’ acts of States in their relations with other States.<sup>15</sup> With regards to the practical elements that comprise State practice, these can include international agreements, the decisions of national and international courts and tribunals, the national law of States, and, to a lesser extent, the practice of international organisations, the declarations and resolutions of the UN General Assembly and Security Council, and the opinions and writings of publicists.<sup>16</sup>

In order for practice to be considered constitutive of custom, the ICJ determined in the *North Sea Continental Shelf Cases* that ‘State practice, including that of States whose interests are specially affected, should... [be] both extensive and virtually uniform.’<sup>17</sup> ‘Virtually uniform’ does not mean absolutely uniform. So long as the State practice is sufficiently similar, then too much importance should not be attached ‘to a few uncertainties or contradictions, real or apparent.’<sup>18</sup> Indeed, instances of non-compliance with a rule do not necessarily mean that the rule does not exist or that its customary

12 For more on customary international law, see generally D’Amato, *The Concept of Custom in International Law* (1971); Wolfke, *Custom in Present International Law* (2<sup>nd</sup> ed, 1993); Thirlway, *International Customary Law and Codification: An Examination of the Continuing Role of Custom in the Present Period of Codification of International Law* (1972); Cheng, ‘*Opinio Juris*: A Key Concept in International Law that is Much Misunderstood’ in Yee & Tieya (eds), *International Law in the Post-Cold War World* (2001); Kopelmanas, ‘Custom as a Means of the Creation of International Law’ (1937) 18 *BYBIL* 127; Akehurst, ‘Custom as a Source of International Law’ (1974–1975) 47 *BYBIL* 1.

13 Article 38 of the Statute of the International Court of Justice; annexed to the Charter of the United Nations (hereinafter ICJ Statute).

14 ICJ Statute, Art 38(1)(b).

15 There is some debate as to whether the term ‘practice’ might be replaced with ‘usage’. See the ICJ in the *Asylum Case*, where the Court used the term ‘usage’ rather than ‘practice’, when it stated ‘the Colombian Government must prove that the rule invoked by it is in accordance with the constant and uniform usage practiced by states in question.’ *Asylum Case (Colombia v Peru)*, Judgment, 20 November 1950, ICJ Reports 1950 at 277.

16 See Art 38(1)(d) of the Statute of the ICJ, which determines that the judgments and opinions of legal publicists may be considered as a subsidiary means of determining the law.

17 ICJ, *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)*, Judgment, 20 February 1969, ICJ Reports 1969 at 43, § 74.

status has been undermined. So long as the contrary practice is condemned as a breach of international law or denied by the State itself, the rule in question is confirmed. As noted by the ICJ in the *Nicaragua* case:

In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way *prima facie* incompatible with a recognised rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than weaken the rule.<sup>19</sup>

Practice need not encompass all States, but should include the practice of States who are specially affected by the rule in question.<sup>20</sup> It is possible for there to be 'regional' custom, where the rules are applicable only in a certain geographic region, or between a certain group of States regardless of geography.<sup>21</sup>

The practice in question must not encounter strong or consistent opposition from other States. If the practice is actively accepted, a customary rule may be considered to have crystallised. If States tacitly assent, through failure to object to the practice, acquiescence in the rule may be found to exist. The ICJ defined acquiescence as 'equivalent to tacit recognition manifested by unilateral conduct which the other part may interpret as consent.'<sup>22</sup> However, something more than just the appearance of 'acceptance' or 'acquiescence' must be demonstrated.<sup>23</sup> It must be shown that a State has 'clearly and consistently evinced acceptance' of the rule that an opposing State claims as fact. Failure to protest against a State's actions may not, in itself, be enough to amount to acquiescence. The Permanent Court of International Justice clarified this position, stating that the failure of a State to protest may only be considered as acquiescence 'only if such abstention were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom.'<sup>24</sup>

In addition, such acceptance must have itself affected the opposing State. That is to say, the opposing State must demonstrate its reliance on the presumed acquiescence, so that, if the State seeking to deny the existence of a rule were to in fact deny the rule, the opposing State 'in reliance of such conduct' would be forced 'detrimentally to change position or suffer some prejudice.'<sup>25</sup>

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18 See the ICJ in the *Fisheries case (United Kingdom v Norway)*, Judgment, 18 December 1951, ICJ Reports 1951 at 138. See also ICJ, *Continental Shelf Case (Tunisia v Libyan Arab Jamahiriya)*, Judgment, 24 February 1982, ICJ Reports 1982 at 74, § 100.

19 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)*, ICJ Reports 1986 at 98, § 186.

20 *North Sea Continental Shelf Cases* at 42.

21 *Asylum Case* at 266; see also the *Rights of Passage over India Case*, ICJ Reports 1960 at 6.

22 See the *Gulf of Maine case*, ICJ Reports 1984 at 246, 305.

23 See the *Temple of Preah Vihear case*, ICJ Reports 1962 at 6.

24 The *Lotus case*, PCIJ, Series A, No 10, 1927 at 28.

25 *North Sea Continental Shelf Cases* at 26, [30].

At this point, note should be made of the issue of the ‘persistent objector’ in international law. According to the theory of the ‘persistent objector’, a State who, from the outset, objects to the formation of a particular rule will not be bound by that rule. The idea of the ‘persistent objector’ goes to the heart of the international law system and the principle that ‘international law essentially depends on the consent of States.’<sup>26</sup> Despite the ongoing statement by a few States and commentators, it is questionable whether the persistent objector rule exists, at least to the degree that its proponents suggest. There is little international case law to support the existence of the doctrine.<sup>27</sup> In dissent in the *North Sea Continental Shelf* cases, Judge Lachs acknowledged the possibility of the persistent objector rule stating that, excepting instances of rules of *ius cogens*, States are not precluded from ‘adopting an attitude apart. They may have opposed the rule from its inception and may, unilaterally, or in agreement with others, decide upon different solutions of the problem involved.’<sup>28</sup> However, Judge Lachs goes on to note that the contrary practice will usually be considered a ‘mere permitted derogation and cannot be held to have disturbed the formation of a general rule of law.’ It seems that the persistent objector rule, if it does exist, acts primarily as a hindrance, but not necessarily a complete impediment, to the formation of a customary rule.<sup>29</sup>

Returning to the question of the development of a customary norm, the ‘time factor’ is also an issue. How much time must have passed for a practice to be considered custom? The ICJ addressed this issue in the *North Sea Continental Shelf* cases, stating that the ‘passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law’<sup>30</sup> provided that during that time, the practice of States, especially those ‘specially affected’ by the purported rule, was extensive and virtually uniform. In this respect, it is helpful to look to the example of the development of the customary law relating to outer space. As only two States, the US and USSR, were initially involved in outer space research and exploration, once both States began to act similarly, it was generally accepted that these two States had created a new set of customary rules for State practice in outer space.<sup>31</sup>

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26 See the US Restatement of the Law Third, The Foreign Relations Law of the United States, I (1987) at 32.

27 See *Asylum* case at 277–278; *Anglo-Norwegian Fisheries* at 131; both instances of *obiter*. See also Stein, ‘The Approach of a Different Drummer: The Principle of the Persistent Objector in International Law’ (1985) 26 *Harv Int’l LJ* 457 at 459–463, where he states that few States have attempted the ‘persistent objector defence’ in their pleadings before tribunals.

28 *North Sea Continental Shelf Cases*, Lachs J (dissent) at 229, 232.

29 See Cassese, *International Law* at 162–163; Charney, ‘The Persistent Objector Rule and the Development of Customary International Law’ (1985) 56 *BYBIL* 1; and Thirlway, ‘The Sources of International Law’ in Evans (ed), *International Law* at 125. Note however Brownlie seems to accept that the principle does exist, stating that ‘it is well recognised by international tribunals, and in the practice of states’: *Principles of Public International Law* (6<sup>th</sup> ed, 2003) at 10.

30 *North Sea Continental Shelf Cases* at § 74.

31 Cheng, ‘United Nations Resolutions on Outer Space: ‘Instant’ International Customary Law?’ (1965) 5 *IJIL* 23 at 23.

## B. *Opinio Juris*

The second element necessary to the formulation of custom is that of *opinio juris*. Customary international law comprises both the material element, that is, the actual behaviour of States and the subjective element, the belief that such behaviour is 'lawful' and done in accordance with law.<sup>32</sup> The latter element, *opinio juris* means that a State must perform the act or practice in the belief that the practice is prescribed by international law.<sup>33</sup> This is to differentiate State practice undertaken for reasons of *opinio juris* from State practice undertaken for economic, societal, or domestic political reasons.<sup>34</sup> The ICJ put it thus in the *North Sea Continental Shelf Cases*:

Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not, in itself, enough.<sup>35</sup>

The difficulty is how to determine the existence of *opinio juris*? How is it possible to determine why States act in the way they do? This is especially problematic when the purported customary rule is in the process of formation. How is the *opinio juris* of a developing norm to be demonstrated, if the norm is nascent and therefore, not at the normative stage? As Thirlway puts it, 'how can a practice ever develop into a customary rule if States have to believe the rule already exists before their acts of practice can be significant for the creation of the rule?'<sup>36</sup>

Furthermore, how is *opinio juris* to be discerned when it is difficult to determine whether the practice under scrutiny is being performed for reasons of policy or convenience, rather than under the belief of customary legal obligation? From a practical perspective, *opinio juris* would logically be evidenced by official statements of the law by duly designated officials of the State, acting in their capacity as officials of the State. However, such pronouncements or acts must be 'self-aware'. That is to say, that either in acts or words, the State 'discloses a recognition or acceptance or conviction that a given rule is one of general international law.'<sup>37</sup> The ICJ in the *North Sea Continental Shelf Cases*

32 See the ICJ in the *Libya/Malta Case*, where it was held that in order to ascertain the substance of customary law, one should look 'primarily in the actual practice and *opinio juris* of states'; *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya v Malta)*, Judgment, 21 March 1984, ICJ Reports 1984 at 13, 29. See also the *Nuclear Weapons Advisory Opinion* at 253.

33 See Shaw, *International Law* (5<sup>th</sup> ed, 2003) at 68–86.

34 See Gény's *Méthode d'Interprétation et Sources en Droit Privé Positif* (Librarie générale de droit et de jurisprudence, Paris, 1954) at [110]; Müllerson, 'The Interplay of Objective and Subjective Elements in Customary Law' in Wellens (ed) *International Law – Theory and Practice* (1998) at 161; Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' (2001) 95 *AJIL* 757; Kirgis, 'Custom on a Sliding Scale' (1987) 81 *AJIL* 146. See also *Lotus case* at 28; *North Sea Continental Shelf cases* at 3, §§ 77–78, and *Nicaragua* at 14.

35 *North Sea Continental Shelf cases* at 3, §§ 77–78.

36 Thirlway, 'The Sources of International Law' at 125; see also Cheng, '*Opinio Juris*' at 56.

noted that practice may itself demonstrate the existence of *opinio juris*.<sup>38</sup> However, other situations may call for a more thorough analysis. The answer seems to be one of context. Where the *opinio juris* is questionable or negligible, there would need to be a significant quantum of practice in order to demonstrate the emergence of a customary rule. The corollary to this is where practice is scant, but there seems to be a significant degree of *opinio juris* to support the emergence of the purported rule. Indeed, this was the approach taken by the ICJ in the *Nicaragua* decision, which will be discussed in this next section.

### C. State Practice and *Opinio Juris* — How ‘Much’ of Each is Necessary?

The question of the relative weighting to give to practice and *opinio juris* in determining the customary status of a norm is the issue that arises here. Are equal ‘amounts’ of practice and *opinio juris* necessary in order to demonstrate the existence of a customary norm? In *Nicaragua*, the ICJ seems to demonstrate the position that practice and *opinio juris* exist relative to one another. That is, in determining the existence of a customary rule, where one element is scant, the existence of considerably more of the other element will be required.<sup>39</sup> In *Nicaragua*, the ICJ came to a decision on the customary status of a rule without seeming to rely on strong and consistent State practice, drawing instead on evidence of *opinio juris*. The content of the purported rule seems to be of importance also. Where the rule relates to a pressing matter, such as fundamental human rights, a more ‘relaxed’ approach with regards State practice may be evidence by an international decision maker in their analysis of requisite amounts of practice and *opinio juris*. As Kirgis notes:

the more destabilising or morally distasteful the activity — for example, the offensive use of force or the deprivation of fundamental human rights — the more readily the international decision makers will substitute one element for the other, provided that the asserted restrictive rule seems reasonable.<sup>40</sup>

Indeed, it has been suggested that the unique demands of humanitarian law, namely those of protecting the wounded and the vulnerable in situations of armed conflict, may exert a pressure on the forces that create and shape customary international law, leading to the creation of a rule, even in instances where State practice is negligible.<sup>41</sup> As noted by Meron, ‘given the scarcity of actual practice, it may well be that tribunals have been guided, and may continue to be guided, by the degree to which certain acts are offensive to human dignity. The more heinous the act, the more willing the tribunal will be to assume that it violates not only a moral principle of humanity but also a positive norm of customary law.’<sup>42</sup>

37 Cheng, ‘*Opinio Juris*’ at 73. See also Lauterpacht, *The Development of International Law by the International Court* (1958) at 380, and Baxter, ‘Treaties and Custom’ (1970–I) 129 *Recueil des Cours* 25 at 69.

38 *North Sea Continental Shelf Cases* at 77.

39 Kirgis, ‘Custom on a Sliding Scale’ at 147.

40 *Id* at 149.

41 See, for example, Baxter: ‘Treaties of an essentially humanitarian character might be thought to be distinguishable by reason of their laying down restraints on conduct that would otherwise be anarchical. In so far as they are directed to the protection of human rights, rather than to the interests of States, they have a wider claim to application than treaties concerned, for example, with the purely political and economic interests of States.’ (‘Multilateral Treaties as Evidence of Customary Law’ (1965–1966) 41 *BYBIL* 275 at 286).

42 Meron, *Human Rights and Humanitarian Norms as Customary Law* (1989) at 42.



This very approach was demonstrated by the ICTY in *Kupreskić*, where the Chamber stated that '[due] to the pressure exerted by the requirements of humanity and the dictates of public conscience, a customary rule of international law has emerged [on reprisals against civilians in NIAC],<sup>43</sup> even though State practice with regards to reprisals in non-international armed conflicts was limited. As Kirgis notes, 'when issues of armed force are involved, it may well be that the need for stability explains an international decision maker's primary reliance on normative words rather than on a combination of words and consistent deeds.'<sup>44</sup>

This trend can also be discerned in relation to the adoption of the Rome Statute of the ICC. As Meron states with regard to the Preparatory Committee on the Establishment of the ICC, 'many participating governments appear ready to accept an expansive conception of customary international law without much supporting practice' going on to note 'the elevation of many principles of international humanitarian law from the rhetorical to the normative, and from the merely normative to the effectively criminalised'.<sup>45</sup>

Finally, note should be made about the unique circumstances when one is attempting to discern State practice in time of armed conflict. Specifically, it is often difficult, from a purely practical standpoint, to accurately determine State practice 'in the field' during time of armed conflict, States made be unwilling or unable to report on their conduct in the field, thus hindering any attempt to accurately assess State practice. As noted in *Tadić*:

When attempting to ascertain State practice with a view to establishing the existence of a customary rule or a general principle, it is difficult, if not impossible, to pinpoint the actual behaviour of the troops in the field for the purpose of establishing whether they in fact comply with, or disregard, certain standards of behaviour. This examination is rendered extremely difficult by the fact that not only is access to the theatre of military operations normally refused to independent observers (often even to the ICRC) but information on the actual conduct of hostilities is withheld by the parties to the conflict; what is worse, often recourse is had to misinformation with a view to misleading the enemy as well as public opinion and foreign governments. In appraising the formation of customary rules or general principles one should therefore be aware that, on account of the inherent nature of this subject-matter, reliance must primarily be placed on such elements as official pronouncements of States, military manuals and judicial decisions.<sup>46</sup>

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43 *Kupreskić* at [531]. See also Dingwall, 'Unlawful Confinement' at 137–138.

44 Kirgis, 'Custom on a Sliding Scale' at 147.

45 See Meron, 'War Crimes Law Comes of Age' (1998) 92 *AJIL* 462 at 467, 468. Meron also noted the tendency of international judicial bodies 'to ignore, for the most part, the availability of evidence of state practice (scant as it may have been) and to assume that noble humanitarian principles that deserve recognition as the positive law of the international community have in fact been recognised as such by states. The 'ought' merges with the 'is', the *lex ferenda* with the *lex lata*.' See Meron, 'The Geneva Conventions as Customary Law' (1987) 81 *AJIL* 348 at 361.

46 *Tadić (Interlocutory Appeal)* at [99].

The unique nature of the customary international law of armed conflicts, and internal armed conflicts especially, thus arguably promotes favouring *opinio juris* over State practice.

## 2. Fundamental Principles of IHL and their Customary Status in Non-International Armed Conflicts

An analysis of State practice and *opinio juris* throughout the latter part of the 20<sup>th</sup> century demonstrates that certain fundamental principles of international humanitarian law have developed to the stage where they can be considered customary in non-international armed conflicts. These include the principle of distinction, including the prohibition on indiscriminate attacks, the requirement of proportionality, including the principle of military necessity, and the prohibition on employing means of armed conflict which cause unnecessary suffering.<sup>47</sup>

### A. Principle of Distinction

The principle of distinction between combatant and civilian is one of the fundamental principles of modern international humanitarian law.<sup>48</sup> The principle of distinction provides that all persons involved in an armed conflict must distinguish between persons who take direct part in hostilities — that is, combatants, and persons who may not be attacked or do not take direct part in hostilities — civilians.<sup>49</sup> Distinction comprises two elements. Combatants must distinguish themselves from the civilian population, and civilians are not to be made the object of attack.

A number of international tribunals have affirmed the customary status of the principle of distinction in non-international armed conflicts. The ICJ in the *Nuclear Weapons Advisory Opinion* held that the principle of distinction is considered to be one of the ‘cardinal principles contained in the texts constituting the fabric of humanitarian law... [and one of the] intransgressible principles of international customary law.’<sup>50</sup> This position was affirmed by the ICTY in *Tadić* (Interlocutory Appeal),<sup>51</sup> in *Kordić and Čerkez*,<sup>52</sup> in *Blaškić*,<sup>53</sup> and in *Strugar*,<sup>54</sup> where the Appeals Chamber noted:

The Trial Chamber made no error in its finding that, as the Appeals Chamber understood it, the principles prohibiting attacks on civilians... [in] Article 13 of

47 See generally Hoffman, ‘The Customary Law of Non-International Armed Conflict’ (1990) 277 *IRRC* 322.

48 Sassöli & Bouvier, *How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law* (2<sup>nd</sup> ed, 2006) at 143 (hereinafter *Sassöli & Bouvier*).

49 *Sassöli & Bouvier* at 143–144. See also Jean-Marie Henckaerts & Louise Doswald-Beck (eds), *International Committee of the Red Cross: Customary International Humanitarian Law*, Volume I: Rules, Volume 2: Practice (in two parts) (2005), Rules 1–2, 5–6, and 7–10 (hereinafter *ICRC CIHL Study*).

50 At §§ 78–79.

51 At [98], [117] and [132].

52 Decision on the Joint Defence Motion to Dismiss the Amended Indictment for Lack of Jurisdiction based on the Limited Jurisdictional Reach of Article 2 and 3, 2 March 1999, Case No IT-95-14/2 at [25–34]; recognising that Article 13(2) of Additional Protocol II constituted customary international law.

53 *Prosecutor v Blaškić*, Judgment, Case No IT-95-14, 3 March 2000 at § 180.

54 *Prosecutor v Pavle Strugar*, Decision on Interlocutory Appeal, Case No IT-01-41-AR72, 22 November 2002 (hereinafter *Strugar*).

Additional Protocol II [is a] principle[s] of customary international law. Customary international law establishes that a violation of these principles entails individual criminal responsibility.<sup>55</sup>

The customary status of the principle of distinction was also affirmed by the Inter-American Commission on Human Rights ('IACiHR') in the *Tablada* Case, where the Commission stated:

In addition to Common Article 3, customary law principles applicable to all armed conflicts require the contending parties to refrain from directly attacking the civilian population and individual civilians and to distinguish their targeting between civilians and combatants and other lawful military objectives.<sup>56</sup>

The primacy of the principle of distinction has been restated in a number of UN General Assembly and Security Council Resolutions. The General Assembly has called on parties to observe the principle of distinction and not make civilians the object of attack, in ongoing conflicts in, for example, Sudan.<sup>57</sup> The UN Security Council has repeatedly condemned the failure to ensure that civilians are not made subject to attack, either deliberately or accidentally, in conflicts such as Rwanda in 1994,<sup>58</sup> Burundi in 1996,<sup>59</sup> and Sierra Leone in 1998.<sup>60</sup> The fundamental nature of the principle of distinction in armed conflict was affirmed by the UN Security Council:

The [Geneva] Conventions were designed to cover inter-State wars and large-scale civil wars. But the principles they embody have a wider scope. Plainly, a part of contemporary international customary law, they are applicable wherever political ends are sought through military means. No principle is more central to the humanitarian law of war than the obligation to respect the distinction between combatants and non-combatants.<sup>61</sup>

A similar statement can be found in UN Security Council Resolution 1296 (2000) on the protection of civilians in armed conflict, reaffirming the principle of distinction as being applicable in all armed conflicts.<sup>62</sup>

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55 At [10].

56 See *Abella v Argentina, Case 11.137*, Report No 55/97, 18 November 1997, Annual Report of the International American Commission on Human Rights 1997 (17 February 1998) at § 177 (hereinafter *Tablada*). See also Zegveld, 'The Inter-American Commission on Human Rights and International Humanitarian Law: A Comment on the *Tablada* Case' (1998) 38 *IRRC* 505.

57 UNGAR 51/112, 51 UN GAOR Supp (No 49), UN Doc A/51/49 (Vol I) (1996).

58 UN SC Res 912, UN Doc S/RES/912 (1994). See also UN SC Res 913, UN Doc S/RES/913 (1994); UNSC Res 918, UN Doc S/RES/918 (1994); UN SC Res 925, UN Doc S/RES/925 (1994); UN SC Res 929, UN Doc S/RES/929 (1994) and UN SC Res 935, UN Doc S/RES/935 (1994).

59 UN SC Res 1049, UN Doc S/RES/1049 (1996).

60 UN SC Res 1181, UN Doc S/RES/1181 (1998).

61 Report pursuant to paragraph 5 of Security Council resolution 837 (1993), UN Doc S/26351 (24 August 1993), Annex, § 9.

62 UN Doc S/RES/1296 (19 April 2000).

Other inter-governmental bodies such as the Organisation of African Unity ('OAU')<sup>63</sup> and the EU have also condemned failures to observe the principle of distinction, regardless of the character of the armed conflict. In debate in the Parliamentary Assembly of the Council of Europe regarding Chechnya, a member of the Committee on Legal Affairs and Human Rights stated, 'the United Nations General Assembly has... adopted important documents that demand respect for, and protection of, the civilian population in military conflicts. None of these documents differentiates between international and internal military conflicts.'<sup>64</sup>

## **B. Prohibition on Indiscriminate Attacks**

Closely connected to the principle of distinction is the principle that civilians are to be protected from violence to life and person; specifically, there is an express prohibition on launching indiscriminate attacks that affect the civilian population in the knowledge that such attack will cause excessive loss of life or injury to civilians. This principle was affirmed during the Spanish Civil War,<sup>65</sup> when, in official statements made in the House of Commons in 1938, Britain protested against the bombing of Barcelona.<sup>66</sup> Reaffirmation came in the Assembly of the League of Nations, which proclaimed:

1. the intentional bombing of civilian populations is illegal;
2. objectives aimed at from the air must be legitimate military objectives and must be identifiable;
3. any attack of legitimate military objectives must be carried out in such a way that civilian populations in the neighbourhood are not bombed through negligence.<sup>67</sup>

The prohibition on indiscriminate attacks has been included in a number of other international documents, including the Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines.<sup>68</sup> A number of UN General Assembly Resolutions have also condemned the indiscriminate attacks on civilian populations in the conflicts in Afghanistan,<sup>69</sup> the former Yugoslavia,<sup>70</sup> and the Sudan.<sup>71</sup> Similar resolutions have been passed by the UN Commission on Human Rights.<sup>72</sup> The prohibition on indiscriminate attacks on civilians in any armed conflict was also

63 See OAU Res 1649 (LXIV) 1–5 July 1996, on Burundi; OAU Assembly of Heads of State and Government, Declaration 2 (XXIX) (28–30 June 1993).

64 Council of Europe, Parliamentary Assembly, *Official Report of Debates*, 1995 Session, 7<sup>th</sup> Sitting (2 February 1995) at 222–223.

65 See Cassese, 'The Spanish Civil War and the Development of Customary Law Concerning Internal Armed Conflicts' in Cassese (ed), *Current Problems of International Law* and 'The Geneva Protocols of 1977 on the Humanitarian Law of Armed Conflict and Customary International Law' (1984) 3 *UCLA Pacific Basin Law Journal* 55 at 105.

66 See 333 House of Commons Debates, Col 1177, 23 March 1938.

67 League of Nations, OJ Spec Supp, 135–136, 1936. In this statement, the League of Nations was referring both to the Spanish Civil War and to the Sino-Japanese War.

68 Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law between the Government of the Republic of the Philippines and the National Democratic Front of the Philippines, Part III, Art 2(4); archived at <se2.isn.ch/serviceengine/FileContent?serviceID=23&fileid=CA25D33F-9C4C-D0BA-82EE-15003220BB69&lng=en->.

69 UNGAR 40/137, 40 UN GAOR Supp (No 53), UN Doc A/40/1007 (13 December 1985).

reaffirmed in the Report of the UN Secretary General<sup>73</sup> regarding the June 1993 attack on UN Forces in Somalia, where the Secretary-General noted that it was fundamental that parties to an armed conflict did not ‘demonstrate a wanton indifference to the protection of non-combatants.’<sup>74</sup>

The importance of ensuring that civilians were not indiscriminately targeted was echoed by the ICTY in *Tadić* (Interlocutory Appeal),<sup>75</sup> *Kordić and Čerkez*,<sup>76</sup> and *Kupreškić*.<sup>77</sup> The principle also received reaffirmation by the Inter-American Commission on Human Rights *Tablada*, where it stated ‘in order to spare civilians from the effects of hostilities, other customary law principles require the attacking party to take precautions so as to avoid or minimise loss of civilian life or damage to civilian property incidental or collateral to attacks on military targets.’<sup>78</sup> The Inter-American Commission also stated in their Third Report on the Human Rights Situation in Colombia that international humanitarian law prohibits ‘the launching of attacks against the civilian population and requires the parties to an armed conflict, at all time, to make a distinction between members of the civilian population and parties actively taking part in the hostilities and to direct attacks only against the latter and, inferentially, other legitimate military objectives.’<sup>79</sup>

### C. *The Principle of Proportionality in Attack*

Observing the principle of proportionality in attack means that parties to an armed conflict are prohibited from launching any attack which may be expected to cause ‘incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.’<sup>80</sup>

Various international organisations and judicial bodies have stated, as the IACiHR did in their Third Report on Human Rights in Colombia, that the ‘legitimacy of a military

70 See UNGAR 48/153, 48 UN GAOR Supp (No 49), UN Doc A/48/49 (7 February 1994); UNGAR 49/196, 49 UN GAOR Supp (No 49), UN Doc A/49/49 (10 March 1994); UNGAR 50/193, 50 UN GAOR Supp (50) UN Doc A/RES/50/193 (11 March 1996).

71 UNGAR 51/112, 51 UN GAOR Supp (No 49), UN Doc A/51/49 (5 March 1997); UNGAR 55/116, 55 UN GAOR Supp (No 49), UN Doc A/RES/55/116 (12 March 2001).

72 See Resolutions 1987/58 and 1995/74 on Afghanistan; Resolutions 1992/S-2/1, 1993/7, 1994/75, and 1995/89 on the conflict in the Former Yugoslavia; Resolutions 1995/77, 1996/73, 1997/59, and 1998/67 on the conflict in the Sudan; Resolution 1998/82 on Burundi; and Resolution 2000/58 on the conflict in Chechnya.

73 Report pursuant to paragraph 5 of Security Council Resolution 837 (1993), UN Doc S/26351 (24 August 1993), Annex, § 9.

74 UN Doc S/26351 (24 August 1993), Annex at [12].

75 At [100–102].

76 At § 31.

77 At § 524.

78 *Tablada* at § 177.

79 Doc OAS/Ser L/V/II 102, doc. 9 rev. 1, 26 February 1999 at [40]. See also ICRC *CIHL Study*, Rules 11–13.

80 From Protocol I, Article 51(5)(b). See generally Gardam, *Necessity, Proportionality, and the Use of Force by States* (2004), specifically at 121–127, which deals with the principle of proportionality in non-international armed conflicts.

target [does] not provide unlimited licence to attack it.<sup>81</sup> The UN Darfur Commission Report has noted the customary status of the principle of proportionality,<sup>82</sup> as has the UN Commission on Human Rights, in Resolution 2000/58 on Chechnya. The UN Security Council has also condemned ‘disproportionate’ use of military force, in situations such as Kosovo.<sup>83</sup>

Failures to observe the principle of proportionality in attack have frequently brought condemnations from Third States. For example, the UK, in response to the Chechnya conflict, stated that military operations ‘must be proportionate and in strict adherence to the rule of law.’<sup>84</sup> Similarly, Spain, in statements regarding the armed conflicts in Chechnya and Bosnia & Herzegovina, also called for the observance of the principle of proportionality.<sup>85</sup> The issue has also been addressed in case law in Argentina, in the *Military Junta Case*, where it was determined that the principle of proportionality was considered to be a customary norm.<sup>86</sup> The ICTY in both *Martić*<sup>87</sup> and *Kupreškić* also reaffirmed the fundamental importance of observing proportionality in attack.<sup>88</sup>

#### D. The Principle of Military Necessity

The principle of military necessity provides that, ‘in so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action *and whose partial or total destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage.*’<sup>89</sup> The principle of military necessity includes a prohibition on destruction and devastation not justified by military necessity. This concept is linked to the idea of proportionality in attack and is another of the fundamental principles of humanitarian law; the idea being that the aim of a Party to an armed conflict should be the weakening of the military potential of the enemy, not their outright destruction. Therefore, only legitimate military installations or objects may be made the target of attack.

Section 5.1 of the UN Secretary-General’s Bulletin on IHL states that UN forces must always make a ‘clear distinction at all times between civilian objects and military objectives’ and, in Section 5.3 that UN forces must take ‘all feasible precautions to avoid, and in any event, to minimise incidental loss of civilian life, injury to civilians or damage to civilian property.’ The UN Commission on Human Rights also called on the parties to the conflict in El Salvador to take all measures to ensure that civilian deaths and injuries were minimised when conducting military operations.<sup>90</sup>

81 See Doc OEA/Ser L/V/II/102 doc. 9 rev.1 (26 February 1999) at §§ 77–79. See also the *ICRC CIHL Study*, Rule 14.

82 At [166].

83 UN SC Res 1160, UN Doc S/RES/1160 (31 March 1998) and UN SC Res 1199, UN Doc S/RES/1199 (23 September 1998).

84 73 *BYBIL* 955 (2002).

85 See statements made to the Spanish Parliament by the Spanish Foreign Minister, in *Actividades, Textos y Documentos de la Política Exterior Española*, Madrid, 1995 at 473 and 535.

86 Federal Court of Appeals, *Military Junta Case*, Judgment, 9 December 1985.

87 *Martić* at 7, § 18.

88 *Kupreškić* at [513].

89 *ICRC CIHL Study*, Vol I at 29, emphasis added.

90 UN Commission on Human Rights Res 1987/51.

The ICTY in *Blaškić*<sup>91</sup> and *Kupreškić*<sup>92</sup> also recognised the importance of distinguishing between military and non-military targets, and taking care to only attack military objects where there is no risk of concomitant disproportionate damage to the civilian population. The IACiHR in the *Tablada* case noted the importance of taking precautions against incidental damage or damage not warranted in relation to potential military gains, stating that customary international law imposes an obligation on persons to avoid or minimise loss as a consequence of attacks on military targets.<sup>93</sup>

### **E. Prohibition on Causing Unnecessary Suffering**

The prohibition on causing unnecessary suffering is also a fundamental tenet of IHL, based on the idea of diminishing the cruelty employed between combatants, and protecting civilians and those *hors de combat*. The notion finds expression in provisions in the law of armed conflict stating that ‘in any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited’<sup>94</sup> and that ‘it is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.’<sup>95</sup>

The prohibition on causing unnecessary was first outlined in the Lieber Code. Under Article 16(2), it is stated that ‘military necessity does not admit of cruelty — that is, the infliction of suffering for the sake of suffering.’ Over 100 years later, when the UN Secretary-General released a report on ‘Respect for Human Rights in Armed Conflicts’, the prohibition on causing unnecessary suffering was restated, and it was specifically noted that the reference to ‘all armed conflicts’ in Resolution 2444 (XXIII) was intentionally done to avoid ‘certain traditional distinctions as between international wars, internal conflicts, or conflicts which although internal in nature are characterised by a degree of direct or indirect involvement of foreign Powers or foreign nationals.’<sup>96</sup>

The principle regarding the prohibition on means and methods of war that cause superfluous injury or unnecessary suffering was acknowledged as a fundamental principle of IHL by the ICTY in *Tadić*:

Indeed, elementary considerations of humanity and common sense make it preposterous that the use by States of weapons prohibited in armed conflicts between themselves be allowed when States try to put down rebellion by their own nationals on their own territory. What is inhumane, and consequently proscribed, in international wars cannot but be inhumane and inadmissible in civil strife.<sup>97</sup>

The ICJ also noted that the prohibition on causing unnecessary suffering was an ‘intransgressible [principle] of international customary law.’<sup>98</sup>

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91 *Blaškić* (Judgment) at § 180.

92 *Kupreškić* (Judgment) at § 524–525.

93 *Tablada* at § 177.

94 Art 35(1) of Protocol I.

95 Art 35(2) of Protocol I.

96 UN Secretary-General, Report on Respect for Human Rights in Armed Conflicts, UN Doc A/7720 (20 November 1969) at 11 and 59–63, §§ 183–201.

97 *Tadić* (Interlocutory Appeal) at [110].

Indeed, prohibitions on certain specific means of warfare have been determined by the ICRC Study to have achieved customary status, as these weapons have been deemed to cause unnecessary suffering or superfluous injury. The customary prohibition now exists on poison, the use of chemical and bacteriological means of warfare, and the use of expanding or exploding bullets, blinding laser weapons, and weapons that leave non-detectable fragments in the human body.<sup>99</sup>

### 3. The Customary Status of Common Article 3

It has long been held by the ICJ and other international tribunals, by commentators,<sup>100</sup> and in other *fora* like the UN, that Common Article 3 is declaratory of certain fundamental standards applicable in all armed conflicts. When Common Article 3 was first drafted and adopted, the ICRC Commentary stated that the principles enunciated in Common Article 3 were ‘already recognised as essential in all civilised countries, and enacted in the municipal law of the States in question, long before the Convention was signed.’<sup>101</sup> Whether such an assessment was true in 1949, it has since been held to be true. As stated by the ICJ in *Nicaragua*:

Article 3 which is common to all four Geneva Conventions of August 12 1949 defines certain rules to be applied in the armed conflicts of a non-international character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court’s opinion, reflect what the Court in 1949 called ‘elementary considerations of humanity’.<sup>102</sup>

The fundamental nature of Common Article 3 as a minimum set of standards applicable in all armed conflicts as a rule of customary law, has also been affirmed in a number of cases in the ICTY including the decisions in *Tadić* (Interlocutory Appeal)<sup>103</sup> and *Tadić* (Trial Chamber Judgment),<sup>104</sup> in *Delalić*,<sup>105</sup> *Kunarac*<sup>106</sup> and in the ICTR in *Akayesu*.<sup>107</sup> As stated in *Akayesu*:

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98 *Nuclear Weapons Advisory Opinion* at §§ 78–79.

99 ICRC *CIHL Study*, Rules 70–79 and 86.

100 Indeed, Solf goes as far as saying the Common Article 3 can be considered *jus cogens*. ‘Remarks of Professor Waldemar Solf in the Humanitarian Law Conference: Determining Customary International Law Relative to the Conduct of Hostilities in Non-International Armed Conflicts (1987) 2 *Am U J Int’l L & Pol’y* 471 at 481. See also Meron, ‘The Geneva Conventions as Customary Law’ (1987) 81 *AJIL* 348.

101 *GCI Commentary* at 50.

102 *Nicaragua* at [218], referring to *Corfu Channel Case* at 22. See also *Tadić* (Interlocutory Appeal): ‘at least with respect to the minimum rules in common Article 3, the character of the conflict is irrelevant’ (at [102]).

103 At 102.

104 Case No IT-94-1-AR72, 7 May 1997 at 609.

105 *Prosecutor v Delalić, Mucić, Delić, and Landžo* (Appeals Chamber Judgment), Case No IT-96-21-A, 20 February 2001 at 136–139 (hereinafter *Delalić* (Appeal)).

106 *Prosecutor v Kunarac, Kovac and Vukotić* (Trial Chamber Judgment), Case No IT-96-23-T (22 Feb 2001) at 406 (hereinafter *Kunarac* (Judgment)).

107 *Prosecutor v Akayesu*, Case No ICTR-96-4, Judgment, 2 Sept 1998 at 608 (hereinafter *Akayesu*).



It is today clear that the norms of Common Article 3 have acquired the status of customary law in that most States, by their domestic penal codes, have criminalised acts which if committed during internal armed conflict, would constitute violations of Common Article 3. It was also held by the ICTY Trial Chamber in the *Tadić* judgment that Article 3 of the ICTY Statute (Customs of War), being the body of customary international humanitarian law not covered by Articles 2, 4, and 5 of the ICTY Statute, included the regime of protection established under Common Article 3 applicable to armed conflicts not of an international character. This was in line with the view of the ICTY Appeals Chamber stipulating that Common Article 3 beyond doubt formed part of customary international law, and further that there exists a corpus of general principles and norms on internal armed conflict embracing Common Article 3 but having a much greater scope.<sup>108</sup>

The US Supreme Court decision in *Hamdan v Rumsfeld*<sup>109</sup> also affirmed the applicability of Common Article 3 in all armed conflicts, and to all persons, provided the conflict takes place in the territory of a party to the Geneva Conventions.<sup>110</sup> The Court affirmed Common Article 3 as the minimum legal standard applicable to all detainees captured in armed conflicts, regardless of whether such detainees have been classified as ‘unlawful combatants.’<sup>111</sup>

#### 4. The Customary Status of Protocol II

When the 1974-1977 Diplomatic Conferences drafted and adopted Protocol II, it was the general consensus that Protocol II was a reaffirmation and development of the principles of Common Article 3.<sup>112</sup> As stated in the Commentary to Protocol II, ‘to understand the scope of the Protocol one should indeed always bear in mind the fact that this instrument supplements and develops common Article 3; it is an extension of it, and is based on the same structure.’<sup>113</sup> In the years since the adoption of the Protocol, a number of States, judicial bodies, and international and inter-governmental bodies have stated that Protocol II now constitutes a set of rules that can be considered as having crystallised emerging rules of customary international law.<sup>114</sup> The UN Enquiry on Darfur noted:

Other customary rules crystallised in the course of diplomatic negotiations for the adoption of the two Additional Protocols of 1977, for the negotiating parties

108 At 608.

109 *Hamdan v Rumsfeld, Secretary of Defense, et al*, 548 U.S. \_\_\_\_; 126 S. Ct. 2749; 165 L. Ed. 2d 723. The case was decided on June 29, 2006, the majority comprising Stevens, Souter, Breyer, Ginsburg & Kennedy, with Thomas, Scalia, and Alito in dissent. Chief Justice Roberts took no part in the consideration or decision of the case. For more detailed assessment of the both *Hamdan* and the Military Commissions Act, see further Katyal, ‘Hamdan v Rumsfeld: The Legal Academy Goes to Practice’ (2006) 120 *HLR* 65, and Moyer, ‘Explaining Hamdan’ (2006) 53 *Federal Lawyer* 8.

110 See the decision of Stevens J, in *Hamdan* at 66–69. Moreover, the Court held that the Conventions are enforceable as US law, as well as international law.

111 *Hamdan* at 70.

112 See CDDH/I/SR.24 at [27].

113 *AP Commentary* at 1343, [4437]; see also 1339, [4424], where the Commentary calls Common Article 3 the ‘parent provision’ of Protocol II.

114 See *Tadić* (Interlocutory Appeal) at [117].

became convinced of the need to respect some fundamental rules, regardless of whether or not they would subsequently ratify the Second Protocol. Yet other rules were adopted at the 1974–1977 Diplomatic Conference as provisions that spelled out general principles universally accepted by States. States considered that such provisions partly codified, and partly elaborated upon, general principles, and that they were therefore binding upon all States or insurgents regardless of whether or not the former ratified the Protocols. Subsequent practice by, or attitude of, the vast majority of States showed that over time yet other provisions of the Second Additional Protocol came to be regarded as endowed with a general purport and applicability.<sup>115</sup>

In 1987 the US Deputy Legal Adviser to the State Department stated that ‘the basic core of Protocol II is, of course, reflected in common Article 3 of the 1949 Geneva Conventions and therefore is, and should be, a part of generally accepted customary law. This specifically includes its prohibitions on violence towards persons taking no active part in hostilities, hostage taking, degrading treatment, and punishment without due process.’<sup>116</sup> The ICTY in *Tadić* (Interlocutory Appeal) affirmed this approach, stating that ‘many provisions of [Additional Protocol II] can now be regarded as declaratory of existing rules or as having crystallised emerging rules of customary law or else as having been strongly instrumental in their evolution as general principles’.<sup>117</sup>

Some institutions have gone so far as to declare the entire Protocol applicable as a matter of customary international law. The Colombian Constitutional Court, in their Constitutional Review of both Protocol II and the Colombian Law 171 of 16 December 1994, through which Protocol II was approved, stated that Protocol II is declaratory of certain basic humanitarian principles. As stated by the Court:

Since the principles of international humanitarian law embodied in the Geneva Conventions and their two Protocols constitute a set of minimum ethical standards applicable situations of internal or international conflict and widely accepted by the international community, they form part of *jus cogens* or the customary law of nations. Consequently, their binding force derives from their universal acceptance and the recognition which the international community of States as a whole has conferred upon them by adhering to this set of rules and by considering that no contrary rule or practice is acceptable.<sup>118</sup>

Furthermore, some commentators have asserted that, quite aside from its own customary status, Protocol II contains provisions which reflect a basic core of human rights, many of which have been reaffirmed as representing customary international law,

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115 At [158].

116 See further (1987) 2 *Am U J Int'l L & Pol'y* 430 at 430–431.

117 At [117].

118 Colombia Constitutional Court, Constitutional Review of both Protocol II and Colombian Law 171 of 16 December 1994, through which Protocol II was approved; Ruling No C-225/95, Re: File No LAT-040, unpublished; unofficial translation from Spanish excerpted in Sassòli & Bouvier at 2267. See also Kalshoven, ‘A Colombian View on Protocol II’ (1998) 1 *YBIHL* 262.

and thus should therefore enjoy customary status when restated in humanitarian instruments.<sup>119</sup> This was acknowledged by the ICRC in the Commentary to Protocol II:

The conventions and their additional Protocols have the same purpose as international instruments relating to human rights, i.e. the protection of the human person... [these instruments contain an] irreducible core of human rights, also known as ‘non-derogable rights’, [which] corresponds to the lowest level of protection which can be claimed by anyone at any time. Protocol II contains virtually all the irreducible rights of the Covenant on Civil and Political Rights, which constitute the basic protection mentioned in the paragraph under consideration here.<sup>120</sup>

Finally, note should be made of the ICRC’s landmark study on the customary status of international humanitarian law. The stated aim of the Study is to assess what elements of contemporary international humanitarian law can now be considered as enjoying customary status — in particular, those more recent treaties, which do not enjoy the same level of ratification as the Geneva Conventions.<sup>121</sup> The methodological approach of the Study was to examine both national and international sources demonstrative of state practice, and then categorise such practice into six overarching groups including the principle of distinction, specially protected persons and objects, specific methods of warfare, weapons, the treatment of civilians and persons *hors de combat*, and implementation of IHL. The ICRC Study has declared that certain provisions of Protocol II now enjoy customary status, including:

- the prohibition of attacks on civilians (Rule 1);
- the obligation to respect and protect medical and religious personnel, medical units and transports (Rules 25, and 27-30);
- the obligation to protect medical duties (Rule 26);
- the prohibition of starvation (Rule 53);
- the prohibition of attacks on objects indispensable to the survival of the civilian population (Rule 54);
- the obligation to respect the fundamental guarantees of civilians and persons *hors de combat* (Rules 87–105);
- the obligation to search for and respect and protect the wounded, sick and shipwrecked (Rules 109–111);
- the obligation to search for the dead and prevent despoiling (Rules 112–113);

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119 Meron, *Human Rights and Humanitarian Norms* at 73.

120 *AP Commentary* at 1340, [4429-4430].

121 As Henckaerts notes ‘the great majority of the provisions of the Geneva Conventions, including common Art 3, are considered to be part of customary international law. Furthermore, given that there are now 192 parties to the Geneva Conventions, they are binding on nearly all states as a matter of treaty law. Therefore, the customary nature of the provisions of the Conventions was not the subject as such of the study. Rather, the study focused on issues regulated by treaties that have not been universally ratified, in particular the Additional Protocols...’: ‘Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict’ (2005) 87 *IRRC* 175 at 187.

- the obligation to protect persons deprived of their liberty (Rules 118–119, 121 and 125);
- the prohibition of forced movement of civilians (Rule 129);
- and respect for the specific protections afforded to women and children (Rules 134–137).<sup>122</sup>

## 5. The General Trend of Invoking IHL Obligations without Making the Distinction as the Source of the Obligation

In the decades following the adoption of the Geneva Conventions, there is evidence of a general trend towards the application of the rules and principles regarding international armed conflict to non-international armed conflicts. This is seen in the nascent tendency to either apply, or call for the application of, international humanitarian law in situations of armed conflict, without drawing the distinction as to which ‘type’ of humanitarian law was applicable in the relevant situation.

### A. State Practice

During the internal armed conflict in Yemen in the early 1960s, both the Royalists and the opposing Republicans declared their intention to ‘respect the principles’ of the Geneva Conventions. Indeed, the Royalists eventually established prisoner of war (‘POW’) camps, allowing the ICRC to visit detainees.<sup>123</sup> During the civil war that took place in the Democratic Republic of Congo in the early 1960s,<sup>124</sup> the Congolese government issued a declaration, affirming its intention to abide by certain principles of humanitarian conduct in its civil war. These principles included limiting its action to military objectives, observing the distinction between civilians and combatants, and calling for the ICRC to observe its commitment to upholding basic humanitarian standards. In the public statement issued by the Prime Minister on 21 October 1964, it was declared that:

For humanitarian reasons... the Congolese Government wishes to state that the Congolese Air Force will limit its action to military objectives. In this matter, the Congolese Government desires not only to protect human lives but also to respect the Geneva Convention [*sic*]. It also expects the rebels — and makes an urgent appeal to them to that effect — to act in the same manner.<sup>125</sup>

122 Henckaerts, ‘Study on Customary International Humanitarian Law’ at 188.

123 See the International Committee of the Red Cross, *Annual Report 1963* (1963) at 16–17. In making these declarations, both sides to the Yemeni internal armed conflicts ‘appear to go beyond acceptance of the provision of Article 3 and to support a more far-reaching interpretation of the obligations of the parties with respect to the laws of war than might otherwise be the case in an internal war.’ See Boals, ‘The Internal War in Yemen’ in Falk (ed), *The International Law of Civil War* at 315.

124 For more on the conflict in the Congo, see generally McNemar, ‘The Postindependence War in the Congo’ in Falk (ed), *The International Law of Civil War*.

125 See Public Statement of Prime Minister of the Democratic Republic of the Congo, 21 October, 1964; reprinted in (1965) 59 *AJIL* 614 at 616. See also ICRC, ‘Red Cross Action in the Congo’ (1962) 10 *IRRC* 3 and ‘The ICRC in the Congo’ (1961) *IRRC* Supplement 14. See generally Moir, *The Law of Internal Armed Conflict* at 74–78 on the internal conflict in the Congo.

Similar declarations were made regarding the civil war in Nigeria in the 1960s.<sup>126</sup> During the conflict with Biafran separatists, the Head of the Federal Military Government, Major General Y Gowon, issued the 1967 Operational Code of Conduct for the Nigerian Armed Forces, which outlined permissible behaviour in military operations for the Federal Army. The Code specifically stated that Nigerian troops were ‘in honour bound to observe the rules of the Geneva Convention [*sic*]’.<sup>127</sup> Nigeria agreed to apply both the Geneva Conventions rules designed to protect civilians in the hands of the enemy, and captured combatants; and the general rules on the conduct of hostilities that are normally applicable only in international armed conflicts.<sup>128</sup> The Nigerian Government employed a strict policy against indiscriminate bombing in civilian areas, and established POW camps for captured Biafran fighters. The Government also allowed regular ICRC visits to detainees.<sup>129</sup> An independent observer team comprising delegates from Canada, Poland, Sweden, the UK, the UN Secretary-General and the Organisation of African Unity was invited by Nigeria to observe and report on Nigerian compliance with humanitarian law. The Observer Team reported that, in large part, Nigerian forces were aware of the rules of the Code of Conduct and were fulfilling their obligations under the Code.<sup>130</sup>

## **B. UN General Assembly and Security Council Resolutions**

The UN General Assembly has issued a number of resolutions calling on States to respect human rights in armed conflicts, starting with Resolution 2444 (XXIII) on Respect for Human Rights in Armed Conflict.<sup>131</sup> Resolution 2444, unanimously adopted, recognised ‘the necessity of applying basic humanitarian principles in all armed conflicts’ and determined that certain principles should be observed ‘by all governmental and other authorities responsible for action in armed conflicts’, including:

- that the right of the parties to a conflict to adopt means of injuring the enemy is not unlimited;
- that it is prohibited to launch attacks against the civilian populations as such; and

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126 See generally Niven, *The War of Nigerian Unity, 1967-1970* (1970); Okpaku (ed), *Nigeria: Dilemma of Nationhood; an African Analysis of the Biafran Conflict* (1972); and Moir, *The Law of Internal Armed Conflict* at 79–83.

127 Directive to all Officers and Men of the Armed Forces of the Federal Republic of Nigeria on conduct of Military Operations at [3]; downloaded from Dawodu.com – On Nigeria’s Social and Political Issues at <<http://www.dawodu.com/codec.htm>> on 28 September 2005.

128 The ICRC had managed to obtain assurances from both the Nigerian government and the Biafran separatists that they would observe the rules of the Geneva Conventions. See the ICRC *Annual Report 1967* at 36, and ICRC, ‘External Activities: Nigeria’ (1967) 79 *IRRC* 535.

129 See ICRC reports entitled ‘Help to War Victims in Nigeria’ in (1968) 92 *IRRC* 571; (1969) 94 *IRRC* 3; (1969) 95 *IRRC* 81; and (1969) 96 *IRRC* 119. See also Bothe, ‘Article 3 and Protocol II: Case Studies of Nigeria and El Salvador’ (1982) 31 *AULR* 899 and Nwogugu, ‘The Nigerian Civil War: A Case Study in the Law of War’ (1974) 14 *IJIL* 13.

130 See *Report of the Observer Team to Nigeria*, 24 September to 23 November 1968: Presented to Parliament by the Secretary of State for Foreign and Commonwealth Affairs by Command of Her Majesty (1969) at 31–34.

131 23 UN GAOR, Supp (No 18), UN Doc A/7433 (1968) (18 December 1968).

- that distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible.

In declaring these principles, the UN General Assembly affirmed two previous documents, Resolution XXIII, adopted by the International Conference on Human Rights in Tehran on 12 May 1968;<sup>132</sup> and Resolution XXVIII of the XX<sup>th</sup> International Conference of the Red Cross, held in Vienna in 1965. In both of these documents, as with Resolution 2444, the reference to ‘all armed conflicts’ was maintained, with no distinction between international and non-international armed conflicts being made. This position was again affirmed by the UN General Assembly in Resolution 2675 (XXV)<sup>133</sup> which reasserted the same ‘basic principles for the protection of civilian population in armed conflicts.’<sup>134</sup>

This tendency to call for respect of IHL and human rights in ‘all armed conflict’ was reiterated in a number of additional UN Resolutions, all entitled ‘Respect for Human Rights in Armed Conflicts’. These were Resolutions 2597,<sup>135</sup> 2674,<sup>136</sup> 2676,<sup>137</sup> 2677,<sup>138</sup> 2852,<sup>139</sup> 2853,<sup>140</sup> 3032,<sup>141</sup> 3102,<sup>142</sup> 3500,<sup>143</sup> 31/19,<sup>144</sup> and 32/44.<sup>145</sup> In each of these resolutions, the UN called upon parties involved in armed conflicts to respect basic humanitarian principles in all situations of armed conflict. Similar sentiments were expressed by the United Nations Security Council<sup>146</sup> in resolutions 788,<sup>147</sup> 972,<sup>148</sup> 1001<sup>149</sup> and 1083<sup>150</sup> on Liberia,<sup>151</sup> 794<sup>152</sup> and 814<sup>153</sup> on Somalia,<sup>154</sup> 1213<sup>155</sup> on Angola,<sup>156</sup> 993<sup>157</sup> on Georgia,<sup>158</sup> and 1193<sup>159</sup> on Afghanistan, all of which refer to the

132 Final Act of the International Conference on Human Rights, UN Doc A/CONF 32/41 at 18 (1968).

133 25 UN GAOR Supp (No 28), UN Doc A/8028 (1970).

134 See also the work undertaken by the UN Commission on Human Rights, in their attempts to establish minimum standards applicable in human rights and humanitarian law – see Resolutions 1997/21, 1998/29, and 1999/65. See also the Report of the Secretary-General to the 1999 Commission, UN Doc E/CN.4/1999/92 and the Declaration of Minimum Humanitarian Standards (E/CN.4/Sub.2/1991/55).

135 24 UN GAOR Supp (No 30), UN Doc A/7909 (16 December 1969).

136 25 UN GAOR Supp (No 28), UN Doc A/8178 (9 December 1970).

137 25 UN GAOR Supp (No 28), UN Doc A/8178 (9 December 1970).

138 25 UN GAOR Supp (No 28), UN Doc A/8028 (9 December 1970).

139 26 UN GAOR Supp (No 29), UN Doc A/8429 (20 December 1971).

140 26 UN GAOR Supp (No 29), UN Doc A/8589 (20 December 1971).

141 27 UN GAOR Supp (No 30), UN Doc A/8966 (18 December 1972).

142 28 UN GAOR Supp (No 30), UN Doc A/9030 (12 December 1973).

143 30 UN GAOR Supp (No 34), UN Doc A/10463 (15 December 1975).

144 31 UN GAOR Supp (No 39), UN Doc A/31/295 (24 November 1976).

145 32 UN GAOR Supp (No 45), UN Doc A/32/396 (8 December 1977).

146 While one cannot draw too weighty a conclusion based on declarations by the Security Council – nor the specific refusal to draw attention to the ‘type’ of international humanitarian law applicable in each instance – the Resolutions are demonstrative of a certain attitude which, together with other acts of States, is persuasive in suggesting moves towards a more uniform approach to regulation of armed conflict. Indeed, Schindler notes that the fact that ‘practically all humanitarian law treaties adopted since 1995 have been made applicable to both international and non-international armed conflicts’ is demonstrative of the growing international acceptance of this ‘progressive assimilation’ of the dual laws of armed conflicts into one body of law; see Schindler, ‘International Humanitarian Law: Its Remarkable Development’ at 177.

147 UN SC Res 788, UN Doc S/RES/788 (19 November 1992).

148 UN SC Res 972, UN Doc S/RES/972 (13 January 1995).

importance of the parties to the conflict to respect IHL, without making the distinction as to the 'type' of IHL to be observed.<sup>160</sup>

The UN Secretary-General's Bulletin for Peacekeeping Forces issued in 1999 does not distinguish between the types of IHL that UN Peacekeeping Forces should observe.<sup>161</sup> The Bulletin's field of application, as outlined in Section 1.1 simply determines that 'the fundamental principles and rules of international humanitarian law set out in the present bulletin are applicable to United Nations forces when in situations of armed conflict they are actively engaged therein as combatants, to the extent and for the duration of their engagement.'<sup>162</sup>

### C. Resolutions of Inter-Governmental Bodies

Other organisations have also contributed to the trend for calls to observe IHL in all armed conflicts. In 1995, the European Union ('EU') called for respect for IHL in the civil war in Chechnya. On 17 January, the EU President issued a declaration which stated that the Union 'strongly deplores the large number of victims and the suffering being inflicted on the civilian population', reiterated in a further declaration by the EU on 23 January 1995, which 'deplores the serious violations of human rights and international humanitarian law which are still occurring'.<sup>163</sup> Furthermore, in 2000, the Rapporteur of the Council of Europe on the human rights situation in Chechnya called upon the Chechen fighters to observe and respect the rules of IHL.<sup>164</sup>

149 UN SC Res 1001, UN Doc S/RES/1001 (30 June 1995).

150 UN SC Res 1083, UN Doc S/RES/1083 (27 November 1996).

151 All three resolutions appealed to 'all parties to the conflict and all others concerned to respect strictly the provisions of international humanitarian law.'

152 UN SC Res 794, UN Doc S/RES/794 (3 December 1992).

153 UN SC Res 814, UN Doc S/RES/814 (26 March 1993).

154 The Resolution condemned breaches of international humanitarian law, including 'the deliberate impeding of the delivery of food and medical supplies.'

155 UN SC Res 1213, UN Doc S/RES/1213 (3 December 1998).

156 Which called upon the government of Angola and UNITA in particular to 'respect international humanitarian, refugee and human rights law'; see also the statement by the UN Security Council President in 1993, condemning UNITA's attacks on a train that was carrying civilians, and urging 'UNITA leaders to make sure that its forces abide by the rules of international humanitarian law' UN Doc S/25899 (8 June 1993).

157 UN SC Res 993, UN Doc S/RES/993 (12 May 1993).

158 The Resolution reaffirmed 'the need for the parties to comply with international humanitarian law'.

159 UN SC Res 1193, UN Doc S/RES/1193 (28 August 1998).

160 See also UNGAR 50/193 on Croatia; the UN Commission on Human Rights resolutions 1998/70, 1992/68, 1990/53, 1995/74, 1996/75 and 1997/65 on Afghanistan; the UN Sub-Commission on Human Rights Res 1989/9 on El Salvador; and the UN Secretary General's Report on the Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa, UN Doc A/52/871-S/1998/318, 13 April 1998. All of these documents called upon affected parties in conflicts to observe the rules of humanitarian law, without drawing specific attention as to which type of IHL was applicable.

161 See UN Secretary-General's Bulletin of 6 August 1999, entitled Observance by UN Forces of International Humanitarian Law, UN Doc ST/SGB/1999/13 (hereinafter UN Secretary-General's Bulletin on IHL).

162 See UN Secretary-General's Bulletin on IHL.

163 See the EU Parliament Resolutions B4-0418, 0421, 0433, 0445, 0473 and 0477/95.

In addition, at the African Parliamentary Conference on International Humanitarian Law for the Protection of Civilians During Armed Conflict in 2002, where Niger declared that all States of Africa, as well as all other 'parties to armed conflicts' should 'honour their duties as regards International Humanitarian Law and international instruments related to human rights and refugee law and respect, in all circumstances, the rights of the victims of armed conflicts and the dignity of the human person'.<sup>165</sup>

#### **D. Resolutions of Other International Organisations**

This continuing trend to call for a more uniform adherence to international humanitarian law, was echoed during the Berlin Session of the Institute of International Law in 1999, which adopted the Resolution on the Application of International Humanitarian Law and Fundamental Human Rights in Armed Conflicts in which Non-State Entities are Parties, which stated that:

All parties to armed conflicts in which non-State entities are parties, irrespective of their legal status, as well as the United Nations, and competent regional and other international organisations, have the obligation to respect international humanitarian law as well as fundamental human rights law.<sup>166</sup>

This trend towards calling for respect for IHL, without making the distinction as to 'type' of armed conflict was further witnessed in 1990 with the Turku Declaration, adopted at an expert meeting convened by the Institute for Human Rights, which 'affirms minimum humanitarian standards which are applicable in all situations, including internal violence, disturbances, tensions, and public emergency, and which cannot be derogated from under any circumstances. These standards must be respected whether or not a state of emergency has been proclaimed'.<sup>167</sup>

Indeed, it has been suggested that the unique demands of humanitarian law, namely those of protecting the wounded and the vulnerable in situations of armed conflict, may exert a pressure on the forces that create and shape customary international law, leading to the creation of a rule, even in instances where State practice is negligible.<sup>168</sup> As noted by Meron, 'given the scarcity of actual practice, it may well be that tribunals have been guided, and may continue to be guided, by the degree to which certain acts are offensive

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164 Council of Europe, Parliamentary Assembly, Opinion on Russia's request for membership in light of the situation in Chechnya, Doc 7231, 2 February 1995.

165 Niger, Declaration made at the African Parliamentary Conference on International Humanitarian Law for the Protection of Civilians During Armed Conflict, Niamey, 18–20 February 2002.

166 Resolution on the Application of International Humanitarian Law and Fundamental Human Rights in Armed Conflicts in which Non-State Entities are Parties, Institute of International Law, Berlin Session, 25 August 1999.

167 See text of the Declaration at the website of the Institute for Human Rights, Åbo Akademi University, in Turku/Åbo, Finland at [http://web.abo.fi/institut/imr/publications/publications\\_online\\_text.htm](http://web.abo.fi/institut/imr/publications/publications_online_text.htm).

168 See, for example, Baxter: 'Treaties of an essentially humanitarian character might be thought to be distinguishable by reason of their laying down restraints on conduct that would otherwise be anarchical. In so far as they are directed to the protection of human rights, rather than to the interests of States, they have a wider claim to application than treaties concerned, for example, with the purely political and economic interests of States.' (Multilateral Treaties as Evidence of Customary Law' (1965-1966) 41 *BYBIL* 275 at 286).



to human dignity. The more heinous the act, the more willing the tribunal will be to assume that it violates not only a moral principle of humanity but also a positive norm of customary law.<sup>169</sup>

This very approach was demonstrated by the ICTY in *Kupreškić*, where the Chamber stated that '[due] to the pressure exerted by the requirements of humanity and the dictates of public conscience, a customary rule of international law has emerged [on reprisals against civilians in NIAC]<sup>170</sup>, even though State practice with regards to reprisals in non-international armed conflicts was limited. As Kirgis notes, 'when issues of armed force are involved, it may well be that the need for stability explains an international decision maker's primary reliance on normative words rather than on a combination of words and consistent deeds.'<sup>171</sup>

## Conclusion

As this examination of State practice has shown, there is a tendency among affected States to generally apply the rules relating to international armed conflict to non-international armed conflicts. Arguably, there now exist customary rules applicable in internal armed conflicts governing protection of civilians from hostilities, specifically from indiscriminate attack; protection of civilian objects, including cultural property; protection of all those who do not, or no longer, take part in hostilities; and the prohibition on certain means and methods of conducting hostilities.

Similar far-reaching effects have also been witnessed with respect to the provisions of Protocol II, with many of its fundamental principles having now achieved the status of customary international law.<sup>172</sup> One of the over-arching findings of the ICRC study into the customary status of international humanitarian law is that there is a more uniform approach to the regulation of conduct in *all* armed conflict than had been previously thought. Of the 161 customary rules of humanitarian law as identified in the ICRC study, 142 rules are uniformly applicable in all armed conflicts. To put this in a somewhat rudimentary statistical context approximately 88 per cent of customary rules are uniformly applicable in all armed conflicts.<sup>173</sup>

This convergence of applicable rules is important for the ongoing reaffirmation and development of international humanitarian law. In the years since the drafting of the Geneva Conventions and particularly, since the introduction of the 1977 Additional Protocols, armed conflict has been transformed from an endeavour largely the sole provenance of states, to one more likely to be conducted within state borders, and between individuals of the same nationality. Moreover, the incidence of non-international armed conflict has increased exponentially,<sup>174</sup> far outstripping international armed conflict as the most prevalent form of armed conflict.

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169 Meron, *Human Rights and Humanitarian Norms as Customary Law* (1989) at 42.

170 *Kupreškić* at [531]. See also Dingwall, 'Unlawful Confinement' at 137–138.

171 Kirgis, 'Custom on a Sliding Scale' at 147.

172 Henckaerts, 'Study on Customary International Humanitarian Law' at 188.

The treaty rules the rules for international armed conflict are far more exhaustive than those in place for non-international armed conflict. This raises a conundrum in that international law has in place a comprehensive set of rules governing a type of armed conflict which is no longer the norm. In contrast, the rules applicable to the more prevalent type of conflict, non-international armed conflict, are comparatively limited.

The ICRC had no immediate plans for any comprehensive revision of either the Geneva Conventions or the Additional Protocols.<sup>175</sup> As MacLaren and Schwendimann note:

In principle, gaps in IHL could be filled by new treaty provisions rather than custom. Obtaining the state support necessary for their adoption and ratification would, however, be tricky, time-consuming and treacherous... the divisions prevailing in the state community and a climate dominated by 11.9.2001 might, if anything, lead to a codification to the detriment of the protection of individuals through the enhancement of coercive measures available for state security.<sup>176</sup>

The recent adoption of the treaty banning the use and production of cluster munitions demonstrates that the international community is prepared to adopt new rules regulating their behaviour in armed conflicts. However, it seems unlikely that a complete re-visiting of the laws of armed conflict in their entirety, like the Additional Protocols and the Geneva Conventions before them, will occur in the foreseeable future.

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173 It should be kept in mind that the *ICRC CIHL Study* is an academic work, and not a declaration of the law to which States are bound. States may yet refute its findings, especially on some of the more controversial suggestions. Indeed, some academics have already criticised the Study for failing to adequately establish the precise normative status and weight it accords the statutes of the ICTY, ICTR and Special Court for Sierra Leone. Criticism can also be levelled at the Study for placing too significant an emphasis on State military manuals as being evidence of state practice and *opinio juris*. It does not always follow that the inclusion of a rule in a military manual is done for reasons of obligation; the rule may be the result of a policy initiative, and have nothing to do with international law *per se*. Such reliance on military manuals could perhaps skew the findings prematurely to conclusion of customary status. See generally Cryer, 'Of Custom, Treaties, Scholars and the Gavel: The Influence of the International Criminals Tribunals on the ICRC Customary Law Study' (2006) 11 *J Conf & Sec L* 239; Balgamwalla, 'Review of Conference "The Reaffirmation of Custom as an Important Source of International Humanitarian Law"' (2006) 13 *Human Rights Brief* 13, which summarises critiques of the Study from Joshua Dorosin, Assistant Legal Adviser to the US State Department, Professor Michael Matheson, Lt. Col Burrus Carnahan, JJ Paust & Col W Hays Parks. See also Wilmshurst & Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (2007).

174 A study conducted by the Department of Peace and Conflict Research at Uppsala University, in conjunction with the Conditions of War and Peace Program at the International Peace Research Institute in Oslo, categorised and analyzed all armed conflicts that had taken place following World War II. The study found that of the 225 armed conflicts which had taken place between 1946 and 2001, the majority – 163 – were internal armed conflicts. Comparatively few – 42 – were qualified as inter-state or international armed conflicts. The remaining 21 were categorised as 'extra-state' – which were determined as being a conflict involving a state engaged against a non-state group, with the non-state group acting from the territory of a Third state. For more on this study, see Gleditsch, et al, 'Armed Conflict 1946–2001: A New Dataset' (2002) 39 *Journal of Peace Research* 615.

175 Bugnion, 'The International Committee of the Red Cross and the Development of International Humanitarian Law' (2004) 5 *Chicago Journal of International Law* 191 at 211–212.

176 MacLaren & Schwendimann at 1222.