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RESEARCH MONOGRAPH

on

Mandates of States to Implement International Humanitarian Law

COURSE NAME: RESEARCH MONOGRAPH

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DECLARATION

I hereby declare that the work, present in this research is the outcome of the investigation, performed by me under the supervision of **SHARMIN JAHAN RUNA ,** Assistant Professor & Head (Acting) Department of Law, Sonargaon University Bangladesh.

I also declare that this research or no part thereof has been or is being submitted elsewhere for the award of any degree

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List of Abbreviations

API - Additional Protocol 1

CC - Crown Court

HCP - High Contracting Parties

IHL - International humanitarian law

ICRC - International Committee of the Red Cross

ICJ - International Court of Justice

UN - United Nation

NGO - Non-Governmental Organization

NATO - North Atlantic Treaty Organization

USSR - Union of Soviet Socialist Republics

UNHCR - United Nations High Commissioner for Refugees

CHAPTER : ONE

1.1.Introduction

International humanitarian law is a set of rules that seeks to limit the effects of armed conflict. Its goal is to protect people who are not taking part in hostilities and to restrict the means and methods of warfare to what is necessary for the attainment of a military aim. The 1949 Geneva Conventions, the main treaties of humanitarian law, have been accepted by every state in the world. However, becoming a party to these instruments is only the first step. The rules must be acted upon, that is to say humanitarian law must be implemented. If international law is seen as a part of national law, then it may presumably also be implemented and interpreted as national law. In such case international law may have as many interpretations as there are different nations[1]. This is one of the reasons why national implementation must be examined when addressing international humanitarian law. The implementation of humanitarian law is the domain of states that can choose the best measures for doing so. In that sense, international treaties never stand alone, but rather take effect when states begin implementing what is in them. While the Geneva Conventions and other related documents are the same for every state party, national implementation gives the rules within them a distinctive face. All states have an obligation to adopt and carry out the measures necessary to implement humanitarian law[2]. Bodies responsible for this can be various ministries, the parliament, the courts, the armed forces, universities, etc. In some cases the Conventions stipulate specific responsibilities and in others they create general obligations to make sure that internal laws are in conformity with the Conventions. Measures for implementation must be taken in both wartime and peace- time, as it may be too late to implement many of the provisions if hostilities have already begun. Three keywords could be used to summarize such measures: disseminating, organizing and sanctioning. The dissemination of international humanitarian law means that both civilians and military personnel are made familiar with the rules within this branch of law. Organizing means that all the structures, administrative arrangements and personnel required for compliance with the law are in place. Sanctioning means that violations of humanitarian law are prevented as much as possible and punished when they do occur.

[1] V. Heiskanen.1990. The Relation of International and Municipal Law. ―book of International Law, Vol. 1, p. 179.
[2] Geneva Convention I, Article 27; Geneva Convention II, Article 48; Geneva Convention III, Articles 41 and 127; Geneva Convention IV, Articles 99 and 144.

1.2. Purpose of the Study

The study may be useful for many purposes. Below are a few examples of its possible uses:

1. Rules of customary international law apply to all States. As a result, the rules that have been identified as customary international law have to be respected by every State. This will be particularly useful in cases where States have not ratified the 1977 Additional Protocols or in the event of non-international armed conflict, an area where few treaty rules exist, as explained above.

2. The study can also be used to convince governments to ratify certain treaties. If it is shown that certain rules are already customary international law, States should be less hesitant to ratify treaties containing those rules.

3. The study can serve as a dissemination tool. Customary international law takes into account the practice and legal opinion of States around the world and is therefore culturally neutral, so to speak.

4. The study could serve as a basis for the drafting of other document, such as a revised document on the essential rules of international humanitarian law.

5. The study can be useful for the military. Military manuals should not fall below the standards set by customary international law. Military training should be based at least on these same standards.

6. The study will also serve to indicate areas of international humanitarian where is no agreement and areas where the situation is unclear. These areas may be identified as deserving particular attention from the international community in the coming years.

1.3. Nature and Scope of the Study

In the light of contemporary conflicts, essays consider the legal position of States that have chosen not to become a party to an ongoing international armed conflict (law of neutrality) as well as the question of whether and to what extent international humanitarian law provides rules governing counter-terrorism operations, that is, the 'global war on terror'. Taken together, these essays provide a comprehensive analytical survey of the scope and applicability of international humanitarian law[3].

[3] http://www.ashgate.com/isbn/9780754629337, Accessed on 03/08/2014.

"A number of conflicts nowadays, such as those in Afghanistan, Libya and Somalia can be said to have multiple implications for many different regions of the world," said Mr Bellon. "Is that reason enough to speak of a 'worldwide battlefield'? If so, how are we to consider the application of international humanitarian law in such cases?"

As part of their work with the European Union and NATO, the ICRC and the College of Europe have held a colloquium on international humanitarian law every year since 2000[4].

1.4. Methodology

To determine the best way of fulfilling the task entrusted to it, the ICRC consulted a group of academic experts in international humanitarian law who formed the Steering Committee of the study.

Unlike treaty law, customary international law is not written. The original rule is actually confirmed. State practice in this context does not mean age-old practice. In general, research for the study has focused on State practice during the last twenty years. Customary international law can emerge in an even shorter period of time.

The research was conducted using both national and international sources reflecting State practice (usus) and/or legal opinion (opinio juris). The measure of access to these various sources largely explains the research method adopted[5].

1.5. Limitations

Though the research topic "Mandates of States to Implement International Humanitarian Law" is one of the important topics for research in this present time but there are some vital limitation when I prepared this research paper such limitations are;

a) Rare access to information.

b) Limited access to resources.

c) Time management.

d) A little access to experts for editing, proofreading, and guidance.

e) Slight support from organizations and participant.

[4]http://www.icrc.org/eng/resources/documents/news-release/2012/belgium-news-2012-10-18.htm, Accessed on 03/08/2014.

[5] http://www.icrc.org/eng/resources/documents/misc/57jq3k.htm, Accessed on 03/08/2014.

1.6.Abstract

A major part of international humanitarian law is contained in the four Geneva Conventions of 1949, which have been adopted by all nations in the world. The Conventions have been developed and supplemented by two further agreements: the Additional Protocols of 1977 relating to the protection of victims of armed conflicts, and the 2005 Additional Protocol III, relating to the adoption of an additional distinctive emblem. Along with the Hague Conventions of 1899 and 1907, IHL forbids the use of weapons and tactics that cause unnecessary suffering to combatants and non-combatants alike. IHL reflects the basic principles of distinction, proportionality and precaution.

CHAPTER-TWO

Development of International Humanitarian Law

2.1.Overview

International humanitarian law (IHL) is a set of rules that seek for humanitarian reasons to limit the effects of armed conflict. IHL protects persons who are not or who are no longer participating in hostilities and it restricts the means and methods of warfare. IHL is also known as the law of war or the law of armed conflict. A major part of international humanitarian law is contained in the four Geneva Conventions of 1949, which have been adopted by all nations in the world.

2.2.History

Although international humanitarian law traces its philosophical origins back to antiquity, it was not until the 19th century that nations began in earnest to adopt binding treaties and military codes to govern armed conflict. In 1859, Henry Dunant, a Swiss businessman traveling through Solferino, Italy, witnessed the aftermath of a bloody battle between French and Austrian armies. As the armies departed, Dunant saw the suffering of thousands of wounded and dying men who lay unattended on the battlefield. Dunant enlisted nearby residents to provide what relief they could, but despite their efforts, thousands died. Greatly moved by the experience, Dunant wrote "A Memory of Solferino," which described the plight of the victims of war. Dunant called for an international agreement on the treatment of battlefield casualties and proposed the establishment of a civilian volunteer relief corps to care for the wounded[6]. He wrote: "Would it not be possible, in time of peace and quiet, to form relief societies for the purpose of having care given to the wounded in wartime by zealous, devoted, and thoroughly qualified volunteers?" During the same time that Dunant was starting his humanitarian movement in Europe, he United States was embroiled in civil war. In 1863, President Abraham Lincoln issued a military code drafted by Dr. Francis Lieber to regulate the conduct of soldiers in the field. The code laid out specific rules for protecting civilians and their property, treating prisoners and enemy wounded humanely, and limiting military objectives to only those ends that are militarily necessary Lieber's code represented the first attempt to gather the laws, customs, and usages of war into one document. What became known as the Lieber Code significantly influenced later foreign

[6] Fleck, Dieter (2008). The Handbook of International Humanitarian Law. Second Edition. Oxford University Press, USA. ISBN 0-19-923250-4.

military codes, especially in Europe, and also became the basis for many international humanitarian treaties.

2.3.The Geneva and Hague Conventions

Dunant's call for an international conference to draft an agreement on the treatment of battlefield casualties was answered in 1864 when the Swiss government hosted a conference in Geneva at the suggestion of Dunant's newly formed International Committee for the Relief of Military Wounded (which would become the International Committee of the Red Cross or ICRC in 1876). Diplomats from a number of nations, as well as representatives of military medical services and humanitarian societies, adopted a treaty known as the first Geneva Convention, containing 10 articles specifying that[7]:

•Ambulances, military hospitals, and the personnel serving with them are to be recognized as neutral and protected by parties to a conflict;

• Civilians and medical personnel who assist the wounded are to be protected;

• Wounded or sick combatants are to be collected and cared for by either party; and

• The symbol of a red cross on a white background (the reverse of the Swiss flag) will serve as a protective emblem to identify medical personnel, equipment, and facilities. The first Geneva Convention showed that certain humanitarian rules could be imposed on combatants—even in wartime. Whereas the Geneva Convention regulated the treatment of the wounded, the nations of the world at the same time began to negotiate a second component of IHL that regulated the means and methods of warfare. In 1868, they adopted the St. Petersburg Declaration, which asserted that "the employment of such arms" as "would uselessly aggravate the suffering of disabled men, or render their death inevitable" would "be contrary to the laws of humanity." To this end, the Declaration outlawed certain fragmenting, explosive and incendiary ammunition. At the urging of Tsar Nicholas II of Russia, the international community convened two conventions at The Hague, Netherlands, in 1899 and 1907. The resulting Hague Conventions banned a number of other weapons and methods of war (including "dum dum" bullets, which expand in the body, poison weapons, and attacks from hot air balloons) and set out rules for the humane treatment of prisoners of war, occupied territory, and neutral parties. They also took many of the principles of the 1864 Geneva Convention and adapted them to maritime warfare. The

[7] Article 10 of first Geneva Convention.

experiences of the ICRC during World War I, working on behalf of victims of war, led to the preparation of another international treaty to further define the status of prisoners of war. A diplomatic conference convened in 1929 and adopted another Geneva Convention, specifically governing the treatment of prisoners of war. The red crescent and red lion and sun emblems were also recognized by nations at this conference, although the red lion and sun is no longer in use. During World War II, heavy civilian casualties resulted from bombardment as well as policies of genocide. The deportation and mass murder of civilians, as well as the taking and killing of hostages, focused international attention on the need for civilian protection. Following World War II, an international effort was made to evaluate the wartime experience and update the existing rules. When hostilities ceased, the ICRC submitted a draft revision of the Geneva Conventions to governments[8]. In 1949, the Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War ratified a fourth Geneva Convention on civilians and incorporated it and the previous treaties into the Geneva Conventions of August 12, 1949. In contrast with the 10 articles of the first Geneva Convention of 1864, the four 1949 Conventions contain 429 articles. The ICRC, supported by national societies, met with considerable success in convincing governments to accept the 1949 Geneva Conventions. The Geneva Conventions have been universally adopted by all nations in the world.

2.4.The Additional Protocols to the Geneva Conventions

The appearance of new forms of conflict such as guerrilla warfare and widespread non-international conflicts led the ICRC to propose new laws to meet these challenges. In 1956, rules were drafted for the protection of the civilian population from the dangers of indiscriminate warfare. The 1968 United Nations Conference on Human Rights provided further backing to increase the scope of IHL. As a result, the ICRC organized meetings of government legal advisers, paving the way for a diplomatic conference. In 1977, two Additional Protocols to the Geneva Conventions were adopted. The Additional Protocols supplement the protections under the Geneva Conventions. Protocol I expands protection for the civilian population and military and civilian medical workers in international armed conflicts. Protocol II extends similar

[8] Pictet, Jean (1985). Development and Principles of International Law. Dordrecht: Martinus Nijhoff. ISBN 90-247-3199-2. p.2.

protections during non-international armed conflicts. As of 2011, 170 nations have ratified Protocol I and 165 have ratified Protocol II. Furthermore, in December 2005, governments adopted a Third Additional Protocol, creating an optional emblem, known as the red crystal. It is equal in status to the red -cross and red -crescent emblems. Today, the four Geneva Conventions of August 12, 1949, and their Additional Protocols, represent the major thread in the evolution of IHL, safeguarding vulnerable groups in armed conflict.

2.5.The Development of IHL Continues

Following the development of the first two Additional Protocols in the

1970s, the past three decades have brought further updates in the field of international law applicable to armed conflict. A number of legal instruments were drafted specifically restricting or regulating the use of certain weapons including[9]:

1972 Convention on the prohibition of the Development, Production, Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction.

1976 Convention on the prohibition of Military or Any Other Hostile Use of Environment Modification Techniques (ENMOD)

1980 The Convention on the prohibition or Restriction on the use of certain conventional Weapons which may be deemed to be Excessively Injurious or Indiscriminate Effects.

1993 Convention on the prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction.

1995 Protocol on Blinding Laser Weapons (part of CCW)

1997 Ottawa Convention on the Prohibition of Use, Stockpiling, Production, and transfer of Anti-personnel Mines and on their Destruction.

2008 Convention on Cluster Munitions

Child on the involvement of children in armed conflict was adopted in 2000 to strengthen their legal protections and prevent their exploitation during hostilities. Some key provisions of the Optional Protocol include the prohibition of children under 18 years of age from taking direct part in armed conflict and being forcibly recruited into the armed forces of their countries. All of these represent the continued evolution of the law as it reacts and responds to changes in the nature of today's conflicts.

[9] McCoubrey, Hilaire (1999). International Humanitarian Law. Aldershot, UK: Ashgate Publishing. ISBN 1-84014-012-7.

2.6.Development of Modern International Humanitarian Law

The Conventions have been developed and supplemented by two further agreements: the Additional Protocols of 1977 relating to the protection of victims of armed conflicts, and the 2005 Additional Protocol III, relating to the adoption of an additional distinctive emblem. Along with the Hague Conventions of 1899 and 1907, IHL forbids the use of weapons and tactics that cause unnecessary suffering to combatants and non-combatants alike. IHL reflects the basic principles of distinction, proportionality and precaution.

1859

The Battle of Solferino

Swiss businessman Henry Dunant, witnesses the suffering of thousands left to die on the battle field. The battle of Solferino (24 June 1859) was the decisive episode in the struggle for Italian unification. The French, allied to the Sardinians, with Emperor Napoleon III at their head, faced the Austrian troops. The first exchange of gunfire took place shortly after three in the morning; by six o'clock the battle was in full swing; bright sunshine bore down on some 300,000 men who were slaughtering each other. In the afternoon, the Austrians abandoned their positions one by one; when night fell, the battlefield was strewn with more than 6,000 dead and 40,000 wounded.

The medical services of the French and Sardinian armies were overwhelmed: the French army had fewer doctors than veterinarians, transportation was non-existent and cases of bandages had been left behind. Those wounded who were able to do so headed for the nearest village -- Castiglione -- in search of a little food and water; 9,000 reached it, pouring into houses and barns, squares and narrow streets. In the church of Castiglione, the Chiesa Maggiore , Henry Dunant, helped by local women, cared for the wounded and dying for three days and three nights.

1862

A Memory of Solferino

This is the book that prompted the creation of what is now a worldwide movement with millions of members and made the name of Henry Dunant known everywhere. The account has moved many people and still does today. "One finishes this book cursing war", wrote the Goncourt brothers in the nineteenth century. Since it was first published in 1862, the book has been translated into so many languages and reprinted so many times that it is difficult to know how many versions exist throughout the world.

1863

International Committee for the Relief of Military Wounded

The forerunner of the International Committee of the Red Cross (ICRC) established.

Lieber Code

General Orders No. 100, Instructions for the Government of Armies of the United States in the Field.

• Military code issued by President Lincoln to United States armies fighting in the American Civil War.

• Requires the humane treatment and Protection of civilians, prisoners, and enemy wounded.

Geneva International Conference

1864

Geneva Convention

• International treaty for care of wounded and sick soldiers on the battlefield adopted by governments.

• Protection granted for medical workers to provide humanitarian care.

1867

First International Conference of the Red Cross

Conference of nine governments, 16 national committees, and the ICRC meets to discuss humanitarian issues.

1899

III Hague Convention

• Regulations adopted respecting laws and customs of war on land.

• Principles of the 1864 Geneva Convention adapted to maritime warfare.

1906

Geneva Convention

1864 Geneva Convention for the care of wounded and sick soldiers on the battlefield is revised and expanded.

1907

Xth Hague Convention

• 1899 Hague Convention and expanded.

• Principles of 1906 Geneva Convention adapted to maritime warfare.

1925

Geneva Protocol

Protocol for the prohibition of the use in war of asphyxiating, poisonous or other gases and of bacteriological methods of warfare.

•Prohibits the use of biological and chemical weapons.

1929

Geneva Conventions

• 1906 Geneva Convention revised and expanded.

• New Convention adopted protecting prisoners of war.

1949

Geneva Conventions

• Convention I: The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949 (1929 Geneva Convention revised and expanded).

• Convention II: The Geneva Convention for the Amelioration of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949 (Xth Hague Convention revised and expanded).

• Convention III: The Geneva Convention Relative to the Protection of Prisoners of War of August 12, 1949 (1929 Geneva Convention revised and expanded).

1954

Cultural Property Convention

Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict

• Prohibits acts of hostility against cultural property and requires parties to refrain from using cultural property in a manner likely to expose it to destruction of damage in armed conflict.

1972

Biological Weapons Convention

• Convention on the Prohibition, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction

• Prohibits the development, production, acquisition, stockpiling, or transfer of biological weapons.

1977

Additional Protocols (to the Geneva Conventions of 1949)

• **Protocol I:** Protocol additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of

International Armed Conflicts (1949 Geneva Conventions supplemented).

• **Protocol II:** Protocol additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non- International Armed Conflicts (Common Article 3 of the four Geneva Conventions complemented).

1980

Convention on Certain Conventional Weapons

Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects

• Aims to protect military troops from inhumane injuries and prevent noncombatants from accidentally being wounded or killed by certain types of arms.

• When the Convention entered into force in 1983, the treaty applied to incendiary weapons, mines and weapons designed to injure through very small fragments. Other provisions have since been added.

1993

Convention on Chemical Weapons

Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction

• Prohibits the direct or indirect transfer of chemical weapons, their use or military preparation for use and assisting, encouraging or inducing other states to engage in activities that violate the treaty.

1995

Protocol on Blinding Laser Weapons

Protocol to the Convention on Certain Conventional Weapons

• Prohibits the use and transfer of laser weapons specifically designed to cause permanent blindness.

1997

Ottawa Treaty

Convention on the Prohibition of the Use, Stockpiling, Production and or Transfer of Anti-Personnel Mines and Their Destruction

• Prohibits the use, stockpiling, production and transfer of anti-personnel mines.

• Requires State Parties to destroy or ensure the destruction of anti-personnel landmines.

1998

Rome Statute

Rome Statute of the International Criminal Court

• Establishes a permanent international criminal tribunal in The Hague.

• Grants the court authority to hear cases of war crimes, crimes against humanity, genocide, and aggression referred to it by the U.N. Security Council or committed in the territory, or by nationals, of member nations.

2000

Optional Protocol on the involvement of children in armed conflict

Optional Protocol to the Convention on the Rights of the Child

• Members of armed forces who have not attained the age of 18 years cannot take a direct part in hostilities.

• Prohibits compulsory recruitment of persons under 18 years.

• Armed groups distinct from the armed forces of a state should not recruit or use in hostilities persons under the age of 18 years.

2008

Convention on Cluster Munitions

Convention on Cluster Munitions

• Prohibits the use, development, production, acquisition, stockpiling, or transfer of munitions that release explosive fragments.

These Conventions provide specific rules to safeguard combatants, or members of the armed forces, who are wounded, sick or shipwrecked, prisoners of war, and civilians as well as medical personnel, military chaplains, and civilian support workers of the military.

CHAPTER- THREE

Conceptual Framework

The study seeks to respond to questions commonly asked by humanitarian workers on the legal framework that serves as a basis for assistance and protection activities in situations of armed conflict. It sets out the relevant international instruments and offers examples of their provisions and application by responding to the following questions:

3.1.Meaning of International Humanitarian law:

International humanitarian law (IHL) is comprised of international rules, established by treaty or custom, which are specifically intended to solve humanitarian problems directly arising from international or non-international armed conflicts. Its principal aims are to protect persons and property that are, or may be, affected by the conflict - e.g. civilians and prisoners of war and civilian objects - and to limit the right of the parties to a conflict to use methods and means of warfare of their choice.

It is primarily the duty of states to respect and ensure respect for international humanitarian law. Other actors also play a role in IHL implementation - in particular the International Committee of the Red Cross (ICRC), which has been mandated by the international community with specific protection and assistance tasks in times of armed conflict. IHL, which is applicable only in times of armed conflict, does not deal with the legality of use of force by states or other actors, but applies whenever an armed conflict breaks out regardless of the underlying reasons. The legality of use of force in international relations is regulated by the UN Charter and by customary international law[10].

Example

War is raging between Country Y and Country X. Humanitarian agency representatives are travelling across the frontlines to provide aid and protection to the civilian population. The parties to the conflict are prohibited from attacking or deliberately harming civilians, including humanitarian personnel. Attacks must be restricted to military objectives only.

[10] Please visit: http:// www.unicef.org/.../FAQs_IHL.p...,Accessed date 15/06/2014.

3.2. What is Implementation?

The term implementation covers all measures that must be taken to ensure that the rules of international humanitarian law are fully respected.

However, it is not sufficient merely to apply these rules once fighting has begun. There are also measures that must be taken in both wartime and peacetime. These measures are necessary to ensure that:

- both civilians and the military personnel are familiar with the rules of humanitarian law;
- the structures, administrative arrangements and personnel required for compliance with the law are in place;
- violations of humanitarian law are prevented, and punished when they do occur.

Such measures are essential to ensure that the law is truly respected.

3.3. The Need for Implementation of IHL

Advocates of IHL emphasis the central importance for its implementation - and, therefore, for the protection of civilians - of the role of individual states.

The way forward lies in states adopting, ratifying and codifying in national laws the various conventions and protocols on the law of armed conflict, and assuring its implementation on the ground.

Just as national governments have the primary responsibility to assure the safety and protection of their civilians, in times of peace or violent conflict, so national courts have a clear obligation to bring to court those accused of grave breaches of international humanitarian law and national laws based upon it, according to the ICRC.

But while the application of IHL is primarily the responsibility of states and other parties to armed conflict, other states are also bound by the Geneva Conventions "to respect and ensure respect for those rules in all circumstances".

This implies "that we must prosecute those who break these laws," says Gnaedinger, because to ignore the crime is to deny justice to the victims of war crimes, crimes against humanity and other atrocities.

In June 2001, for instance, a jury of the Brussels 'Cour d'Assises' [Crown Court] in Belgium declared four Rwandans guilty or partially guilty of war crimes committed during the 1994 genocide.

But with states frequently failing to protect civilians as called for under IHL, or to bring perpetrators of war crimes and crimes against humanity to justice, there has been a growing trend of internationalizing individual responsibility for certain heinous crimes[11].

3.4.What Instruments Make up International Humanitarian law?

IHL consists of a large number of international treaties that have been developed over the past 150 years, starting with the 1864 Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field. The bulk of modern IHL is, however, composed of the four Geneva Conventions of 1949 and their two Additional Protocols of 1977:

- Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949.
- Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. Geneva, 12 August 1949.
- Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949.
- Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949.

3.5. The Basic Rules of International Humanitarian law?

- They may be summed up as follows:
- The lives, physical and moral integrity of persons not taking, or no longer taking an active part in hostilities must be respected. They must in all circumstances be protected and treated humanely without discrimination.
- It is forbidden to kill or injure an enemy who surrenders or who is hors de combat.
- The wounded and sick must be collected and cared for by the party holding them. Protection also covers medical personnel, establishments, transports and equipment. The Red Cross or Red Crescent emblems must also be respected.

[11] Please visit: http://www.irinnews.org/in-depth/70523/31/africa-asia-part-2-implementing-international-humanitarian-law, Accessed date 15/06/2014.

- The lives, dignity, personal rights and convictions of captured combatants and civilians under the authority of an adverse party must be respected. They must be protected against all acts of violence and reprisals.
- Everyone has the right to benefit from fundamental judicial guarantees. No one shall be responsible for an act he or she has not committed. No one shall be subjected to torture, corporal punishment or cruel and degrading treatment.
- The parties to a conflict do not have an unlimited choice of methods and means of warfare. It is prohibited to employ weapons or methods of warfare of a nature to cause unnecessary losses or excessive suffering.
- Parties to a conflict shall at all times distinguish between the civilian population and combatants in order to spare civilian population and property. Neither the civilian population as such, nor civilian persons shall be the object of attack. Attacks shall be directed solely at military objectives[12].

[12] Please visit:http://www.icrc.org/eng/resources/documents/misc/basic-rules-ihl-311288.htm, Accessed date 15/06/2014.

CHAPTER: FOUR

The International Committee of the Red Cross (ICRC)

The International Committee of the Red Cross (ICRC) is a humanitarian institution based in Geneva, Switzerland and a three-time Nobel Prize Laureate. States parties (signatories) to the four Geneva Conventions of 1949 and their Additional Protocols of 1977 (Protocol I, Protocol II) and 2005, have given the ICRC a mandate to protect victims of international and internal armed conflicts. Such victims include war wounded, prisoners, refugees, civilians, and other non-combatants

4.1. The International Legal Status of the ICRC

The ICRC is a Swiss society governed by the Swiss Civil Code as well as by its own Statutes. Its governing body is made up exclusively of Swiss citizen who guarantees its neutral character. Neutrality is one of the fundamental principles the ICRC operates under the other principles are: humanity, impartiality, independence, voluntary service, unity, universality[13].

In spite of its domesticity, the ICRC has, through practice, acquired an international legal personality of a functional nature.[14] As a result, it can enter into some treaties, such as headquarters agreements, have diplomatic relations with States, extend its diplomatic protection to its delegates, etc.

Moreover, since 1990, it has the status of an observer at the United Nations which allows the ICRC to contribute to the work of the Organization relating to IHL.
It should also be noted that the ICRC is the cornerstone of the International Red Cross and Red Crescent Movement, which also plays a role in the development of IHL.

[13] F. Bugnion, Le Comité international de la Croix-Rouge et la protection des victimes de la guerre, Genève, C.I.C.R., at 1113 et seq.
[14] C. Dominicé, « La personnalité juridique internationale du CICR », in Swinarski, op.cit., note 5, at 663; P. Reuter, « La personnalité juridique internationale du Comité international de la Croix-Rouge », Id., at 782; J. A. Barberis, « El Comité internacional de la Cruz Roja como sujeto del derecho de gentes », Id., at 635.

2.2. The ICRC and the Development of IHL

The history of the ICRC is closely linked to that of IHL. As mentioned before, the expression IHL is recent. However, the modern origins of its rules can be traced back to the battle of Solferino and to one man: Henry Dunant.[15] The battle of Solferino took place in 1859, in northern Italy between Austro- Hungarian armies on one side and the Franco-Sardinian Alliance on the other. The battle lasted 15 hours. The casualties were heavy: some 40,000 dead, wounded or missing. Most wounded were left to die without help for want of adequate medical resources.

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

Later on, back in Geneva, Dunant wrote a short book entitled « A Memory of Solferino »[16] in which he gives a vivid account of his experience in Solferino. In his book, Dunant also developed two seminal ideas:

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

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

[15] Bugnion, op.cit., note 18, at 6 et seq.
[16] Geneva, Imprimerie Jules-Guillaume Fick, 1862.

The first conference was held in Geneva in 1863. It led to the adoption of 10 resolutions which set up the foundations of national societies for the relief of wounded soldiers.[17] They were to become national societies of the Red Cross in 1872. The resolutions of 1863 also provided that the Committee of Geneva would temporarily serve as a link between the national societies. However, this role proved to be so important during the Franco-Prussian war of 1870 that eventually, the Committee of Geneva ended up acting as a permanent connection between national societies. It became the ICRC in 1880.

The second conference organized by the Committee of Geneva took place in 1864 under the auspices of the Swiss government. It led to the adoption of the first Geneva Convention (Convention for the Amelioration of the Condition of the Wounded in Armies in the Field).[18]

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

- army medical personnel are not combatants; if captured by the enemy, they must not be held prisoners;
- all wounded and sick soldiers must be cared for without any adverse distinction;
- civilians who tend to wounded soldiers must be respected;
- field hospitals and ambulances are neutral.

They are identified by a red cross on a white background, an in versed version of the Swiss federal flag. At the time, this emblem was adopted in recognition of the role played by Switzerland in his adoption of this first Geneva Convention.

The Convention, which was ratified by twelve States, is a landmark. For one thing, it is the first multilateral treaty concluded in time of peace to govern future armed conflicts between the contracting parties. For another thing, it marks the beginning of IHL. Indeed, the Geneva Convention of 1864 was revised in 1906, 1929 and 1949 when it became Geneva Convention I.[19]

Moreover, the provisions of the Geneva Convention of 1864 were extended to the wounded, sick and shipwrecked at sea by Hague Convention III of 1899. Subsequently, the provisions of that Hague Convention were revised in 1907 (Hague Convention X). In 1949, both Hague Conventions were replaced by Geneva Convention II.[20]

[17] Bugnion, op.cit., note 18, at 21.
[18] Id., at 27-28.
[19] Roberts/Guelff, op.cit., note 3, at 195.
[20] Id., at 221.

In the meantime, other Hague Conventions adopted in 1899 (HCII) and in 1907 (HCIV)[21] identified the groups of combatants who are entitled, when captured, to prisoner of war status and defined how they should be treated during their captivity. The relevant provisions of these Conventions were supplemented by a Geneva Convention of 1929, and complemented in 1949 by Geneva Convention III.[22]

In 1949, a fourth Geneva Convention was adopted to deal with the protection of civilians.

Furthermore, as noted before, the four Geneva Conventions of 1949 were developed and supplemented by Additional Protocol I of 1977.

Thus, the Geneva Convention of 1864 was the starting point of a movement which led to the adoption of a whole body of rules of IHL applicable to international armed conflicts.

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

Together, the four Geneva Conventions of 1949 and the three additional Protocols make up the body of what is known as Geneva Law because of the role which the Committee of Geneva (the ICRC) has played in its development since the beginning. Indeed, from the start, the ICRC has been leading efforts to develop IHL.

Thus, it started the process which ended up with the conclusion of the Geneva Conventions of 1864, 1906, 1929 and 1949.

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

Moreover, the ICRC initiated the move to supplement the Geneva Conventions of 1949 with the two additional Protocols of 1977. Those were negotiated on the basis of drafts prepared by the ICRC. Their provisions, as well as those of the Geneva Conventions, are exposed in the «

[21] Id., at 67.
[22] Id., at 243.

Commentaries » prepared and published by the ICRC.[23] Furthermore, the ICRC was instrumental in the adoption of an additional distinctive emblem by way of Additional Protocol III. It should also be mentioned that in several instances the ICRC developed, on its own initiative, practices which later on were confirmed by conventional rules: for instance, the establishment in 1914 of the International Agency for Prisoners of War. The initiative gave rise to provisions found in the 1929 Geneva Convention on Prisoners of War (art. 79) and in Geneva Convention III of 1949 (art. 123).

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

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

The rationale behind this new development lies in the fact that non International armed conflicts are not regulated in sufficient detail by treaty law.

To be sure, far fewer treaty rules are applicable to non-international armed conflicts than to international armed conflicts. Besides, in practice, many noninternational armed conflicts are only governed by article 3 common to the four Geneva Conventions. As noted before, article 3 merely provides a basic framework of minimum standards. On the other hand, international armed conflicts are regulated in more detail by treaty law. Yet, since the end of World War II, non-international armed conflicts have become proportionally more important than international armed conflicts.[24]

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

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

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

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

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

This raises the following question: on what basis did the ICRC justify its findings? Indeed, customary law, whether domestic or international, is supposed to reflect some social consensus.[25] Here, such a consensus seems to be missing.

Indeed, several States have not consented to be bound by the treaties which gave rise to the rules identified in the study.

To deal with this issue, an investigation into the method used by the ICRC to complete its study is necessary. This method is described in the study. It turns around the application of article 38 (1) b) of the Statute of the International Court of Justice (ICJ). There lies one of the problems which affect the study. Indeed, it may be argued that the ICRC study is flawed for the following reasons:[26]

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

In such a context resorting to article 38 (1) b) seems inappropriate. An investigation into the foundations of customary law seems necessary. Such an investigation goes beyond the terms of article 38 (1) b). The ICRC study ignores this question. As a result, it also fails to tell us what opinio juris consists of. Is it consent based or consensus based?[27] How do we determine the opinio juris of States? This issue is particularly relevant here because, as noted before, most of

[25] J. Patrick Kelly, « The Twilight of Customary International Law », (2000) 40 Virginia Journal of International Law 449, at 453, 461-465.

[26] C. Emanuelli, « L'étude du CICR sur le droit humanitaire coutumier: la coutume en question », (2006) 110 Revue Générale de Droit International Public 435.

[27] Kelly, loc.cit., note 46, at 458, 508 et seq.

the rules identified in the study stem from treaties which have not been ratified by all States. Moreover, as it relies heavily on article 38 (1) b) of the Statute of the ICJ, the approach adopted by the ICRC study creates other problems:

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

- What does State practice consist of? What are its components? Do they include judicial decisions, resolutions adopted by international organizations?
- Do all the components of State practice have the same weight? The issue is particularly important when State practice is not uniform, as it is the case with respect to IHL.
- How widespread must State practice be to give rise to a custom? To what extent is the concept of « specially affected State»[28] relevant in this respect?

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

Furthermore, the study sets aside the practice of armed opposition groups because it does not constitute State practice as such. On the other hand, the study finds the practice of the ICRC relevant because it has international legal personality. Indeed, this is true. However, the ICRC is not a State. It has a more limited legal personality than States. Therefore, its practice should not have the same weight as that of States. Yet, the study puts the practice of the ICRC on an equal footing with the practice of States.

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

4.3.The ICRC and the Implementation of IHL

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

[28] North Sea Continental Shelf, (FRG v. Denmark) (FRG v. Netherlands), 1969 ICJ Rep. 3, para. 74.

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

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

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

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

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

For instance, it can provide the civilian population with food, water, medical
assistance, medicine, etc.

Moreover, the right of initiative enjoyed by the ICRC was extended to international armed conflicts when, in the Nicaragua Case, [29] the ICJ decided that art. 3 applies to all categories of armed conflicts. Furthermore, under the Statutes of the ICRC, and according to international practice, the right of initiative also extends to situations of internal violence. This being said, it must be emphasized that its right of initiative merely allows the ICRC to offer its services to the
warring parties. To follow up on its offer and perform activities in favour of war victims, the ICRC needs the approval of the warring parties.

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

[29] Military and Paramilitary Activities in and against Nicaragua, (Nicaragua v. United States of America), Merits, 1986 ICJ Rep. 14, para. 218.

CHAPTER: FIVE

Mandates of States to Implement IHL

5.1. Individual Obligation of States

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

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

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

(c) steps taken to enforce the law, such as the investigation of violations and the punishment of perpetrators. These means of repression are an integral part of any sound legal system and serve as a valuable deterrent. It is clear that these three types or measures are linked and complementary to each other, and form an integral part of the whole process of implementation.

Under common Article 1 of the 1949 Geneva Conventions, the States Parties have an obligation to respect and ensure respect of the Conventions in all circumstances, whereas under Article 80 of Additional Protocol I[30] to the 1949 Geneva Conventions, the States Parties must, without delay, take all necessary measures to execute their obligations under the Conventions and the Protocol. Therefore, implementation is a legal obligation for States Parties.

Under IHL, notably under the 1949 Geneva Conventions (I-IV), their Additional Protocols of 1977 (I-II) , the 1954 Hague Convention on Cultural Property and its Protocols of 1954 and 1999, a range of measure must be taken[31]. The main ones are:

[30] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 U.N.T.S. 3 (Additional Protocol I).

[31] Dieter Fleck, 'Implementing International Humanitarian Law: Problem and Priorities' in N. Sanajaoba (ed), A Manual of International Humanitarian Laws (2004), 350-352.

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

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

5.1.1. Means of Prevention

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

5.1.1A. Translation

The authentic versions of the Geneva Conventions are in French and English. The depositary, that is Swiss Federal Council, is responsible for making arrangements for their official translation in Russian and Spanish. The authentic versions of the Protocols as well as of other IHL treaties are in Arabic, Chinese, English, French, Russian and Spanish. Therefore, States

Parties whose national languages are other than the above ones must have the texts translated so that they can be applied and disseminated. Under the four Geneva Conventions and Additional Protocol I (API), the States Parties have not only the obligation to translate the instruments but also to translate implementing laws and regulations and to communicate the translation to one other. This is a sensible preventive measure to avoid differences of interpretation that might have unfortunate consequences in times of armed conflict.

5.1.1B. Dissemination and Training

There is an essentially identical article in each of the four Geneva Conventions[32] providing that the States Parties have an obligation to: undertake, in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries, and, in particular, to include the study thereof in their program of military and, if possible, civil instructions, so that principles thereof may become known to the entire population, in particular to the armed fighting forces, medical personnel and the chaplains. Paragraph 1 of Article 83 of API takes up the same idea and goes further for it requires that 'these instruments (Conventions and API)' should be known by the armed forces as well as civilians.

As for non-international armed conflict, common article 3 of the Geneva Conventions and APII are the major sources of conventional applicable law. It is clear that common article 3 should be included in the dissemination and instruction programs required by the Conventions. Article 19 APII also requires that 'this Protocol shall be disseminated as widely as possible'. Article 25 of the 1954 Hague Convention for Protecting Cultural Property and Article 30 of its 1999 Protocol provide for similar obligations.

5.1.2. Means of Control

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

5.1.2A. Supervision of Military Commanders

During on-going armed conflicts, the armed forces play a key role in implementing IHL since a large part of the law aims at regulating behaviour in the battlefield. Thus, the first and foremost control measure defined by related IHL treaties is the duties of military commanders with regard

[32] Geneva Conventions I-IV, Articles 47, 48, 127 and 144 respectively.

to the supervision of their subordinates. Protocol I, Article 87, paragraph 1 specifies the duties of commanders as follows:

The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and to report to competent authorities breaches of the Conventions and of this Protocol. If the commanders fail to prevent or repress breaches that they have knowledge or should have had knowledge of, they will be subject to penal or disciplinary responsibility.

5.1.3. Special Agreements and Unilateral Declarations

The rules on internal conflicts as laid down in Common Article 3 and Protocol II can be supplemented by those that govern international armed conflicts. In terms of Common Article 3(2), parties to a conflict must endeavor to put all or part of the other rules of the Conventions into effect by means of special agreements. In order to interpret the rudimentary rules pertaining to non-international conflicts and make them easier to understand and apply, it is necessary to proceed by analogy with the more detailed (and more demanding) rules applicable to international conflicts. This is an appropriate course to take, as the humanitarian and military challenges of both types of situation are often similar and there can be no real justification for differentiating between them. Problems arising over the legal classification of a conflict can be overcome pragmatically by means of an agreement, since this will have no impact on the legal status of the contracting parties. An agreement can be entered into on all or some of the provisions relating to international armed conflict. Such agreements mostly concern particular provisions (e.g. setting up of safety zones[33], simultaneous release of wounded prisoners, etc.). There have also been broader references to humanitarian law treaties or parts of treaties, e.g. in the case of the conflict in the former Yugoslavia. These special agreements are often the result of an ICRC initiative, and are often prepared by the ICRC and concluded under its auspices.

Special agreements between the parties to a non-international armed conflict (either between a State and an armed group or between armed groups) allow for an explicit commitment to comply with a broader range of rules of international humanitarian law. An agreement may be

[33] Yves Sandoz, 'The establishment of Safety Zones for Persons Displaced within their Country of Origin', N. Al-Nauimi and R. Meese (eds), International Legal Issues Arising under the Decade of International Law, 1995, pp. 899–927.

constitutive if it goes beyond the treaty or customary provisions already applicable in the specific context (thereby creating new legal obligations), or it may be declaratory if it is simply a restatement of the law that is already binding on the parties independently of the agreement. As pointed out by the International Criminal Tribunal for the former Yugoslavia, the former category implicitly develops the customary law applicable to internal armed conflicts.

States are often unwilling to enter into such agreements with armed groups, as they may be concerned about appearing to grant legitimacy to an armed group party to a conflict. In practice, special agreements are more frequently attempted and successfully concluded when the conflict is both seemingly intractable and more 'equal' in terms of the fighting between the State and armed groups (i.e. that the armed group is more 'State-like' in terms of territorial control, effective hierarchical chain-of-command, etc.). Armed groups party to non-international armed conflicts may also make a unilateral declaration (or 'declaration of intention'), in which they state their commitment to comply with international humanitarian law or specific rules thereof.[34] Some armed groups take the initiative to make such declarations through a public statement or press release. At other times the ICRC (or another humanitarian actor or organization) initiates, negotiates and/or receives the declarations.

There is a long history of general or partial declarations of intent. The primary function of a unilateral declaration is to provide armed groups (or their proxies) with an opportunity to express their consent to be bound by the rules of humanitarian law, given that they cannot ratify or formally become party to humanitarian law treaties. Express commitment through a unilateral Declaration provides the hierarchy with an opportunity to take ownership of ensuring respect for the law by their troops or fighters. In addition, it can lead to better accountability and compliance by the armed group, through providing a clear basis for follow-up, as well as dissemination to its members, especially when the declaration explicitly mentions the armed group's responsibility to disseminate international humanitarian law and to punish breaches. Similar functions can be fulfilled by the inclusion of humanitarian rules in armed groups' codes of conduct.

[34] Denise Plattner, 'La porte´e juridique des de´clarations de respect du droit international humanitaire qui e´manent de mouvements en lutte dans un conflit arme´', Revue belge de droit international, 1984– 1985/1, pp. 298–320.

The most common argument against the promotion of unilateral declarations is that they are often made in an attempt to gain political legitimacy and there might be little chance of implementation of the commitments. However, practice suggests that even if the primary motivation appears to be political, one can nonetheless capitalize on the express commitment made by an armed group, using it strategically as an operational tool to promote and improve compliance with the law. Declarations provide a point of entry, or essential 'first step', to establishing contact and beginning a dialogue. The negotiations can help to identify a responsible interlocutor with whom to begin a strategic dialogue and work towards building understanding and improving the political will, capacity, and practice of compliance of the party.

5.2. Collective Obligation of States

The main purpose of this study is to identify, classify and briefly examine certain legal aspects of action that has been taken by States, in various contexts, in order to ensure respect for international law in general, and thereby provide a list of measures that States could consider adopting, as appropriate, in order to fulfill to their obligation under common Article 1.

5.2.1. Means of Control

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

5.2.1A. Protecting Powers

A Protecting Power is a 'state instructed by another state to safeguard its interests and those of its nationals in relation to a third state'[35]. The regime of protecting powers is established for the four Conventions and the Conventions must be 'applied with the cooperation and under the scrutiny of the protecting powers'. However, the appointment of delegates of the protecting powers 'shall be subject to the approval of the Power with which they are to carry out their duties'. Article 5 of API strengthens the Protecting Power system. In case that the parties to the conflict have not designated a Protecting Power, a procedure for its designation is laid down in paragraph 3 of this Article and the ICRC is conferred a role in this regard. Paragraph 6 provides that 'the maintenance of diplomatic relations between the parties or the entrusting of the protection of a party's interests and those of its nationals to a third state' shall not be an obstacle to the designation of a Protecting Power. Paragraph 5 states that the designation and acceptance of

[35] Jean Pictet (ed), Commentary to the Geneva Conventions of 12 August 1949, (1952) Vol. I, 86.

Protecting Power shall not affect the legal status of the Parties to the conflict or of any territory, including occupied territory.

A Protecting Power is entitled to undertake any intervention or initiative, which may enable it to check the application of any provision of the Convention, or help to improve its application[36].According to Article 8 of Geneva Conventions I-II, the activities of the Protecting Powers may be restricted as an exceptional and temporary measure when this is rendered necessary by imperative military necessity. This restriction is omitted in the Third and Fourth Conventions, because the First and Second Conventions mainly apply to the battlefield or its immediate surroundings where the belligerent Power has interest in taking strict measure in order to keep military operations secret. The Protecting Powers system has not been, until now, very effective. The main reasons are: only a few international armed conflicts have taken place since 1949, the majority of conflicts have been non international in nature, the divergent opinions as to the nature of the conflict and the difficulty of finding neutral States acceptable to both parties, and able and willing to act in this capacity.

5.2.1B. Substitute for the Protecting Powers

In case that the Parties face difficulties in designating Protecting Powers, they can choose a substitute. Under common articles 10-10-10 and 11 of the four Geneva Conventions, the States Parties may at any time entrust the duties of the Protecting Power to an organization, provided that it offers all guarantees of impartiality and efficacy (paragraph 1). This allows the States Parties to resort to appointing a substitute directly without having to exhaust the possibilities of finding a Protecting Power. Under Paragraph 2, if protected persons do not benefit or cease to benefit from the activities of the Protecting Power or substitute, the detaining power must request a neutral state or an organization to undertake the functions of the Protecting Powers. Paragraph 2 must be applied when all other possibilities of appointing either a Protecting Power or a special organization have been exhausted. In this last case, the choice of the detaining Power does not need to be agreed by the adverse Party. Last but not the least, if none of the above alternative has been adopted, the detaining Power shall request or shall accept the offer of services of an impartial humanitarian organization to assume the humanitarian functions of a Protecting Power.

[36] Ibid.

Some modifications are made in regard to the substitute for Protecting Powers under Article 5, paragraph 4 of the Protocol I. If no Protecting Power is designated after the good offices of the ICRC or an other humanitarian organization have been provided, the parties must accept without delay an offer of the ICRC or any other organization to act as a substitute where there is no possibility that the parties can agree on a substitute. However, the obligation to accept the above offer is not without restrictions. Firstly, the parties shall be consulted before the offer is made. Secondly, the substitute's functioning is subject to the consent of the parties. The quite complicated procedure to appoint a substitute for Protecting Powers has never been formally used. In practice, many of their functions have been carried out by the ICRC.

5.2.1C. International Fact-Finding Commission

The Geneva Conventions have provided for an enquiry mechanism for alleged violations, whose procedure shall be decided by the interested Parties. Once the violation has been established, the Parties to the conflict shall put an end to it and repress it with the least delay[37]. But this regime has never been used because of the lack of consent of the Parties involved. The enquiry procedure was improved by the establishment of the International Humanitarian Fact-Finding Commission under Article 90 of API[38]. The Commission is composed of fifteen members of high moral standing and acknowledged impartiality, elected for five years by the Parties who have accepted its competence. The Commission is competent to enquire into any facts alleged to be grave breaches or serious violations of the Conventions and API among States Parties that have accepted such competence. The Commission shall submit to the Parties a report on the findings of enquiry with appropriate recommendations. Without the consent of the Parties, the report shall not be made public. In other situations, the Commission may act if the parties to the particular conflict consent to its acting. In that respect it has made it clear that it is willing to act in relation to non-international armed conflicts as well as international ones[39].

The Commission was officially constituted in 1991 and the seat of the Commission is in Berne, Switzerland. As of January 2012, there are 72 States Parties to API that have accepted its

[37] Geneva Conventions, above note 2, Articles 52, 53, 132 and 149 respectively.
[38] According to Article 90 of API, the Commission shall be called 'International Fact-Finding Commission'. When it is established in 1991, the Commission named itself as 'International Humanitarian Fact-Finding Commission'.
[39] Please visit : http://www.ihffc.org/index.asp?page=aboutus_general , Accessed date 06/07/2014.

competence. Until now, the Commission and its activities are mainly within the field of humanitarian diplomacy with the UN and other international or non-international organizations[40].

5.2.2. Means of Repression

War Crimes

5.2.2A. Grave Breaches under the Geneva Conventions and API

The States Parties to the Geneva Conventions are under an obligation to take the necessary measures for the suppression of all acts contrary to the Conventions. To be more precise, in case of grave breaches of the Conventions, the principle of aut judicare aut dedere applies, under which the States Parties shall either refer the alleged authors of such breaches to its own courts regardless of their nationality or hand them over for trial to another State Party provided that the latter has made out a prima facie case[41]. The acts considered as grave breaches are listed in each of the Conventions[42]. The list is supplemented by Article 11 paragraph 4 and Article 85 paragraphs 3 and 4 of Protocol I. They can be categorized as follows:

• Grave breaches common to the four 1949 Geneva Conventions (Articles 50, 51, 130, 147 respectively)

- wilful killing;
- torture or inhuman treatment, including biological experiments;
- wilfully causing great suffering;
- causing serious injury to body or health;
- extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

• Grave breaches common to the third and fourth 1949 Geneva Conventions (Articles 130 and 147 respectively)

- compelling a prisoner of war or a protected civilian to serve in the armed forces of the hostile Power;
- wilfully depriving a prisoner of war or a protected person of the rights of a fair and

[40]Please visit:http://www.ihffc.org/index.asp?page=public_reports&listfilter=off , Accessed date 06/07/2014.
[41] Geneva Conventions, ,Articles 49, 50, 129 and 146 respectively.
[42] Geneva Conventions, Articles 50, 51, 130, and 147 respectively.

regular trial prescribed in the Conventions;

• Grave breaches of the fourth 1949 Geneva Convention

(Article 147)

- unlawful deportation or transfer;
- unlawful confinement of protected person;
- taking of hostages;

• Grave breaches of the 1977 Additional Protocol I (Articles 11 and 85 respectively)

- seriously endangering, by any willful and unjustified act or omission, physical or mental health and integrity of persons who are in the power of the adverse Party or who are interned, detained or otherwise deprived of liberty as a result of an armed conflict, in particular physical mutilations, medical or scientific experiments, removal of tissue or organs for transplantation which is not indicated by the state of health of the person concerned or not consistent with generally accepted medical standards which would be applied under similar medical circumstances to persons who are nationals of the Party conducting the procedure and in no way deprived of liberty;
- when committed willfully and if they cause death or serious injury to body and health;
- making the civilian population or individual civilians the object of attack;
- launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage civilian objects;
- making non-defended localities and demilitarized zones the object of attack;
- making a person the object of attack in the knowledge that he is hors de combat;
- the perfidious use of the distinctive emblem of the Red Cross and Red Crescent or other protective signs;
- when committed willfully and in violation of the Conventions and the Protocol;
- the transfer by the occupying power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;
- unjustifiable delay in the repatriation of prisoners of war or civilians;
- practices of apartheid and other inhuman and degrading practices involving outrages upon person dignity, based on racial discrimination;

- attacking clearly recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of people and to which special protection has been given, causing as a result extensive destruction thereof when such objects are not located in the immediate proximity of military objectives or used by the adverse party in support of its military effort;

- depriving a person protected by the Conventions or by Protocol I of the rights of a fair and regular trial. Under paragraph 1 of Article 86, a grave breach may consist of an omission. It is the responsibility of the States Parties to integrate these provisions in their national criminal legislation to ensure that domestic law enables the repression of all these offences. Article 28 of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict requires States Parties to prosecute and impose penal or disciplinary sanctions upon whoever commits or orders to be committed a breach of the Convention. It is further completed by Article 15 of the 1999 Protocol to the 1954 Hague Convention for Protecting Cultural Property, which defines the breaches that States Parties must criminalize. Under Article 17 of the Protocol, the principle aut judicare aut dedere is applicable in regard of the most serious violations of the Convention and Protocols. Under the Geneva Conventions and its APII, serious violations of Article 3 or of Protocol II are not classified as grave breaches. However, the States Parties do have an obligation to put an end to any breaches of IHL. What is more, serious violations of Article 3 common to Geneva Conventions and its Protocol II are regarded as violations that entail criminal responsibility under customary law[43].

5.2.2B. War Crimes under International Criminal Court Statute (Rome Statute)[44]

The International Criminal Court has jurisdiction over war crimes committed in international armed conflicts as well as non-international armed conflicts. Under the Statute, 'war crimes' means (a) grave breaches of the Geneva Conventions of 12 August 1949; (b) other serious violations of the laws and customs applicable in international armed conflict; (c) serious violations of Article 3 common to the four Geneva Conventions; (d) other serious violations of the laws and customs applicable in non-international armed conflict[45]. The grave breaches referred to in Article 8, paragraph 2 (a) of the Rome Statute, are the grave breaches as defined in

[43] In Prosecutor v. Dusko Tadic (Jurisdiction), 2 October 1995, Case No. IT-94-1-AR72, [86-93].

[44] Antonio Cassese et al (eds), The Rome Statute of the International Criminal Court: A Commentary Volume I, (2002), 395-416.

[45] Rome Statute of the International Criminal Court, adopted on 17 July 1998, UN Doc.A/CONF.183/9 (entered into force 1 July 2002), (Rome Statute), Article 8.

the four Geneva Conventions. However, the elements of these crimes are not specified in the Geneva Conventions and they are left to the States Parties' national legislation. In order to assist the ICC in the interpretation and application of the crimes under its jurisdiction, the Elements of Crimes have been adopted by the Assembly of States Parties. This document can also be used as areference for national legislation on war crimes, which will contribute to a uniform application of the Conventions. Article 8 paragraph 2 (b) covers 'other serious violations of laws and customs applicable in international armed conflict, within the established framework of international law', which is considered as a compilation of customary international law crimes. Even though it does not refer to any specific treaties, its substance is based on API, the 1907 Hague Regulations, the 1925 Geneva Gas Protocol, the Convention on the Safety of the United Nations and Associated Personnel and treaties related to the use of weapons in armed conflicts[46]. As for war crimes in non-international armed conflicts, Article 8, Paragraph 2 (c) provides that serious violations of Article 3 common to the Geneva Conventions, which includes murder, mutilation, cruel treatment, torture, outrages upon personal dignity, taking hostage and sentencing or execution without due process, are subject to the jurisdiction of the Court. Therefore, the criminalization of violations of Article 3 has been confirmed and the Elements of Crimes on Article 8 (2) (c) can help States Parties to apply common Article 3 at the national level.Under Article 8 (2) (e), twelve war crimes (i-xii) are listed for 'serious violations of the laws and customs applicable in armed conflicts not of an international character'. They are essentially identical to those listed in the same Article (2) (b). Some activities under these provisions are also prohibited by APII[47]. Thus, in terms of war crimes, especially war crimes committed in non-international armed conflicts, the Rome Statute not only supplements the Geneva Conventions and their Protocols but also takes stock of the development of IHL with regard to individual criminal responsibility. The Elements of Crimes, as well as the future jurisprudence of the ICC, will clarify the concept of war crimes further, which will definitely contribute to the rule of law in time of armed conflicts.

[46] The Brussels Declaration of 1874, Geneva Gas Protocol of 1925 and the United Nations Convention on Conventional Weapons and its Protocols.

[47] Additional Protocol II, activities prohibited under Articles 4, 5, 9 11, 12, 13, 16 and 17 are reflected in the related crimes listed under Article 2 (e).

5.2.2C. Responsibility of Superiors and Commanders

As noted above, the commander is under the obligation not only to instruct his subordinates in IHL but also to prevent, suppress or to report to competent authorities breaches of IHL[48]. If he fails to do so, the commander may be subject to penal or disciplinary responsibility. It shall be noted that this duty of prevention and control is applicable to both military and civilian commanders, since Article 86 refers to 'any commander'. It may also be noted that the responsibility of prevention and control in this regard applies to all breaches, and not only the grave breaches. As their competence for the punishment of violations is generally limited to disciplinary or preventive actions, they have a duty to report to the competent authorities in accordance with national legislation where penal sanctions would be required. The duty of commanders is reflected in Article 28 of the Rome Statute. The Rome Statute, however, makes a distinction between military commanders and civilian superiors in terms of attribution of liability. As for a military commander, the condition for his liability is that he knew, or should have known that his subordinates are going to commit or have committed crimes, which is applied to both military commander and civilian superiors under Protocol I.

5.2.2D. Mutual Assistance in Criminal Matters

Mutual assistance in criminal proceedings related to grave breaches is provided in Article 88 of the API. However, this article serves more as an encouragement of cooperation among States Parties and it neither specifies the procedures nor the scope of assistance and extradition. It only requires that the States Parties provide 'the greatest measures of assistance' or cooperate on extradition 'when circumstances permit'. The modalities of mutual legal assistance and cooperation on extradition are more developed in the 1999 Protocol to 1954 Hague Convention. Under Article 18 of the Protocol, the serious violations of (a) to (c) shall be regarded as extraditable offences between the Parties and the Protocol may be taken as the legal basis for extradition for Parties, which make extradition conditional on existence of a treaty. Under Article 19 of the Protocol, the Parties shall afford one another the greatest measure of mutual legal assistance. Under Article 20, serious violations defined by the Protocol are not to be regarded as political offences or grounds for refusal of extradition or mutual legal assistance.

[48] Additional Protocol I, Article 87.

5.3. Measures that States Should take to Implement IHL

The present study deals with one specific aspect of the whole issue of finding ways and means of improving respect for international humanitarian law, namely, implementation of the obligation, as contained in Article I common to the Geneva Conventions of 1949 and to their Additional Protocol I of 1977, to ensure respect for this law. It is based upon the premise that the interpretation of common Article 1, whereby the obligation to ensure respect for international humanitarian law implies that every High Contracting Party ought to take action with regard to any other High Contracting Party which does not respect this law, is uncontested. The study therefore does not discuss this issue, but rather identifies and briefly comments upon the various types of measures available to States in order to fulfill their obligation to ensure respect. The examples given for the various measures are merely illustrative and ought by no means to be considered as a judgment by the author regarding their justification in the light of the circumstances under which they were adopted.

5.3.1. General Remarks

The main purpose of this study is to identify, classify and briefly examine certain legal aspects of action that has been taken by States, in various contexts, in order to ensure respect for international law in general, and thereby provide a list of measures that States could consider adopting, as appropriate, in order to fulfill to their obligation under common Article 1.

Accordingly, it does not dwell on a detailed analysis of the veritable legal nature of this obligation to ensure respect[49] . It should nevertheless be pointed out that in view of the almost universal ratification of the Geneva Conventions and the growing number of States party to their Additional Protocols, as well as the transcendence of humanitarian principles and hence erga omnes character of the obligation to respect them[50] , all States have the right to ensure that any other State respects customary humanitarian law, and all States party have the obligation to do so, under the strict terms of the Conventions and Protocol I, vis-a-vis any State party to these instruments.

[49] Kalshoven & Yves Sandoz (eds.), Implementation of International Humanitarian Law, Martinus Nijhoff, Dordrecht, 1989, pp. 263-296.

[50] Military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, ICJ Reports , 1986, paragraph 22.

Common Article I imposes an obligation on the High Contracting Parties to act, but does not id entify any specific course of action. There is no indication of how they should set about ensuring respect for international humanitarian law. It is primarily to fill that gap that the lawful means available have to be identified. A further reason for determining such means is the fact that, in order to make progress in the implementation of international humanitarian law, especially in the context of Article 1, it is necessary to go beyond the framework provided by international humanitarian law itself and to consider other options such as, for example, " humanitarian diplomacy " , which mainly involves States and the United Nations. Of course humanitarian action, in this particular context, then becomes implicated in politics, but the responsibility, both individual and collective, laid down in Article I does rest with States and thus necessarily involves politics.

It is worth pointing out at this juncture that the present study focuses upon measures to enable States to " ensure respect " for international humanitarian law by other States, in the sense of restoring respect for international humanitarian law by States which are violating it[51] . However, it ought to be borne in mind that States may also fulfill their commitment to ensure respect by way of measures designed to assist other States to respect the law, particularly in peacetime (and possibly during armed conflicts of long duration). Such measures include, for instance: providing legal advisers to assist in developing or adapting national legislation and penal codes for effective implementation of international humanitarian law and to train legal advisers within the armed forces; teaching international humanitarian law as part of any kind of military co-operation; holding regional and international seminars with the participation of States in order to debate the specific problems associated with respect for international humanitarian law; and helping to set up and update regional data banks (or a single international data bank) on the various aspects related to national measures and their implementation, which would be accessible to any State needing information.

The legally permissible measures available to third parties, i.e. States which are not party to an international or non-international armed conflict, to ensure respect for international law in the

[51] L. Condorelli and L. Boisson de Chazoumes observe, this aspect (vis-a-vis other States) of the obligation to ensure respect relates to what is required of States in the face of violations of humanitarian law attributable to another State.

event of a breach of the law may be classified into four broad categories. The first of these is measures to exert diplomatic pressure . The second category is coercive measures that States may take themselves. The third comprises steps which States may take in co-operation with international organizations . The fourth category differs from the other three, in that it does not relate to measures aimed at restoring respect for international law by a State violating that law, but rather to that aspect of the obligation to ensure respect which confers on States the duty, moral in the very least, to contribute to assistance action undertaken in conformity with international humanitarian law. The measures in this case could be considered as contributions to humanitarian efforts .

Finally, insofar as international humanitarian law is concerned, it should be noted that, under the terms of Article 1 (" in all circumstances " , i.e. whenever international humanitarian law is applicable) and pursuant to Article 3 common to the Geneva Conventions, the obligation to ensure respect applies to both international and non-international conflicts.

5.3.2. Measures to Exert Diplomatic Pressure

Generally speaking, such measures do not pose any problems from the legal point of view. They may take more or less the following five forms:

a) Vigorous and continuous protests lodged by as many Parties as possible with the ambassadors representing the State in question in their respective countries and, conversely, by the representatives of those Parties accredited to the government of the aforementioned State.

b) Public denunciation, by one or more Parties and/or by a particularly influential regional organization, of the violation of international humanitarian law.

One example would be the statement made by the United States to the Security Council on 20 December 1990 concerning the deportation of Palestinian civilians from the occupied territories: " We believe that such deportations are a violation of the Fourth Geneva Convention... We strongly urge the Government of Israel to immediately and permanently cease deportations, and to comply fully with the Fourth Geneva Convention in all of the territories it has occupied since June 5, 1967 " (S/PV.2970, Part 11, 2 January 1991, pp. 52-53). Similarly, resolution 5038/ES,

of the Council of the League of Arab States, at its extraordinary session (Cairo, 30-31 August 1990), condemned, in its paragraph 1. " ..... the violation by Iraqi authorities of the provisions of international humanitarian law relative to the treatment of civilians in the Kuwaiti territory under Iraqi occupation " .

c) Diplomatic pressure on the author of the violation, through intermediaries.

For instance, the steps that were taken by Switzerland to persuade the USSR, China and France to exert pressure upon the Arab States in the Zerka affair of 1970 when three civilian planes were hijacked by Palestinian movements.

d) Refer all to the International Fact-Finding Commission (Article 90, Additional Protocol I) by a State with regard to another State, both of which have accepted the competence of the Commission.

In fact, the very assertion, by a State which has declared its acceptance of the competence of the International Fact-Finding Commission, of its desire to approach that body, even if the State against which an enquiry is requested has not itself declared its acceptance, might prove a means of inducing the latter to accept the Commission's competence, at least on an ad hoc basis, and or to take steps to suppress continuing violations of international humanitarian law. A refusal could be publicly regretted by States.

5.3.3. Coercive Measures that States may take themselves

The list that follows includes only measures available to States which are legally permissible in international law, and does not therefore take into consideration armed intervention undertaken unilaterally, i.e. without any reference to a treaty or custom, by a State or a group of States, as such intervention is not permitted under public international law and as no armed intervention can be based on international humanitarian law[52].

It would be useful at this stage to touch very briefly upon the legality, in international law, of the adoption of coercive (albeit unarmed) measures by States vis-a-vis other States. Practice shows

[52] international Law Commission: Third report on State responsibility , Chapter X.A. " The Prohibition of the use of Force " (Doc. A/CN.4/440/Add.1, 14 June1991).

that States employ a wide range of such measures in order to exert pressure on other States in retaliation for an act committed by the State against which they are directed. Such measures may be classified in two broad cate gories, namely restoration and unarmed reprisals.

Restoration refers to acts which are unfriendly, and even damaging, but intrinsically lawful, carried out in response to a prior act which might also be unfriendly but lawful, or internationally unlawful.

Reprisals are acts which are by their very nature unlawful but are exceptionally justified in the light of a prior unlawful act committed by the State at which they are directed. Thus the International Law Commission, which uses the term " countermeasures " to designate such acts, considers the initial illegality to constitute a circumstance which precludes the illegality of the response[53].

The lawfulness of the measures themselves[54], notably with regard to their content and implementation, is determined not only in terms of the limits dictated by the demands of civilization and humanity, but also in terms of their aim. The aim is neither to punish (we are concerned with countermeasures, not sanctions) nor to seek compensation, but solely to oblige the State which is responsible for violating the law to stop doing so, by inflicting damage upon it, and to deter it from repeating the same offence in the future. Thus, in order to remain lawful, the coercive measures must :

- be directed against the State responsible for the unlawful act itself;

- be preceded by a warning to the State in question, asking it to stop the said act or acts;

- be proportional; all measures out of proportion with the act which prompted them would be excessive, and hence unlawful;

[53] Yearbook of the International Law Commission , 1979, vol.II, p. 115.
[54] International Law Commission: Third report on State responsibility , Chapter l.B. " Retortion " (Doe. A/CN.4/440, 10 June 1991), and Fourth report on State responsibility , Chapter V. " Prohibited countermeasures " (Doc. A/CN.4/444/Add.1, 25 May 1992).

- respect fundamental humanitarian principles, as provided for in public international law an International humanitarian law, whereby such measures are forbidden against certain categories of persons[55];

- be temporary and therefore cease as soon as the violation of the law by the State in question ceases.

5.3.4. Possible Measures of Restoration

a) Expulsion of diplomats.

For instance, during the hostages affair at the United States embassy in Tehran (1979-1980), the United States expelled some of the Iranian diplomatic personnel posted in Washington.

b) Severance of diplomatic relations.

Soon after the aforementioned decision, the United States broke off diplomatic relations with Iran.

c) Halting ongoing diplomatic negotiations or refusing to ratify agreements already signed.

The American Senate refused to examine the SALT II agreements, already signed by the USSR and the United States, following the invasion of Afghanistan (1979).

d) Non-renewal of trade privileges or agreements.

The United States decided, in 1981, not to renew its bilateral maritime agreement with the USSR and to introduce restrictions on the admission of its vessels to American ports as from January 1982, following the repression in Poland.

[55] International Law Commission, Fourth report on State responsibility, Chapter V.C. " Countermeasures and respect for human rights " (A/CN.4/444/Add.1, 25 May 1992).

5.3.5. Possible Unarmed Reprisals

These include measures to exert economic pressure. The aim is to hamper normal economic and financial relations, either by failing to respect agreements in force or by way of decisions running counter to the rules governing those relations.

a) Restrictions and/or ban on arms trade, military technology and scientific co-operation.

The European Communities took a series of decisions on 4 August 1990 with regard to Iraq which comprised, among others, an embargo on the sale of arms and other military equipment, and the suspension of all technical and scientific co-operation.

b) Restrictions on exports and/or imports to and from the State committing the violations; total ban on commercial relations.

Following the invasion of Afghanistan (1979) the United States set up a grain embargo against the USSR; the European Communities imposed a total ban on imports from Argentina during the Falklands/ Malvinas conflict (1982); the United States suspended commercial relations with Uganda in 1978 in reaction to violations of human rights.

c) Ban on investments.

A ban on all new investment in South Africa was imposed by France in 1985, following a hardening of the repression associated with apartheid.

d) Freezing of capital

The European Communities decided to freeze Iraqi assets on the territory of the Member States (4 August 1990).

e) Suspension of air transport (or other) agreements.

On 26 December 1981, the United States suspended the 1972 US-Polish Air Transport Agreement following the Polish government's repression of the Solidarity movement.

5.3.6. Measures in Co-operation with International Organizations

Regional Organizations

In addition to decisions to take measures to exert economic pressure, such as those identified above, certain regional agencies, particularly those active in the human rights field, may help in another way to promote respect for both human rights and international humanitarian law[56]. This has been the case of the European and Inter-American Human Rights Commissions.

In 1967, a complaint was lodged with the European Commission by the governments of Denmark, Norway, Sweden and the Netherlands against the government of Greece, accusing the latter of violations of the European Convention on Human Rights. As the case was not submitted to the Court, it was the Committee of Ministers which took a decision.

The two aforementioned Commissions have also undertaken fact-finding missions in the field and conducted private interviews with prisoners: the European Commission in Turkey (1986), and the Inter-American Commission during the civil war in the Dominican Republic (1965).

5.3.7. United Nations

As mentioned above, Article 1, by imposing an obligation on States, inevitably brings in politics. And one of the most important means at States'disposal, at the international level, is precisely the United Nations. Moreover, any effective attempt by a State to ensure respect for international humanitarian law, especially in the event of massive violations, would be difficult, if not impossible, without the political support of the community of States, and the United Nations is one of the most widely used vehicles for such support in the contemporary world. This is implicitly recognized in Article 89 of Additional Protocol I, which states: " In situations of serious violations of the Conventions or of this Protocol, the High Contracting Parties undertake to act, jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter " .

[56] Dietrich Schindler, " The International Committee of the Red Cross and Human Rights " , International Review of the Red Cross , January-February 1979. No. 208, pp. 3-14.

5.3.8. Measures Decided by the Security Council

a) Unarmed countermeasures.

Article 41 of the United Nations Charter lists a series of measures that the Security Council may decide to take if it determines the existence of one of the three situations referred to in Article 39, that is, any threat to the peace, breach of the peace, or act of aggression. An analysis of actual practice, however, reveals a certain reticence and an empirical approach on the part of the Security Council, which has not always found it necessary either to refer expressly to the articles on which it bases itself or to declare formally in the preamble or operative part of a resolution whether the situation in question corresponds to one of the three designated in Article 39[57]. Consequently, when the Security Council places itself in the context of Chapter VII of the Charter, it is implicitly acknowledging that it is in the presence of one of the three situations designated in Article 39. Moreover, the Security Council enjoys great latitude in its competence to classify situations, and " ... it is very difficult to find a common guideline in its various resolutions that allows a coherent classification of the various situations enumerated in Article 39 " . For example, in resolution 688 of 5 April 1991, the Security Council deemed that the repression of the Iraqi civilian population in Kurdish-populated areas threatened international peace and security in the region (paragraph 1).

The unarmed measures cited in Article 41 are complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

Thus, from 1965 onwards, the Security Council adopted several decisions requesting member States to suspend all their trade relations with Southern Rhodesia.

b) Use of armed force.

It is generally accepted that all military countermeasures by a State are unlawful, and that the sole body competent to impose a sanction involving armed force today is the United Nations and

[57] La Charte des Nations Unies: Commentaire article par article , Jean-Pierre Cot and Alain Pellet (eds.), Paris/Brussels, Economica/Bruylant, 1985, p. 651 ff.

in principle, within that organization, the Security Council . States may thus act on the Security Council's authorization to use force in order to ensure respect by a given State for its international obligations.

A typical example would be the action taken during the Gulf crisis as from 17 January 1991, in pursuance of Security Council resolution 678 of 29 November 1990.

However, as observed earlier, the Security Council enjoys great latitude in deciding which situations constitute threats to international peace and security. For instance, resolution 794 of 3 December 1992 stated that the human tragedy caused by the conflict in Somalia, and further exacerbated by the obstacles being created to the distribution of humanitarian assistance, constituted a threat to international peace and security (preambular paragraph 3). Consequently, in order to stem violations of international humanitarian law, in particular the deliberate impeding of humanitarian assistance (paragraph 5), the Council decided that action be taken under Chapter VII of the Charter, which would include the use of all necessary means to establish a secure environment for humanitarian relief operations in Somalia (paragraphs 7,8 and 10). This decision was to a large extent repeated in resolution 814 of 26 March 1993, using more or less similar terminology (heading of section B and paragraph 14, in particular). In this context, it would be useful to make the following observations. Although the aforementioned action, with allowance for the use of force, was decided upon by the Security Council with a view to ensuring respect for international humanitarian law in an armed conflict situation (provision of humanitarian assistance in this case), it was taken, firstly, on the basis of the United Nations Charter and not of international humanitarian law, and secondly, with the primary goal (and the only one permitted under Chapter VII of the Charter) of restoring (or maintaining, as the need may be) international peace and security. The lawfulness of the use of force in such circumstances is strictly limited to this goal, and cannot be derived from any rule or provision of international humanitarian law , not even Article 89 of Additional Protocol I, which calls upon States party to act, in co-operation with the United Nations and in conformity with its Charter, in situations of serious violations of that law. For international humanitarian law starts off from the premise that any armed conflict results in human suffering, and proceeds to elaborate a body of rules meant precisely to alleviate this very suffering .

5.3.9. Measures Decided by the General Assembly

a) Implicitly authorized countermeasures.

The General Assembly may more or less explicitly acknowledge that a State has not respected its obligations under the Charter, but without making any recommendation to member States to adopt countermeasures against it.

For instance, resolution A/RES/ES.6/2 adopted by the General Assembly at its sixth emergency special session, on 14 January 1980, strongly deplores the armed intervention in Afghanistan (paragraph 2), but makes no mention of the USSR. In such cases, there is nothing to prevent States from taking lawful countermeasures.

b) Explicitly recommended countermeasures.

The General Assembly may recommend that members (and sometimes even other States) adopt sanctions against a State whose conduct is qualified as contrary to the rules of the Charter.

A perfect example would be resolution A/RES/ES/9/1 of 5 February 1982, adopted at its ninth emergency special session on the situation in the occupied Arab territories. The resolution lists a whole series of measures to be applied against Israel: suspension of economic, financial and technological assistance and co-operation, severing of diplomatic, trade and cultural relations [paragraph 12 (c) and in order to isolate it totally in all fields (paragraph 13).

c) Besides resolutions requesting States to apply countermeasures, the Security Council, the General Assembly and the Secretary-General may be mobilized by member States to issue statements on the applicability of international humanitarian law and denounce violations which have been committed.

The Security Council expressed concern with regard to attacks against the civilian populations in the Gulf in resolution 540 of 31 October 1983 on the situation between Iran and Iraq, which specifically condemned all " violations of international humanitarian law, in particular of provisions of the Geneva Conventions in all their aspects " and called for " the immediate cessation of all military operations against civilian targets, including city and residential areas " (paragraph 2); resolution 681 of 20

December 1990, in its paragraph 4, underlined the applicability of the Fourth Geneva Convention to the territories occupied by Israel; General Assembly resolution A/45/172 of 18 December 1990, concerning the situation of human rights and fundamental freedoms in El Salvador, referred to international humanitarian law; the Secretary-General made several appeals calling upon Iran and Iraq to release and repatriate all sick and wounded prisoners immediately (paragraph 40 of report S/20862 to the Security Council, 22 September 1989).

d) States may also use the public (denunciation) and confidential (in principle, discreet negotiations) procedures provided for in the Commission on Human Rights in order to bring pressure to bear on States to respect applicable international law. They may encourage references to international humanitarian law in the Commission and in the Sub-Commission.

During their 1990 sessions, for example, both the Commission and the Sub-Commission mentioned int ernational humanitarian law in the cases of Afghanistan, southern Africa, El Salvador and Israel.

e) States may encourage recourse by the United Nations to the services of special rapporteurs mandated to conduct enquiries into specific violations of international humanitarian law, taking the procedure already employed in the field of human rights as a model.

In 1984, a report was prepared by experts designated by the Secretary-General to investigate the Islamic Republic of Iran's allegations concerning the use of chemical weapons (S/16433, 26 March 1984); the Commission on Human Rights decided, in paragraph 4 of resolution 1993/2 A (19 February 1993) to appoint a Special Rapporteur to investigate Israel's violations of the principles and bases of inter- national law, international humanitarian law and specifically the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, in the Palestinian territory occupied by Israel since 1967.

f) States may also, through the Security Council and/or the General Assembly (within the limits set out in Article 96, paragraph 1, of the Charter), request the International Court of Justice to give an advisory opinion on whether an established fact - namely an alleged violation of international humanitarian law by a State or States party involved in a conflict - actually constitutes a breach of an international commitment undertaken by that State or those States.

5.3.10. Contribution to Humanitarian Efforts

Such actions may take the form either of support for organizations involved in humanitarian assistance or of practical action to facilitate such assistance.

a) Support.

States could provide financial and/or material support to permanent organizations such as the ICRC and UNHCR, and to ad hoc structures, such as that entrusted to Saddrudin Aga Khan for " Operation Salaam " in Afghanistan.

b) Practical action.

States, particularly those in the region concerned, could make available their logistic (airports, ports, telecommunication networks) and medical (hospitals, personnel) infrastructures.

In the Falklands/Malvinas armed conflict (1982) for example, Uruguay, a neutral country sharing a border with Argentina, allowed wounded British military personnel to be repatriated by air from Montevideo, medical supplies for British hospital ships to transit through its territory (under the supervision of ICRC delegates) and Argentine prisoners to be repatriated and handed over to the representatives of their own authorities, also in Montevideo[58] .

5.3.11. Protecting Powers

Finally, there exists the system of Protecting Powers which, as provided for in international humanitarian law, is essentially aimed at securing more effective respect for this law. Thus, a Protecting Power is a State mandated by one of the parties to a conflict to safeguard its interests in humanitarian matters vis-à-vis the other party or parties to the same conflict. Although it i s true that the appointment of Protecting Powers rests with the parties to a conflict, third States could nevertheless encourage belligerents to have recourse to this system either by approaching them unilaterally with proposals to that effect or by activating interest within the United Nations.

[58] Sylvie-Stoyanka Junod, Protection of the Victims of armed Conflict, Falkland-Malvinas Islands (1982): International Humanitarian Law and Humanitarian Action ICRC, Geneva, 1984, 45 pp.

In a world characterized by increasing concern about violations of international humanitarian law, which in some cases are occurring on an unacceptably massive scale, the need for States to fulfill their obligation to ensure respect for this law has become both urgent and acute. As this study bears out, there do exist a wide range of measures available to them, measures that they have, on various occasions and in different contexts, adopted in the past. It is therefore up to them, as stated in the Final Declaration of the International Conference for the Protection of War Victims (30 August - September 1993), to make every effort to " ensure the effectiveness of international humanitarian law and take resolute action, in accordance with that law, against States bearing responsibility for violations of international humanitarian law with a view to terminating such violations[59] ".

[59] Part II, paragraph 11 of the Final Declaration in IRRC , No. 296, September-October 1993, p. 380.

CHAPTER: SIX

6.1. Findings

The legal basis for the Commissions exercise is Article 90 of the First Protocol Additional to the Geneva Convention. When the Protocol was adopted in 1977, a number of safeguards for State sovereignty were built into the text, in particular that only a State having agreed by declaration to recognize the competence of the Commission can unilaterally request an inquiry, and only against another State having made the same declaration. So far, 74 States have made that declaration: about half of the parties to Protocol I and more than a third of the parties to the Geneva Convention. But in addition, the Commission may offer its good offices in order to re-establish a situation of respect for international humanitarian law. This gives the Commission an active role in the settlement of disputes concerning the respect of international humanitarian law. The Commission is well positioned in the international community. It enjoys the support of the United Nations, expressed in a number of General Assembly resolutions, of the International Red Cross/Red Crescent movement as well as of intergovernmental and non-governmental organizations. The International Fact-Finding Commission mentioned by Article 90 of Additional Protocol I is the only new measure introduced by the Diplomatic Conference of 1974-1977 intended to strengthen implementation of international humanitarian law. (The word 'humanitarian' was added to the title by the Commission itself, in order to better express the Commission's limited jurisdiction.) The Commission was established and its rules of procedure were adopted, but never since 1977 has any party to an armed conflict or any other State ever asked the Commission to exercise its activity in a concrete situation. The author (a member of the Commission) examines the reasons of this apparent failure and suggests new ways of understanding Article 90. He has no doubts about the Commission's usefulness, and he calls upon States and the other members of the international community – in particular the United Nations – to accept the Commission as a tool for strengthening respect for international humanitarian law[60].

[60] http://www.icrc.org/eng/resources/documents/misc/57jr5s.htm , Accessed on 15/08/2014.

6.2. Remarks

1. To renew its support for the efforts of member states to rid their territories of antipersonnel land mines and destroy their stockpiles, and convert into the world's first antipersonnel-land-mine-free zone.
2. To urge those states parties that requested and were granted extensions under Article 5 of the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (Ottawa Convention) to make every effort necessary to comply with their Article 5 obligations within the periods established.
3. To stress the responsibility of all member states to continue their vital cooperation in mine action as a national, sub regional, and regional priority, as well as a means to promote confidence and security, and to develop statements of remaining goals, contribute resources, and collaborate with the Program for Comprehensive Action against Antipersonnel Mines (AICMA).
4. To urge the international donor community to continue its humanitarian support for victim rehabilitation and in ongoing demining activities.
5. To urge the member states, permanent observers, international organizations, and the international community in general to continue their technical and financial support for continuation of the combined Ecuador-Peru humanitarian demining program on their common border, which constitutes a successful example of international cooperation and an effective confidence- and security-building measure.
6. To firmly condemn, in accordance with the principles and norms of international humanitarian law, the use, stockpiling, production, and transfer of antipersonnel mines by non-state actors, acts which put at grave risk the population of the affected countries; and to strongly call upon non-state actors to observe the international norm established by the Ottawa Convention to facilitate progress toward a mine-free world.
7. To condemn also the use of antipersonnel land mines and improvised explosive devices by non-state actors, especially illegal armed groups.
8. To celebrate the support demonstrated by 33 member states of the Hemisphere through their ratification of the Ottawa Convention; and to encourage the governments to continue working in the area of mine action in accordance with said Convention and with their mine action plans in order to meet mine-clearance deadlines pursuant to Article 5 of the Convention.

9. To urge states which have not yet done so to ratify or consider acceding to the Ottawa Convention as soon as possible to ensure its full and effective implementation.

10. To call upon all states parties and non-states parties that share the objectives of the Ottawa Convention to take all necessary action, at the national, sub regional, regional, and international levels, to fulfill the commitments established in the Cartagena Declaration: A Shared Commitment for a Mine-Free World and to implement the Cartagena Action Plan 2010-2014: Ending the Suffering Caused by Anti-Personnel Mines.

11. To urge member states which have not yet done so to become parties as soon as possible to Amended Protocol II to the 1980 United Nations Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be excessively injurious or to have indiscriminate effects and to the other four protocols thereto; and to request member states to inform the Secretary General when they have done so.

12. To instruct the General Secretariat to continue providing member states, within the resources allocated in the program budget of the Organization and other resources, with the support necessary to continue the mine-clearing programs, prevention education programs for the civilian population, and programs for the rehabilitation of victims and their families and for the socio economic reclamation of demined areas.

13. States be encouraged to create national committees, with the possible support of National Societies, to advise and assist governments in implementing and disseminating IHL;

14. States be encouraged to facilitate co-operation between national committees and the ICRC in their efforts to implement and disseminate IHL; and

15. The ICRC organize a meeting of experts from States having already established national committees and from other interested States, and report on the meeting's conclusions to States interested in the establishment of such committees.

6.3. Conclusion

There is no specific provision regarding nuclear weapons. Not only that but also now-a-days developed countries try to make state-of-the-art arms which are obviously dangerous/threat to the international community. These heavy arms are usually used to let know the world how strong position belongs they are. ICRC actually cannot play a vital role regarding this sector because of the stress of developed countries.

Recent Israel-Philistine burning issue is a great example. Israel committed war crimes which is more than clear to international community. But the United Nations and ICRC dramatically play a silent role and that is not a good sign at all.

Now question has risen shall the international community always keep silent regarding this issue. If they do so, the United Nations and ICRC Movement will fall under a unfavorable situation.

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