Current Value of Customary International Humanitarian Law

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General Introduction

§ I *Prefatory Remarks:*

International agreements and custom constitute the essence and fabric of international law.[1]

From time immemorial custom or unwritten law constitutes one of the leading sources of legal rules in all legal systems, be they national or international.

Customary IHL is today, as never before, part of the common heritage of mankind (patrimoine commun de l'humanité tout entière), i.e., it is the core of the *corpus juris gentium* applicable in this field.

This is due to its universality[2]: All legal systems, traditions and civilizations have enormously contributed to the development of IHL. The later is a common cement to the former. Rules of customary IHL have developed over ages and in all corners of the globe.

Customary IHL, as it stands today, is the final result or the best by-product of a very long evolution. In fact, it dates back to as early the existence of humanity. From time immemorial groups and states have felt a great necessity for paying attention to elements of humanity during armed conflicts.

Prima facie, contrary to treaties which are *jus inter partes*, rules of customary IHL are, in principle, binding *erga omnes*.[3]

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(1) See: Ahmed Abou-El-Wafa: Public International Law, Dar Al-Nahda Al-Arabia, Cairo, 2002-1422, P. 201 et ss,
M. Mendelson: The formation of Customary International Law, RCADI, vol. 272, 1998, P. 229 et Seqq, F. Kirgis: Custom on a sliding scale, AJIL, vol. 81, 1987, P. 144 et ss, R. Kolb: Selected problems in the theory of Customary International Law, Netherlands ILR, 2003, p. 119-150.

(2) A universal custom indicates a trend or shows a general consensus on the part of subjects of international law. Accordingly, it is acquiesced in by the international community as a whole (Ahmed Abou-El-Wafa: Public International Law, op. cit., p.205-206).

(3) See as well: GREENWOOD.C. "Customary Law Status of the 1977 Additional Protocols" in DELISSEN, J.M. & TANJA G.J. (eds.), =

§ *II- Importance of Custom:*

This importance may be outlined as follows:

A- Historically, custom preceded international treaties. It has exercised, because of the absence of an international legislature, an influential impact on the formation of International Law and, accordingly, the settlement of international disputes. Moreover, custom plays an essential role in the renewal improvement, and development of rules of International Law.

B- Customary rules of International Law operate vis-à-vis subjects of International Law, even in case of absence of a written or conventional instrument.(4)

= *manitarian Law of Armed Conflicts, Challenges Ahead, Essays in HONOUR of FRITS KALSHOVEN*, Dordrecht, Martinus, Nijhoff Publishers, 1991, pp. 119-126, MERON, T., *Human Rights and Humanitarian Norms as Customary Law*, Oxford, Clarendon Press, 1989, 263 pp., BELLO, E., *African Customary Humanitarian Law*, Geneva, Oyez Publishing, ICRC, 1980, 158 pp., BRUDERLEIN, C., "Customs in International Humanitarian Law", in *IRRC*. No. 285, pp. 579-595, CASSESE, A., "The Spanish Civil War and the Development of Customary Law Concerning Internal Armed Conflicts" in CASSESE. A. (ed.), *Current Problems of International Law*, Milan, Giuffrè, 1975, pp. 287-318, MERON. T., "The Continuing Role of Custom in the Formation of International Humanitarian Law" in *AJIL*, vol. 90 (2), 1996, pp. 238-249, CASSESE, A., "The Geneva Protocols of 1977 on the Humanitarian Law of Armed Conflict and Customary International Law' in *UCLA Pacific Basin Law Journal*, vol. 3 (1 & 2), 1984, pp. 55-118, GREENWOOD, C., "Customary Law Status of the 1977 Geneva Protocols" in *Humanitarian Law of Armed Conflicts-Challenges Ahead, Essays in HONOUR of Frits Kalshoven*, Dordrecht, Martinus Nijhoff Publishers, 1991, pp. 93-114, MERON, T., "The Geneva Conventions as Customary Law" in *AJIL*, vol. 81 (2), 1987, pp. 348-370, ABI-SAAB, G., "The 1977 Additional Protocols and General International Law, Preliminary Reflexions" in *Humanitarian Law of Armed Conflict-Challenges Ahead-Essays in HONOUR of Frits Kalshoven*, Dordrecht, Martinus Nijhoff Publishers, 1991, pp. 115-120, KASTO. J., "Jus Cogens and Humanitarian Law" in *International Law Series*, vol. 2 London, Kasto J., 1994, 95 pp.

(4) The ICJ stated that:
"Principles such as those of the non-use of force, non intervention, respect for the independence and territorial integrity of states, and the freedom of navigation, continue to be binding as part of customary international law, despite the operation of provisions of conventional law in which they have been incorporated" ICJ. Rep., 1984, p. 424, para. 73.

C- A state, making a reservation to an international instrument, may nevertheless be bound by that instrument if a customary rule emerges(5). Hence, in case of an incompatibility between a reservation and an emerging customary international rule, the later shall, in principle, prevail.

§ *III- Elements of Custom:*

1- In General:

Custom is a practice or a behavior followed by subjects of International Law, because they feel legally bound to behave or act in such a way. This is properly highlighted by art. 38 of the statute of the ICJ, which refers to international custom:

"as evidence of a general practice accepted as law".

Accordingly, custom has two elements, namely:

A- The material element:

The material element of custom raises two points:

a- Essentials of the material element:

The material element of custom involves the existence of a consistent, uniform(6) and undeviating behaviour which had been consolidated by a constant and sufficiently long practice(7). Prima

(5) Thus, five states made reservations to the Fourth Hague convention of 1907. Yet, the principles and rules incorporated therein have, with the passage of time, become part of customary International Law, binding upon all states, including those reserving states.

(6) As for uniformity:
"too much importance need not be attached to a few uncertainties or contradictions, real or apparent" ICJ, Rep., 1951, p. 138.

(7) The ICJ said that:
"the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of state, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them" ICJ, Rep. 1985, p. 29-30, para. 27.
The court added:
"to deduce the existence of customary rules ..., the conduct of states should be, in general, consistent with such rules, and that if there are violations of those rules, they should generally have been treated as breaches of the rules, not as indications of the recognition of a new rule" ICJ, Rep. 1986, p. 98, para. 186.

facie, an isolated precedent may be a starting point which, if not challenged, may ripen into a constant and general rule.

This is not the case if the facts disclose uncertainty, fluctuation, contradiction and discrepancy in the application of the usage or behaviour under consideration.

Accordingly:

- If the practice is scattered and far from uniform, it will be impossible to say that an international custom exists in regard to it.[8]

- Contradiction or inconsistent conduct in the practice of states would prevent the emergence of an international customary rule.

- Where practice is embryonic, partial, not clearly universal and evidently controversial, custom cannot be materialized.

It is worth recalling that treaty practice, international jurisprudence, international

arbitration, practice of states (be it unilateral, bilateral or multilateral), legal writings, decisions of international organizations and conferences ... etc. are the principal indicators or constitutive factors of international custom.[9]

(8) See as well:
ILA, Final Report of the Committee on the Formation of Customary (General) International Law, Statement of Principles Applicable to the Formation of General Customary International Law, Report of the Sixty-Ninth Conference, London, 2000.

(9) The ICJ affirmed that:
"State practice, including that of states whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked, and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved" ICJ, Rep., 1969, p. 43-45.
Judge Lachs affirmed that:
"For to become binding, a rule or principle of international law need not pass the test of universal acceptance. The evidence should be sought in the behavior of a great number of States, possible the majority of States, in any case the great majority of interested States" Ibid, p. 230.
See as well:
"International custom before the French Council of state", RGDIP, 1997, p. 1053-1059

As regards the time factor, the formation of a customary rule has in the past been frequently characterized by the passage of a long period of time. This is not the case today, due to the acceleration of international relations and the development of science and technology. In certain domains, customary rules are formed without having to undergo a long period of gestation.

Thus, the speedy tempo of contemporary international life, promoted by the highly developed communication and transportation have accelerated the generation and formation of customary International Law. In fact, what required a hundred years in former days may need now less than five years(10). For example, the rules relating to air space and outer space, those relating to the continental shelf, to the condemnation of international terrorism and to the protection of environment have emerged from fairly quick maturing of practice.

b- The method of prsistant objector:

A state may contract out (or opt out) of a custom in the process of formation (i.e. in *statu nascendi*), provided that objection is manifest, clear and constant.

Accordingly, in certain cases, if a state opposes a rule of customary International Law *ab initio*, i.e., from the time of the rule's inception, the rule will be *inapplicable* to it(11). Clearly,

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(10) The ICJ affirmed that:

"Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law ... an indispensable requirement would be that within the period in question, short though it might be, state practice ... should have been extensive and virtually uniform in the sense of the provision invoked, and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved" ICJ, Rep., 1969, p. 43.

(11) The ICJ said that if the particular rule in question was one of International Law, it would be:

"inapplicable as against Norway insomuch as she has always opposed any attempt to apply it to the Norwegian coast" ICJ, Rep., 1951, p. 131, Ibid, 1969, p. 26-27, 131, 235, 238.

The restatement of the foreign relations of the United States (1987) said as well: =

persistant objection is not valid as regards rules of *jus cogens*, including those of IHL which bind a state even notwithstanding its objection. It is as well in conflict with the totality and integrity of International Law.

B- The psychological or subjective element (the *opinio juris sive necessitates*):

This is an indispensable condition for the existence of customary international rules. In fact, states must feel or have the conviction and belief that, by acting under the rule in question, they must abide themselves by it or are bound by a legal obligation (*opinio juris sive necessitates)* and not merely for reasons of political expediency, friendship, *comitas gentium* (courtesy)[12], onvenience, usage, tradition, opportunism ... etc[13]. Hence, this

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= .. in practice a dissenting State which indicates its dissent from a practice while the law is still in the process of development is not bound by that rule of law even after it matures".

See also: P.M. Dupuy" A propos de l'opposabilité de la coutume générale – enquête brève sur l'objecteur persistant, Mélanges M. Virally, Pedone, Paris, 1991, p. 257-279, Charney: The persistant objector rule and the development of customary international law, BYIL, 1985, p. 1-24, Conforti: Cours général de droit international public, RCADI, 1988, t. 212, p. 74-77, G. Abi-Saab: Cours général de droit international public, RCADI, t. 207, 1987, the Hague, 1996.

Moreover, it had been maintained:

"a state may contract out of a custom in the process of formation' (ICJ, Rep., 1974, p. 286-289, sep. op. Gross).

(12) See as well: J. Paul: Comity in international law, Harvard ILJ, vol. 32, p. 1-79.

In fact, rules of International Law must be distinguished from those of International comity (*comitas gentium*), e.g. saluting the flags of foreign ships at sea, which are practiced solely as a matter of courtesy, not as legally binding.

(13) The ICJ stated that:

"frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g.. in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty" ICJ, Rep., 1969, p. 45.

Moreover the court said that states:

"must have behaved so that their conduct is evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it" ICJ, Rep., 1986, p. 108-109 =

element distinguishes rules which are considered as legally obligatory from those which are not.

2- Customary IHL:

Evidently, the two preceding elements, i.e. the material and psychological ones, are necessary for the existence of customary rules of IHL.

Nevertheless, one should refer, here, to the following remarks:

A) It is difficult, owing to military exigencies, to establish the constituents of the material element of customary IHL out of the behavior of the troops in the battlefield.

In this context, in the Tadic Case, the Yugoslavia Tribunal States:

"Before pointing to some principles and rules of customary law that have emerged in the international community for the purpose of regulating civil strife, a word of caution on the law-making process in the law of armed conflict is necessary. When attempting to ascertain State practice with a view to establishing the existence of a customary rule or a general principle, it is difficult, if not impossible, to pinpoint the actual behavior of the troops in the field for the purpose of establishing whether they in fact comply with, or disregard, certain standards of behavior. This examination is rendered extremely difficult by the fact that not only is access to the theatre of military operations normally refused to independent observers (often even to the ICRC) but information on the actual conduct of hostilities is withheld by the parties to the conflict; what is worse, often recourse is had to misinformation with a view to misleading the enemy as well as public opinion and foreign Governments. In appraising the formation of customary rules or general principles one should therefore be aware that, on account of the inherent nature of this subject-matter, reliance must primarily

= Finally, the court pointed out that the *opinio juris* requirement might be deduced from:
"the attitude of states towards certain general assembly resolutions" ICJ, Rep., 1986, p. 14, 99-100.

be placed on such elements as official pronouncements of States, military manuals and judicial decisions".(14)

Accordingly, one can affirm that:

"Both physical and verbal acts of States constitute practice that contributes to the creation of customary international law. Physical acts include, for example, battlefield behavior, the use of certain weapons and the treatment provided to different categories of persons. Verbal acts include military manuals, national legislation, national case-law, instructions to armed and security forces, military communiqués during war, diplomatic protests, opinions of official legal advisers, comments by governments on draft treaties, executive decisions and regulations, pleadings before international tribunals, statements in international organizations and at international conferences and government positions taken with respect to resolutions of international organizations".(15)

B) In many cases there are violations, by the troops in the field, acting in or not in conformity with instructions of their governments or superiors, of established customary IHL. Such behavior, even if repeated, does not constitute customary rules: it is a breach of an existing rule, not a vehicule for the creation of a new one.(16)

(14) UN Tribunal for former Yugoslavia, oct. 2, 1995, par. 99.

(15) Henckaerts and Doswald-Beck: Customary international humanitarian law, Cambridge Univ. press-ICRC, 2005. vol. I, p. XXXII).

(16) In this context, it had been mentioned:
"Those who follow a traditional theory of customary law and consider it to stem from the actual behaviour of States in conformity with an alleged norm, face particular difficulties in the field of International Humanitarian Law (IHL). First, for most rules this approach would limit practice to that of belligerents, i.e., a few subjects whose practice it is difficult to qualify as "general" and even more as "accepted as law". Second, the actual practice of belligerents is difficult to identify, particularly as it often consists of omissions. There are also additional difficulties, e.g., war propaganda manipulates truth and secrecy makes it impossible to know which objectives were targeted and whether their destruction was deliberate. Finally, States are responsible for the behaviour of individual soldiers even if the latter did not act in conformity with their instructions, but this does not imply that such behaviour is also State Practice constitutive of customary law. It is therefore particularly difficult to determine which acts of soldiers count as State Practice". M. Sassoli et al.: How does law protect in war, ICRC, Geneva, 1999, p. 108.

In this regard, the ICJ says:

"It is not to be expected that in the practice of States the application of the rules in question should have been perfect, in the sense that States should have refrained, with complete consistency, from the use of force or from intervention in each other's internal affairs. The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of States conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule".(17)

C) Rules of IHL are, now, of two kinds, namely:

a- Established Customary rules: In fact, there is a great number of Customary humanitarian rules which should be observed in all circumstances, at all times and in all places(18). One can mention, inter alia, these related to:

- the protection of the wounded, the sick and the shipwrecked.

- prohibition of methods or means of warfare which cause superfluous injury or unnecessary suffering.

- prohibition of perfidy.

- prohibition of improper use of recognized emblems and emblems of nationality.

- prohibition of orders of no quarter.

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(17) ICJ, Rep., 1986, Military and paramilitary activities in and against Nicaragua, par. 186.

(18) C.F., e.g., 161 rules with commentary, in Henckaerts and Doswald-Beck: Customary international humanitarian law, vol. I: Rules, op. cit., 621 pp.

- safeguard of an enemy hors de combat.

- the principle of proportionality.

- prohibition of starvation of the civilian population.

- protection of personnel in relief actions.

b- Established practices which have not an established customary nature, e.g., those related to the reunion of families or civil defence.(19)

The aforementioned two kinds of rules of IHL have been highlighted since 1945. In fact, the US Military Tribunal at Nuremberg (US V. Wilhelm von Leeb, et al.) affirmed:

"In stating that the Hague and Geneva Conventions express accepted usages and customs of war, it must be noted that certain detailed provisions pertaining to the care and treatment of prisoners of war can hardly be so designated. Such details it is believed could be binding only by international agreement".(20)

D- Because many rules of International Humanitarian Law necessitate the adoption of an act in *non fasciendo*, the establishment of the *opinio juris* element requires a non-equivocal will to be bound by the rule under consideration, not mere opportunity, convenience or courtesy.(21)

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(19) Thus, the Swedish report on IHL says: "Sweden has also reason to follow, in all circumstances, other articles in Additional Protocol I that are important in a humanitarian perspective, even where these have little or no connection with customary law. These articles concern protection of the sick, the wounded, medical transports, civil defence (Art. 61-67), basic needs in occupied territories (Art. 69), protection of refugees and stateless persons (Art. 73), reunion of families (Art. 74), and protection of journalists (Art. 79)", C.F., text in M. Sassoli et al: How does law protect in war, op. cit., p.601.
Moreover, it had been maintained that "there is some uncertainty as regards present state of the customary law relating to blockades" (commentary on the additional protocols of 8 June 1977, ICRC, Geneva, 1987, p.654).

(20) C.F., the UN war crimes commission, law reports of trials of war criminals, 1949, vol. XII, p. 86 et seqq.

(21) Thus, an author says:
"In the area of international humanitarian law, where many rules require abstention from certain conduct, omissions pose a particular problem in =

§ *IV- IHL includes both conventional and customary rules:*

The fabric of humanitarian rules is composed of two elements, namely conventional and customary rules.

This means that rules of IHL include:

(a) written rules, i.e., those set forth by international conventions, regulations and decisions

as well as judicial judgements and national legislations.

(b) unwritten rules or customary ones. These rules lead us to explain two points, namely:

Their importance as a *sine qua non* element for IHL, and the Martens Clause.

1- Customary rules are a *sine qua non* element for IHL:

This can be explained by the fact that rules of international law are partly conventional, partly customary.(22)

It suffices to mention, here, article 2/b Protocol I (1977) which provides that the expression "rules of international law applicable in armed conflict"(23) means:

"the rules applicable in armed conflict set forth in international agreement to which the Parties to the conflict are parties and the generally recognized principles and rules of international law which are applicable to armed conflict".

= the assessment of *opinio juris* because it has to be proved that the abstention is not a coincidence but based on a legitimate expectation" (J.M. Henckaerts: Study on Customary International Humanitarian Law, IRRC, vol. 87, No. 857, 2005, p. 182).

(22) Thus, it had been maintained:
"In fact, although the principle of legality (*nullum crimen nulla poena sine lege*) is a pillar of domestic criminal law, the lex should be understood in the international context as comprising not only written law, but also unwritten law, since international law is in part customary law". (Commentary on the additional protocols of 8 June 1977, ICRC, Geneva, 1987, p. 882).

(23) The aforesaid expression is used, by the protocol, in articles 31, 37, 43-44, 57, 59 and 60. Thus, e.g., article 44 par. 2 says: "... all combatants are obliged to comply with the rules of international law applicable in armed conflict".

2- The Martens Clause (the substitute principle):

The famous clause, Martens Clause (after the Russian diplomat who has proposed it) was unanimously included in the preambles of the Hague Conventions of 1899 and 1907 concerning laws and customs of war on land. It has been set forth as well in article 1 par. 2 of Protocol no. 1 (1977), which provides:

"In cases not covered by this protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity[(24)] and from the dictates of public conscience".

Accordingly, in cases not covered by a conventional text, combatants as well as civilians remain under the protection and authority of the principles of international law derived from:

- established custom,
- the principles of humanity, and
- the dictates of public conscience.

§ *V- Scheme of research:*

The current value of customary IHL is, in my opinion, of a twofold nature, namely: *in foro externo*, i.e., on the international level (Section I), and *in foro interno*, namely, on the domestic or national level (Section II).

These two levels will be examined, *in extenso*, as follows.

(24) It is to be noted that in one of its first judgments, the ICJ referred, in 1949, to "elementary considerations of humanity" (ICJ, Reports, corfu channel case, 1949, p.22).

Section I

Current Value Of Customary IHL *in Foro Externo*

Customary IHL has a significant importanceon the international level, i.e., between parties conducting hostilities as well as their relations with civilians and other subjects of international law.

This importance may be examined on three levels, namely: *ratione personae*, *ratione materiae* and *ratione conditionis* and *modus operandi*.[25]

§ *I- The ratione personae value of customary IHL:*

Prima facie, a treaty is a *jus inter partes*, i.e., a *clausula si omnes*, whereas a humanitarian customary rule is , *per se*, a *clausula erga omnes*.

In fact, while treaties bind those states that have expressed their consent to be bound by them according to the principles *pacta sunt servanda, ex consensu advenit vinculum* and *solus consent est*

(25) There are three reasons, in the opinion of the president of the ICRC, why customary humanitarian law remains extremely important:
"First, while the Geneva Conventions enjoy universal adherence today, this is not yet the case for other major treaties, including the Additional Protocols. These treaties apply only between or within States that have ratified them. Rules of customary international humanitarian law on the other hand, sometimes referred to as "general" international law, bind all States and, where relevant, all parties to the conflict, without the need for formal adherence.
Second, international humanitarian law applicable to non-international armed conflict falls short of meeting the protection needs arising from these conflicts. As admitted by the diplomatic conferences that adopted them, Article 3 common to the Geneva Conventions and Protocol II additional to those Conventions represent only the most rudimentary set of rules. State practice goes beyond what those same States have accepted at diplomatic conferences, since most of them agree that the essence of customary rules on the conduct of hostilities applies to all armed conflicts, international and non-international.
Last, customary international law can help in the interpretation of treaty law. It is a well-established principle that a treaty must be interpreted in good faith and with due regard for all relevant rules of international law" (cf., his opinion in: Henckaerts and Doswald-Beck: Customary International Humanitarian Law, op. cit., vol. 1, p.x).

obligat, the existence of customary rules of IHL is necessary for states or other international actors which are not parties thereto. They are not free to act as they wish, for both rules of conventional and customary IHL aim at enhancing the effectiveness of considerations of humanity, in order to improve and offer greater protection of victims of armed conflicts and to crub the cruelty of the later. For compromise and half measures are not, here, to be welcomed. Consequently, rules of IHL should be applied in all armed conflicts, be they of an international or non-international character and whatever may be the parties thereto, i.e., whether they are states, international organizations, movements of national liberation, insurgents(26) ... etc., and whether those actors are parties or not to conventional humanitarian acts.

Particularly, customary IHL is important in the following three situations, namely:

1. For states non-parties to humanitarian treaties:

A State may prefer not to become a contracting party in a treaty codifying IHL. Witness, article 96 par. 2 of Protocol I of 1977 (as well as article 2 para. 3 common to the Conventions of 1949) which reads:

"When one of the parties to the conflict is not bound by this protocol, the parties to the protocol shall remain bound by it in their mutual relations. They shall furthermore be bound by this protocol in relation to each of the parties which are not bound by it, if the latter accepts and applies the provisions thereof".

In fact, *par excellence*, a treaty applies only to and binds its parties , principle of relativity of international treaties or principle *res inter alios acta nec nocent nec prosunt.* Accordingly, non-parties are not, *stricto sensu*, bound by a treaty in force between other states. If we take, for example, the four Geneva Conventions of 1949, we shall find that nearly all states of the world (192 States)

(26) In fact, "through customary law, some rules have also been recognized as norms whose violation gives rise to individual criminal responsibility".
T. Meron: The continuing role of custom in the formation of international humanitarian law, op. cit., p.244.

have ratified them (practically the whole community of nations). However, as for the two additional protocols of 1977 (Protocol I related to international armed conflicts and Protocol II concerning non-international armed conflicts), there are a number of States that have not ratified them yet: Protocol I has been ratified by 162 States, whereas Protocol II has been ratified by only 157 States.

However, the fact that a State is not a party to a humanitarian treaty, does not relieve it from respecting rules of customary nature. In this connexion, the ICJ affirmed that rules of humanitarian law applicable in armed conflicts and embodied in the Hague and Geneva Conventions "are to be observed by all States whether or not they have ratified the Conventions that contain them, because they constitute intransgressible principles of international customary law".(27)

This means:

* that the customary rules of IHL are in force vis-à-vis the State concerned as those which have been assumed by a High contracting party to the conventional act.

* that the rules are equally binding upon all parties to the conflict, i.e., customary rules of IHL are rules de lege lata, not de lege ferendae, one cannot minimize their value, per contra, they must be applied in concreto in order to reduce the serious effects of war as well as its immeasurable, long-standing and irreparable consequences. This is not a judgment of value, it is a mere statement of facts.

* that as long as a non-contracting party applies and respects rules of customary IHL, a party to a treaty should abide by the latter wholly and in full(28). This

(27) ICJ, Reports, Nuclear weapons advisory opinion, 1996, par. 79.

(28) Thus, the Swedish report on IHL states:
"According to general international law and Article 96 of Additional Protocol I, the principle of reciprocity applies. Sweden shall not be required to abide by more comprehensive obligations than those applying to our adversary. From the point of view of humanitarian law that the Humanitarian Law Committee was instructed to consider, it is natural to =

solution is to be applied in all situations where an adversary has not expressed a consent to be bound by a humanitarian treaty.

* that the customary rule exists, even when it has been codified in a written text. Thus, the different rules imposed by customary international law may duplicate, reinforce or supplement those laid down in treaties(29).

= imagine that Sweden in such a situation would do all in her power to ensure that Additional Protocol I were applied by all the parties to a conflict in which we were involved. This might take the form of an official declaration, addressed to the non-ratifying parties, stating that Sweden for its part would apply Additional Protocol I in its entirety as long as the adversary did not, through lack of respect for the rules of the protocol. make this impossible. Thereby, the presumption that Additional Protocol I is capable of application could be maintained, which is important not least because of the example it would set.
If however the adversary failed in his respect for the protocol, Sweden would in turn have to reserve the possibility of waiving full application of the protocol rules. The adversary should be made aware that Sweden in such a case was not considering herself able to follow the protocol's rules of warfare, i.e., the main parts of Articles 51-58.
If during the conflict an adversary announced officially his intention of applying the rules of the Protocol and did so in practice, Sweden would be bound by the Protocol in the normal way (AP I, Art. 96:2). Since the condition is that the adversary really abides by the rules of the Protocol. Sweden would in this case have the right to reserve full application during a "trial period". The customary law parts of the Protocol must however, as already shown, be respected even in the case outlined. If the adversary were to commit only small infringements of the rules, Sweden could hardly motivate non-application: such would conflict with the spirit of the protocol. Above all, a State that has ratified the protocol should not too readily and categorically choose a line of non-application in relation to an adversary that has not ratified. The principle of reciprocity is intended to give reasonable protection against obvious military disadvantages (a "safety net"), not to be an unconditional mechanism for setting aside the provisions of the protocol" (cf. text, in M. Sassoli et al.: How does law protect in war, op. cit., p.601-2).

(29) The ICJ said that:
"even if a treaty norm and a customary norm relevant to the present dispute were to have exactly the same content, this would not be a reason for the court to take the view that the operation of the treaty process must necessarily deprive the customary norm of its separate applicability. Nor can the multilateral reservations be interpreted as meaning that, once applicable to a given dispute, it would exclude the application of any rule =

In fact, if a customary rule exists, it operates as well for the state which is a party to the codifying convention, in the same way and degree as it operates for a state which is not a party thereto.(30)

2. For states denouncing a humanitarian treaty:

A party which denounces a convention relating to IHL remains bound by rules of customary rules of IHL. Thus, the obligation for the denouncing party to respect those rules is "inescapable".

In this respect, article 63 par. 1 of the first Geneva Conventions 1949(31) provides that each contracting party is at liberty to denounce the convention. However, para. 2 of the said article adds:

"The denunciation shall have effect only in respect of the denouncing power. It shall in no way impair the obligations which the parties to the conflict shall remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of public conscience".

In its commentary, the ICRC says:

= of customary international law the content of which was the same as, or analogous to, that of the treaty-law rule" ICJ, Rep., 1986, p.94, para. 175.
The court concluded that:
"More generally, there are no grounds for holding that when customary international law is comprised of rules identical to those of treaty law, the later "supervenes" the former, so that the customary international law has no existence of its own" Ibid, p. 95, para. 17et ss.
Moreover, the ICJ said that customary international law:
"continues to exist and to apply separately from international treaty law, even where the two categories of law have an identical content" ICJ, Rep., 1986, p. 96.
The president of the court as well affirmed that links between customary international law and conventional law were so strict that:
"there is no need to separate the inseparable", Ibid p. 152.

(30) Ahmed Abou El-Wafa: Public International Law, op. cit., p. 207.

(31) Article common to all four Conventions: cf., second convention (article 62), third convention (article 143), fourth convention (article 159).

"Vague and self-evident as it undoubtedly is, such a clause is nevertheless useful, as it reaffirms the value and permanence of the lofty principles underlying the convention. These principles exist independently of the convention and are not limited to the field covered by it. The clause shows clearly ... that a power which denounced the convention would nevertheless remain bound by the principles contained in it insofar as they are the expression of inalienable and universal rules of customary international law".[32]

Accordingly, one can state that the denunciation of a treaty does not relieve the party concerned from obligations provided for in customary IHL.

3. For other international actors (e.g., international organizations):

Customary IHL is of vital importance for the determination of humanitarian rules applicable to other international actors, especially to armed forces operating under the aegis of international organizations (e.g. the UN, The League of Arab States, NATO, ... etc). In fact, those organizations are not formally parties to international treaties codifying IHL.

Thus, one can safely say that rules of international humanitarian law must be characterized by the equality of their application to parties to an armed conflict, be they states, international organizations, movements of national liberation, insurgents ... etc. Accordingly, when forces appertaining to international organizations are involved in armed hostilities, rules of international humanitarian law must apply to them[33]. Moreover,

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(32) Commentary I Geneva Conventions, ICRC, Geneva, 1995, p.413.

(33) It had been affirmed that: "principles of humanitarian law are of critical importance and must, whenever necessary, be applied in United Nations operations" (UNJY, 1992, New York, 1998, p. 430).
In 1971, the IDI adopted a resolution concerning: "conditions of application of humanitarian rules of armed conflict to hostilities to which UN forces may be engaged". Art. 8 of that resolution says that the UN: "is liable for damage which may be caused by its forces in violation of the humanitarian rules of armed conflict. In 1975, the IDI as well adopted a resolution relating to: "conditions of application of rules other than =

rules of armed conflict are applied to hostilities in which international organizations are engaged, even if these rules are not of a humanitarian nature, e.g., rules concerning neutrality, the prohibition of the threat or use of force ... etc.(34)

§ *II- The Ratione Materiae value of customary IHL:*

Customary IHL has, *ratione materiae*, a double weight, namely: as regards norms and armed conflicts.

1- As regards norms of IHL:

The customary rules have a threefold important value, *vis-à-vis* norms of IHL, namely:

= humanitarian rules of armed conflict to hostilities to which UN forces may be engaged.
See also: Question de l'adhésion eventuelle d'organisations intergouvernementales aux conventions de Genève pour la protection des victimes de guerre, NUAJ, 1972, p. 159-160, Vrailas: Safety and security of UN personnel in areas of internal armed conflict, R. Héllinique DI, 1995, p. 95-108, "Les Nations Unies et le droit international Humanitaire" ed. L. Condorelli, A. Pedone, Paris, 1996, 506 pp, D. Shraga: UN peacekeeping operations: Applicability of international humanitarian law and responsibility for operations related damage, AJIL, 2000, vol. 94, p. 93 et ss.

(34) C.f., Ahmed Abou El-Wafa: Public International law, op. cit., p. 642-643.
It is worth recalling that in 1999, the UN secretary general issued a bulletin related to the "observance by UN forces of international humanitarian law, in which he affirmed that:
- Rules of international humanitarian law are applicable to UN forces when in situations of armed conflict they are actively engaged therein as combatants.
- In the status-of-forces agreement concluded between the UN and a state in whose territory a UN force is deployed, the UN undertakes to ensure that the force shall conduct its operations with full respect for the rules of general conventions applicable to the conduct of military personnel.
- In case of violation of international humanitarian law, members of the military personnel of a UN force are subject to prosecution in their national courts.
- All the essential principles mentioned above are, *grosso modo*, applicable to UN forces (Cf, ST/SGB/1999/13, 6 August 1999).
As for Arab security forces which were established in Kuwait (1961) and Lebanon (1976), the secretary general of the LAS issued regulations concerning the observance, by these forces, of rules of international humanitarian law, especially those set forth in international conventions and "inherited Arab traditions", Cf Ahmed Abou El-Wafa: The League of Arab States. Dar Al-Nahda Al-Arabia, Cairo, 1998, p. 618-623 (in Arabic).

A- Customary rules lies at the *fons et origo* of treaties codifying IHL:

Customary IHL is a *sine qua non* element for the codification of treaties related to the protection of victims of war(35). Such treaties evidently codify, *stricto sensu*, pre-existing customary IHL.(36)

Codification(37) aims at avoiding divergence which may exist when it is sought rules of International Law(38), as well as ensuring

(35) In the law of armed conflict: "Custom has often preceded written regulations, sometimes, as with parlementaires and truces, by thousands of years" P. Verri: Dictionary of the International Law of armed conflict, ICRC, Geneva, 1992, p.38.

(36) The report of the secretary general pursuant to paragraph 2 of Security Council resolution 808 (1993), with which he introduced the Statute of the international Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the territory of the Former Yugoslavia since 1991, and which was unanimously approved by the Security Council (resolution 827 (1993)), stated: [...]
"The part of conventional international humanitarian law which has beyond doubt become part of international customary law is the law applicable in armed conflict as embodied in: the Geneva Conventions of August 12, 1949 for the protection of war victims, the Hague Convention (IV) Respecting Laws and Customs of War on Land and the Regulations annexed thereto of October 18, 1907, the Convention on the Prevention and Punishment of the Crime of Genocide of December 9, 1948, and the Charter of the International Military Tribunal of August 8, 1945".

(37) See as well:
Ago: The final stage of the codification of international law, YILC, 1968, 2, p. 171-178: Jennings: The progressive development of international law and its codification, BYIL, 1947, p. 302 ss: Liang: Le développement et la codification du droit international, RCADI, t. 73, 1948, p.411-527: Zemanek: Codification of International Law: salvation or dead letter?, etudes en l'honneur de R. Ago, Guiffrè, Milan, vol. 1, 1987, p. 581-601: "La codification du droit international", SFDI, A. Pedone, Paris, 1999, 341 pp.

(38) In this context, the preamble of the 1983 Vienna convention on succession of states in respect of property, archives and debts emphasized:
"the importance of the codification and progressive development of international law which is of interest to the international community as a whole and of special importance for the strengthening of peace and international cooperation".
"Progressive development" is defined in art. 15 Statute of the ILC as: "the preparation of draft convention on subjects which have not yet been regulated by international law or in regard to which the law has not yet =

a great measure of uniformity in this regard. Hence, it is advantageous to establish a uniform doctrine on important topics of International Law, by seeking to introduce into international relations fixed norms, easy to apply and calculated to produce practical, final and consistent results.

Codification has two aspects: codification of existing norms and progressive development of International Law. Accordingly, there are two aspects, namely:

A- An aspect "*de lege lata*", i.e., the more precise formulation and systemization of "existing" rules of International Law, which have already been generally accepted as forming part of international customary law. In this connection, codification mirrors previously established rules of customary International Law. It is only declaratory of already existing law, it does not create anything new.

B- An aspect "*de lege ferendae*", namely, the progressive development of rules of International Law. This concerns the preparation of draft conventions on which rules of International Law has not yet been sufficiently developed in the practice of states, which are *in statu nascendi*, which regulate matters that have not previously been regulated by International Law, which are still in the formative stage, or are about to become rules of International Law. In a word, the progressive development of International Law often results in the modification of established rules or the formulation of new rules, to be applied "*in futuro*". This means that codification, here, is unaided by the guidance of precedent.

From the foregoing one can say that codification concerns realism and progressive development idealism. The former relates

= been sufficiently developed in the practice of states". Whereas "codification" is defined as : "the more precise formulation and systemization of rules of international law in fields where there already has been extensive state practice, precedent and doctrine".

The ICJ said that a judgment did not:

"preclude the parties from benefiting from any subsequent developments in the pertinent rules of international law" ICJ, Rep., 1974, para. 74 (fisheries case).

to rules as they are, whereas the later relates to rules as they ought to be. However, those two aspects may, in certain cases, overlap or leave some uncertainties as to indicate where codification ends and progressive development begins.[39]

It is to be remembered that codification of customary International Humanitarian Law has been carried out:

1- through international conferences, e.g., the Hague conferences of 1899 and 1907, the diplomatic conference on the reaffirmation of international humanitarian law applicable in armed conflicts 1974-1977, which adopted the two additional protocols of 1977.

2- by international organs, e.g., the ICRC, the Institute of international law, the International law association (ILA).

Additionally, a treaty may contribute to the formation of a customary rule of International Humanitarian Law through subsequent practice, a postriori adherence and consent of subjects of international law to be bound by the treaty[40]i.e., the later serves as a catalyst for the creation of the customary norm.[41]

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(39) This had been highlighted by the ILC in its 1956 report. It stated that: "In preparing its rules on the law of the sea, the commission has become convinced that, in this domain at any rate, the distinction established in the statute between those two activities can hardly be maintained" Report of the ILC, VIII sess., para. 26.

(40) In this context, an author says: "For the contention that a treaty becomes binding upon all nations when a great majority of the world has expressly accepted it would suggest that a certain point is reached at which the will of non-parties to the treaty is overborne by the expression of a standard or an obligation to which the majority of States subscribe. The untenability of that view is quite clear in the case of treaties establishing the basic law of an international organization or laying down detailed rules concerning such matters as copyrights or customs duties or international commercial arbitration [...]. Treaties of an essentially humanitarian character might be thought to be distinguishable by reason of their laying down restraints on conduct that would otherwise be anarchical. In so far as they are directed to the protection of human rights, rather than to the interests of states, they have a wider claim to application than treaties concerned, for example, with the purely political and economic interests of States. The passage of humanitarian treaties into customary international law might further be justified on the ground that each new wave of such treaties builds upon the past conventions, so that each detailed rule of the Geneva Conventions =

In this regard, the Nuremberg Tribunal said that the 1907 Hague regulations "undoubtedly represented an advance over existing international law at the time of their adoption ... but by 1939 these rules laid down in the convention were recognized by civilized nations, and were regarded as being declaratory of the laws and customs of war".[42]

B- It is well known that questions not regulated by provisions of international treaties codifying IHL, continue to be governed by the rules of customary International Law.[43]

Thus, art. 1 para. 2 of the 1977 Additional Protocol(1) to the Geneva Conventions of 1949, states that:

"In cases not covered by this protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principle of humanity and from the dictates of public conscience".

= for the Protection of War Victims is nothing more than an implementation of a more general standard already laid down in an earlier convention, such as the Regulations annexed to Convention No. IV of the Hague. These observations, however, are directed to a distinction which might be made but which is not yet reflected in State practice or in other sources of the positive law". Baxter B., "Multilateral Treaties as Evidence of Customary International Law" in the British Year book of International Law, 1965-66, pp. 285-286.

(41) C.F., Ahmed Abou El-Wafa: Recherches sur les traités conclus par les organisations internationales *inter se* ou avec des Etats, thèse, Lyon, 1981, p. 332.

(42) International Military tribunal at Nuremberg, case of the Major war criminals, Judgement, 1 October 1946, off. doc., vol. I, p. 253 et ss.
Accordingly, reservations formulated by five states to the fourth Hague Convention of 1907 become obsolete, owing to the formation of customary rules. The later are binding on all states, including the reserving ones (*vide supra*).

(43) This applies as well to other branches of international law.Thus, the preamble of the Vienna Convention on diplomatic relations provides that:
"the rules of customary international law should continue to govern questions not expressly regulated by the provisions of the present convention" See Ahmed Abou El-Wafa: The law of diplomatic and consular relations, Dar Al-Nahda Al-Arabia, Cairo, 1996, p. 46 (in Arabic).

In fact, despite the enormous increase of legal acts that codify rules of IHL, it is impossible for any codification to be wholly complete at any given moment: lacunae and gaps are usually conceivable in any written or conventional act[44]. Accordingly, customary rules may play, here, a non-negligible role. This role has four aspects, namely:

* it impedes the application of the assumption that "all what is not expressly prohibited by a written text is therefore permitted". This, inevitably, has a leading impact on the protection of victims of war.
* it means that an international tribunal judging criminals of war may not abstain from sentencing them, by rendering a *non liquet* judgment.
* it means that breaches of IHL should not go unpunished.
* it confirms the essentially humanitarian nature of rules of International Humanitarian Law.

C- The existence of customary IHL constitutes a flexible and dynamic factor that usually permits taking into consideration elements of humanity regardless of subsequent developments in technology, weapons, means of combat, methods and means of warfare, ...etc.[45]

2- Concerning armed conflicts:

It is well known that armed conflicts are of two kinds, namely: international and non-international armed conflicts.

Prima facie, rules of customary IHL are applicable to both kinds of armed conflicts.[46]

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(44) C.F., Ahmed Abou El-Wafa: La cour internationale de justice et le problème des lacunes de droit international public, R. Egyptienne de droit international, 1995, p. 1 et ss.

(45) In fact, even though "the parties to the conflict may only be bound within the limits of "what is practicable" in a particular case, they will never be exempted from fundamental humanitarian requirements" (Commentary on the Additional Protocols of 8 June 1977, op. cit., p. 395).

(46) Vide infra, more details, for non-international armed conflicts.

§ *III- The ratione conditions and modus operandi value of customary IHL:*

This may be illustrated with regard to states and international tribunals.

1- *Vis-à-vis* states:

Being the primary addressees of rules of customary IHL, states should co-operate with each other, through individual or collective approaches as well as acts *in fasciendo* and in *non fasciendo*, in order to ensure full respect for and observance of rules of IHL in all circumstances, at all times and in all places.

Moreover, the importance of customary rules of IHL lies in the fact that they are destined to assume universal dimensions, transcending, in this regard, borders, cultures and civilizations. To put it differently, they have *erga omnes*, not *si omnes*, value and weight. For faithfully implementing those rules by all actors and in every corner of the world will inevitably take IHL great and decisive steps forward, through attenuating the horrors of war and protecting those affected by it.

2- *Vis-à-vis* International tribunals:

International tribunals are as well involved in the implementation of rules of customary IHL. It suffices to mention that the international criminal tribunal for the Former Yugoslavia has, under article 3 of its statute, jurisdiction over "violations of the laws and customs of war". Accordingly, the tribunal has jurisdiction to determine whether, in a certain case, there exist violations of customary rules of IHL.

In its resolution 827 (1993), the security council says that it:

"decides hereby to establish an international tribunal for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia".

Evidently, an international tribunal may confirm the existence of customary rules of IHL. Thus, the ICJ affirmed that the great

majority of the provisions of the 1949 Geneva Conventions represent "customary international law".(47)

(47) ICJ, Reports, 1996, Nuclear weapons, p. 257-258, paras. 79, 82.

Moreover, the court said: "A weapon that is already unlawful *per se*, whether by treaty or custom, does not become lawful by reason of its being used for a legitimate purpose under the charter" (Ibid, par. 39). See as well: Ibid, para. 64 et ss. Additionally, referring to Geneva Conventions of 1949, the ICJ said that their rules:

"constitute a minimum yardstick" which reflects the "elementary considerations of humanity" (see: ICJ, Rep., 1986, p. 114, para. 218).

Section II

The Current Value of Customary IHL *in Foro interno*

The question of the relationship between international law and municipal law is one of the most ancient issues developed before national as well as international tribunals and in the writings of the publicists of international law.

On the domestic level, rules of customary IHL have a threefold legal weight, namely:

§ *I- Customary IHL is a source of inspiration for national constitutions and legislations:*

It is well known that states have the obligation to enact legislations that incorporate rules of IHL into the domestic legal order, so that those rules can be applied by the executive and the judiciary.

The existence of national laws and legislations concerning IHL has many advantages, namely:

* to put the rules of IHL in force within the national legal order of the state concerned
* to give competent legal authorities (especially, armed forces, the judiciary and the executive) a national legal basis for the application, *in concreto*, of rules of IHL.
* to put the legal status of rules of IHL, beyond any doubt, on the national level.
* to determine precisely the content and extent of such rules.

In this regard, the constitutional court of Colombia says:

"In the case of Colombia, the humanitarian provisions are especially binding due to the fact that Article 214, para. 2, of the Constitution provides that "the rules of international humanitarian law shall be respected in all cases". As already stated by this Body, this means not only that international humanitarian law is valid at all times in Colombia, but also that it is automatically incorporated

in the "national legal order, which is, moreover, consistent with the mandatory nature (as already explained) of the axioms which make this body of law an integral part of jus cogens". Consequently, both the members of irregular armed forces and all State officials, particularly all members of the police force whose duty it is to apply the humanitarian rules, are under the obligation to respect the provisions of international humanitarian law at all times and in all places".(48)

Moreover, though the USA has not ratified Additional Protocol I, the President of that country, in a message sent to the congress says:

"We recognize that certain provisions of Protocol I reflect customary international law, and other appear to be positive new developments. We therefore intend to consult with our allies to develop appropriate methods for incorporating these provisions into rules that govern our military operations, with the intention that they shall in time win recognition as customary international law separate from their presence in Protocol I. This measure would constitute an appropriate remedy for attempts by nations to impose unacceptable conditions on the acceptance of improvements in international humanitarian law. I will report the results of this effort to you as soon as possible, so that the Senate may be advised of our progress in this respect".(49)

Finally, the explanatory memorandum of the Egyptian Law no. 25 of 1966 related to military judgements affirms that articles 137 and 138 (which protects the dead or wounded soldier or the soldier who cannot defend himself even if it is an enemy, against theft and acts of violence) contain a principle which is "in conformity with principles of international law and principles of humanity".(50)

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(48) C.f., text in M. Sassoli et al." How does law protect in war", op. cit., p. 1359-1360.

(49) C.F., text in Ibid, p. 604-605.

(50) Addendum to the procès-verbal of the 23th session, (30 april 1966), people's assembly, p. 1719 (in Arabic).

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§ *II- Application of customary IHL by national courts:*

Prima facie, rules of international law in general, and of IHL in particular, may be applied, in certain circumstances, by national courts. The later may decide questions the solution of which depends on the application of some international norms.(51)

However, it seems, courts of occupying powers refuse to apply customary rules of IHL to disputes submitted to them.

This occurred in South Africa and Israel:

1- Thus, in South Africa, S.V. Petane, the court affirms: "For the reasons which I have given I have concluded that the provisions of Protocol I of 1977 have not been accepted in customary international law".(52)

= Moreover, in a report presented to the people's assembly (the Parliament) Egypt affirms that protection of civilians is a principle imposed by "dictates of humanity as well as the cultural and civilizational heritage of all nations and peoples", Procès-verbal, addendum to the 107th session, 19 July 1992, p. 37 (in Arabic), see as well:
Ahmed Abou El-Wafa: A report on Egypt practice relating to customary rules of international humanitarian law, Revue Egyptienne de droit international, 1997, vol. 53, p. 1 et ss.
Additionally, Egypt affirms: "our own contribution was inspired by our old-age civilization, by our system of Islamic law and by the traditions of Arab chivalry" (off. Rec. of the diplomatic conference on the reaffirmation and development of international humanitarian law applicable in armed conflicts, Geneva, 1974-1977, vol. XIV, p. 192).

(51) Ahmed Abou El-Wafa: Public International Law, op. cit., p. 63.

(52) M. Sassoli et al.: How does law protect in war, op. cit., p. 955.
Moreover, a court in South Africa said:
"in the evidence, reference was made to the fact that there is a tendency in international law to accord prisoner of war status to captives who have openly participated, in a characteristic uniform, in an armed conflict against a colonial racist or foreign regime. However, Professor Dugard, who testified on this point made it clear that such recognition rests on a contractual basis. Governments such as those of South Africa and Great Britain, which do bot accept the relevant Protocol, are not bound by it. In my opinion, Professor Dugard was right in his opinion that this Court cannot simply declare that the accused must be treated as prisoners of war, but that the tendency in international law must be taken into consideration when deciding whether the death sentence must be imposed.
In this connection, I would refer you to the following passage from his testimony: South Africa did not sign the text of the First Protocol, nor had it ratified or acceded to the 1977 Protocols. Consequently it was quite =

2- In Israel, in Israeli deportation orders, the Court stated:

"Countries, which are signatories to the treaty, are obligated to adhere to their said obligations in relations among themselves, however, in the system of relations between the individual and government, one can lean in court only upon rules of customary public international law. This approach formed the basis for Witkon J.'s remarks in H.C. 390/79 mentioned above, when he said at p. 29:

"One must view the Geneva Convention as part of conventional international law, and therefore –according to the view accepted in common law countries and by us- an injured party cannot petition the court of a state against which he has grievances to claim his rights. This right of petition is given solely to the states who are parties to such a convention, and even this litigation cannot take place in a state's court, but only in an international forum".(53)

= clear that South Africa is not bound by Protocol 1 and therefore, in terms of the treaty, is not obliged to confer prisoner of war status upon members of SWAPO.

Although South Africa is not bound in terms of this treaty, I suggested that there is support for the view that this position has now become part of customary international law, part of the common law of international law. In my judgment this argument is premature, in that Protocol 1 has not yet received that support to argue that it is a part of international law, binding upon States that have not ratified the convention.

Yes, I have already expressed the view that in my judgment a South African Court has no option but to exercise criminal jurisdiction over SWAPO, that a Court cannot simply direct that members of SWAPO be treated as prisoners of war. Nevertheless, it is my view, having regard to new developments in international humanitarian law as reflected in Protocol 1 of the 1977 Geneva Conventions and having regard to the special status of a Namibian, that such factors should be taken into account when it comes to the imposition of a sentence and, in particular, it is my view that a Court might have regard to these developments when it comes to the question of the death penalty because the Convention on prisoners of War of 1949 makes it clear that a prisoner of war may not be executed by the detaining power for military activities prior to his arrest unless they amounted to war crimes". (Text of the judgment, in Ibid, p. 965).

(53) Text in, ILM, vol. 29, 1990, p. 139 et ss.. Moreover, in Ayub V. Minister of defence, the court said:

"With regard to provisions of the 1907 Hague Convention and the 1949 Fourth Geneva Convention, Witkon J. refers to three judgments of the Supreme Court in which both these Conventions were held to the part of conventional international law on which individuals may not rely in an =

§ *III- Application of Customary IHL in non-international armed conflicts (civil wars):*[54]

1- In general:

The phenomenon of civil wars exists from time immemorial. It dates back to as early as the existence of man over our planet.

The end of the twentieth century witnessed an escalation in the number of non-international armed conflicts (civil wars). This occurred, e.g., in Somalia, Rwanda, Haiti, former Yugoslavia... etc.

= Israeli internal court. However, following thses judgments, Professor Yoram Dinstein published an article stressing that a difference does exist between the two Conventions and that while the 1949 Fourth Geneva Convention has remained part of Conventional international law, the 1907 Hague Regulations, which in any case only express the law as it had been accepted by all enlightened States, are considered as customary international law.

In light of this article, and after considering the views of Schwarzenberger and von Glahn, Witkon J. became convinced that the 1907 Hague Convention is generally regarded as Customary international law, whereas provisions of the 1949 Fourth Geneva Convention remain conventional in their nature. Consequently the petitioners may rely in this Court on the 1907 Hague Convention which thus forms part of Israeli internal law, but not on provisions of the 1949 Fourth Geneva Convention. Since their contention as to the illegality of the settlements was totally based on Article 49 of the 1949, Fourth Geneva Convention, the Court lacks the competence to deal with it" (c.f., text in M. Sassoli: How does law protect in war, op. cit., p. 815).

See as well: R. O'Keffe: Customary International Crimes in English Courts, BYIL, 2001, p. 293-335. The author concludes that "customary international law is applicable in the English Courts only where the Constitution permits. In terms of the trial and extradition of customary international crimes, it turns out in the end that it does" (Ibid, p. 335).

(54) In its resolution of 1975, the IDI said that the term "civil war":

"shall not cover local disorders or riots and conflicts arising from decolonization".

C.F., Ann. IDI, 1975, vol. II.

Moreover, civil war is a:

"Lutte armée ayant éclatée au sein d'un Etat et ayant pris une importance et une extension qui la différencient d'une simple révolte ou insurrection "Dictionnaire de la terminologie du droit international,. Paris, 1960, p. 308.

See as well:

ICJ, Rep., 1996. p. 621, para. 43.

The term civil war is characterized by the following elements:

- The occurrence of an armed conflict.

- This armed conflict breaks out in the territory of a state: for example, between the established government and insurgents or, in the absence of an established government, between two or more groups, each of them seeks the control of the state. Accordingly, the conflict is not of an international character.[55]

Under art. 1 Protocol II Additional to Geneva conventions of 1949, a non-international armed conflict is an armed conflict which takes place:

"in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol".

Accordingly, situations of internal disturbances and tensions, such as riots and sporadic acts of violence are not considered as non-international armed conflicts.[56]

During non-international armed conflicts are frequently committed acts of extermination and violence of religious, ethnic or social groups as well as other severe infringements of rules of IHL, of human rights and fundamental freedoms.

Evidently, rules of international humanitarian law apply also to non-international armed conflicts. These rules are, inter alia, the following:[57]

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(55) Ahmed Abou El-Wafa: Public International law, op. cit., p. 601.

(56) It is worth recalling that par. 2 article 2 of the European convention of human rights states that deprivation of life is possible if it is absolutely necessary "in action lawfully taken for the purpose of quelling a riot or insurrection".
In this regard, the European court of human rights says: "la cour considère que la force utilisée pour disperser les manifestants et qui cause la mort de ... n'était pas absolument nécessaire au sens de l'article 2", (c.f., V. Berger: Jurisprudence de la Cour européenne des droits de l'homme, Sirey, Paris, 2004, p. 23). This means that, even during riots or insurrections, human rights should be observed.

A- Persons, who do not take part in hostilities or are *hors de combat* are entitled to respect for their person, honour and convictions and religious practices, especially the following acts are prohibited:[58]

- violence to the life, health or mental well-being of persons.
- collective punishments.
- taking of hostages.
- acts of terrorism.
- outrages upon personal dignity.
- slavery and slave trade.
- pillage.
- orders that there shall be no survivors.

B- All the wounded, sick and shipwrecked must be respected and protected. They must receive the necessary medical care.

C- Medical units and transports must be respected and protected.

D- The civilian population must be protected against the dangers arising from military operations.

E- Starvation of civilians is prohibited. For that reason, it is not, in principle, permissible to attack or destroy objects indispensable to the survival of civilians, such as: foodstuffs, crops, drinking water ... etc.

F- Works and installations containing dangerous forces, e.g., dams, dykes and nuclear electrical generating stations must not be made the object of attack.

G- The protection of cultural objects and places of worship.

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(57) See also, art. 3 common to the four Geneva conventions of 1949, Additional Protocol II (1977).

(58) See as well other examples in art. 8 para. 2 statute of the international criminal court (1998).

H- The prohibition of forced displacement of civilians, unless their security or imperative military reasons so demand.

2- Current value of customary IHL for non-international armed conflicts:

This importance goes without saying. In fact, treaty rules applicable to non-international armed conflicts are, *de jure* and *de facto*, incomplete, rudimentary and insufficient. They essentially concern, as codified by article 3 common to the four Geneva Conventions and Additional Protocol 2 of 1977, the "hard core" of human rights and fundamental freedoms applicable at all times and in all places. It suffices to mention, here, that whereas Additional Protocol I (applied to international armed conflicts) contains 102 articles, Additional Protocol II embraces only 28 articles.

Moreover, the later does not contain rules concerning the conduct of hostilities, the use of weapons and the protection of civilian population from the effects resulting from hostilities. Finally, from the 429 articles of the Geneva Conventions 1949, only a sole article (i.e. article 3 common to all four conventions) applies to non-international armed conflicts.

This means that customary rules of IHL are, in this regard, of vital importance and of a great significance(59). Accordingly, under

(59) In this context, the constitutional court of Colombia says:

"It can therefore be concluded from the foregoing that the compulsory nature of international humanitarian law applies to all parties to an armed conflict, and not only to the armed forces of States which have ratified the relevant treaties. Irregular armed individuals or national armed forces may not then legitimately consider that they do not have to respect the minimum standards of humanity in an armed conflict because they are not party to the relevant international agreements, since, once again, the regulatory force of international humanitarian law derives from the universal acceptance of its rules by civilized peoples and from the fundamental humanitarian values enshrined in these international instruments. All armed individuals, whether or not they are party of a State force, are therefore under the obligation to respect the rules embodying those basic humanitarian principles, from which there is no possible derogation even in the extreme situation of armed conflict.

An armed individual may not cite failure to comply with humanitarian law by his adversary as an excuse for his own violations of these rules, since the restrictions pertaining to behaviour in combat apply for the benefit of =

established rules of international law and the very nature and essence of rules of customary IHL, the later apply to non-international armed conflicts, be they written or unwritten norms.

Nevertheless, it should be noted that, in contrast to Additional Protocol I (article 1 par. 2), there is no mention of established custom in Additional Protocol 2 (even in the preamble of the later)[(60)]. In this regard, the question may well be asked whether this omission suggests that customary law is deemed not to be applied to non-international armed conflicts.

According to the ICRC, the answer is in the negative, the ICRC says:

"This should not be interpreted as a rejection on the part of the Conference, as the ICRC had not made a proposal to that effect in its initial draft. It was apparently felt that the regulation of non-international armed conflicts was too recent a matter for State practice to have sufficiently developed in this field. In our opinion this cautious point of view requires some clarification as there is more to it than that. Even though customary practices are traditionally only recognized as playing a role in international relations, the existence of customary norms in internal armed conflicts should not be totally denied. An example that might be

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= the individual. The distinctive feature of this law is therefore that its rules constitute inalienable guarantees that are unique in that they impose obligations on armed individuals not for their own benefit but for that of third parties, namely the non-combatant population and the victims of the conflict. That explains why humanitarian obligations are not based on reciprocity, indeed, they are incumbent upon each of the parties and do not depend on compliance by the other party, because the beneficiary of those guarantees is the non-combatant third party, not the parties to the conflict", (cf., text in M. Sassoli et al.: How does law protect in war, op. cit., p. 1358-1359).

(60) In fact, the preamble of Protocol 2 only states that "in cases not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates of the public conscience". Whereas article 1 par. 2 of Protocol I reads: "In cases not covered by this protocol or other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from *established custom*, from the principles of humanity and from the dictates of public conscience" (Italics added).

given is the respect for and protection of the wounded. Irrespective of the qualification of the conflict as an internal or international conflict, the codes of conduct are not fundamentally different. This is shown by the Lieber code, as it was developed for a civil war, based on the existing principles of the laws of war".[61]

Moreover, this may be explained by the fact that:

"... The discussions in the Conference do not indicate that any doubt was cast on the applicability of customary law. The reference to other rules of international law was probably omitted because it was not considered necessary, given that the only rule explicitly laid down for non-international armed conflicts is common Article 3 of the 1949 Conventions, which does not contain provisions relating to the protection of the civilian population as such".[62]

(61) Commentary on the additional Protocols of 8 June 1977, op. cit., p. 1341.
(62) Ibid, p. 1351.

General Conclusion

During the last two centuries, there have been worldwide efforts to mitigate the horrors of war. In fact, during, because of hostilities, or even at the end of the later, parties to an armed conflict are required to respect *durante belle* rules of *jus in bellum* or rules of international humanitarian law.

International humanitarian law aims at ensuring effective protection of both combatants and civilian victims of all kinds of armed conflicts, be they of an international or non-international character. In other words, these rules aim at mitigating, as far as possible, the severity of war and preventing the arbitrary judgment of military commanders.

International Humanitarian law aims as well at achieving a balance between two fundamental principles, that is, the dictates of humanity and military necessity. These two principles mean that only acts necessary for the defeat of the opposing side are permitted, whereas those which cause needless suffering or unnecessary pain are prohibited. Thus, in certain conditions, the necessities of war ought to yield to the requirements of elementary considerations of humanity.(63)

Rules of customary IHL really represent the fruit of prolonged and arduous efforts. They, Thus, mark the milestone or the normative backbone in the process of developing humanitarian acts of belligerents in their relations *inter se* and *vis-à-vis* civilian population and objects. These rules reflect the acceptance of states and indicate the normal conduct and behaviour expected from them. The *ratio existendi* of this state of things is to realize the aim of all human beings to safeguard and achieve the ideals and principles of humanity during armed conflicts.

The importance of customary IHL lies, *grosso modo*, in the fact that:

* it is applicable to humanitarian problems that are not covered by treaty provisions, i.e., it remains important

(63) C.F., Ahmed Abou El-Wafa: Public international law, op. cit., p. 637-638.

for the protection of victims of armed conflicts on issues not covered by international treaties.

* it is applicable to problems whose regulations under treaty provisions needs be clarified by practice.

* it is valid for international actors that are not parties to international treaties that codified IHL.

* it remains valid even where reservations have been formulated or made against codified rules. However, one should state, *ab initio*, that the overwhelming majority of rules of customary IHL are non reservable ones.

* it is characterized by the fact that humanity lies at the *fons et origo* of its rules.(64)

* it is valid vis-à-vis states that denounce treaties of IHL.

* Finally, given the rapidly evolving nature of new technology as well as "inhumane practices *durante belle*, the importance of customary rules of IHL will inevitably increase, *in futuro*, in this field.

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(64) The declaration of St. Petersburg (1868) affirmed:
"That the only legitimate object that states should endeavour to accomplish during war is to weaken the military forces of the enemy.
That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable.
That the employment of such arms would, therefore, be contrary to the laws of humanity".
See also, Hague IV (1907), regulations 23, Additional protocol No. 1 (1977), articles 35, 57.
In the legality of the threat or use of nuclear weapons, the ICJ emphasized that:
"it is prohibited to cause unnecessary suffering to combatants, it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering. In application of that .. principle, states do not have unlimited freedom of choice of means in the weapons they use "ICJ, Rep., 1996, para. 78.
The court as well added that that principle and the principle of the distinction between combatants and non-combatants constituted "intransgressible principles of international customary law". At the heart of such principles lie the "overriding consideration of humanity" Ibid, paras. 79, 95.

However, the importance of custom does not mean that treaty law is not necessary in the field of IHL. A treaty is, *per definitionem*, binding and clear as for its terms, whereas custom is still difficult to formulate, is in constant evolution and may be, in some cases, subject to controversy.

This means that both written and unwritten (customary) rules of IHL should be scrupulously applied and observed in all circumstances, at all times and in all places.

In fact, the legal value of those rules, be they customary or conventional, should be essentially linked with their *in concreto* implementation, for "implementation is, after all, the real and effective yardstick of law"[(65)]. Prima facie, this prevents running the risk of eroding all the advance achieved after long years of practice.

Otherwise, non-respect of or non-observance for rules of IHL can be compared to a ship which leaves the yards in which it has been built, and sails away alone, no longer attached to the dockyard.

Moreover, for armed conflicts, the application of both conventional and customary rules is a must.[(66)] For it is impossible, in this connection, to set the clock back and undo what has passed.

As is maintained in the report prepared by the Secretary-General of the UN on the Constitution of the International Criminal Tribunal for the former Yugoslavia, the later is to exclusively apply

(65) Ahmed abou El-Wafa: A report on Egypt practice relating to customary rules of international humanitarian law, op.cit., p. 5

(66) Even, there is a presumption according to which "Les traités sont présumés ne pas déroger au droit coutumier" J-M. Grossen: Les présomptions en droit international public, Délachaux & Niestlé, Neuchatel -Paris, 1954, p. 115.

Moreover, Lauterpacht points out:

"There is no room in a developing international society for a rigid application of the principle according to which the rights and duties of a state can never be determined by a will other than its own". H. Lauterpacht: The development of international law by the international court, Grotius publications limited, London, 1982, p. 180-181.

such norms of IHL "which are beyond any doubt part of Customary International Law".[67]

Prima facie, the same holds true for every International Criminal Court.[68]

The CJI, in its recent advisory opinion concerning the "wall" affirmed that the Hague regulations annexed to the fourth Hague Convention of 1907 "have become part of customary law".[69]

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(67) UN, Doc. S/25704 (3 May 1993).

(68) see as well, W.H. Heinegg: Criminal International Law and Customary International Law, in "International Criminal Law and the current development of public international law", ed. By A. Zimmermann, Duncker – Humblot, Berlin, 2003, p. 27-47.

(69) ICJ, Rep., 2004, para. 89.