

Summary of Thesis submitted for PhD degree

By Toshinobu Kawai

on

1977 Protocol II Additional to the 1949 Geneva Conventions and

Customary International Law

Traditionally the laws of war, or widely known as international humanitarian law today, in principle did not cover civil wars but only wars between States. The Geneva Conventions were adopted in 1949 to increase the protection of victims in armed conflicts, but the protection of the victims in internal conflict by the Conventions was limited. Thus, Protocol II additional to the Geneva Conventions of 1949 was introduced in 1977 to be specifically applicable to non-international armed conflicts in order to ameliorate the conditions of those who suffer in such conflict.

A State confronting a conflict in its own territory is almost always unwilling to apply an international treaty to the situation, and therefore the pace of the ratification of Protocol II has been slow. The State is not bound by the treaty unless she ratifies it, and an internal war tends to become severe and cruel with few regulations. Despite such inadequate protection, however, customary international law based on State practice and *opinio juris* applies to such circumstances. The purpose of this thesis is therefore to ascertain the customary status of Protocol II.

This thesis first examines whether customary rules had existed before the introduction of the 1949 Geneva Conventions, and proceeds to study what is customary international law applicable to non-international armed conflict. Then this author

determines whether each article of Protocol II has become customary by investigating into State practice and *opinio juris*, and he finds through the investigation that only a little part of the Protocol has become customary. Notwithstanding such insufficient protection for the victims in civil conflict, however, the general principles of the laws of war are always applicable to internal conflict. In addition this writer emphasises the importance of the domestic “implementation” of the humanitarian rules and recommends the introduction of a unified and simplified treaty in the future revision of the Geneva Conventions and their Protocols.

1977 Protocol II Additional to the 1949 Geneva Conventions and
Customary International Law

being a Thesis submitted for the Degree of PhD

in the University of Hull

by

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May 2001

CONTENTS

Table of Cases	vii
Table of Treaties and Statutes	viii-ix
Table of United Nations Materials	x-xiii
Table of Other Sources	xiv-xvi
Table of Abbreviations	xvii-xviii
Chapter 1 Introduction	1-11
1.1. Introduction	1
1.2. The Purpose of This Thesis	3
1.3. The Approach of This Thesis	6
1.4. The Chapters in This Thesis	7
1.5. The Limitations of This Thesis	9
Chapter 2 The Recognition of Belligerency and the General Principles of the Laws of War	12-30
2.1. Introduction	12
2.2. Recognition of Belligerency	13
2.2.1. Opinions of Early Writers	13
2.2.2. The American Civil War and its Aftermath	14
2.2.3. The Spanish Civil War and its Aftermath	18
2.2.4. Were the Laws of War Applicable to Civil War?	20
2.3. The General Principles of the Laws of War	21
2.3.1. Sources of the General Principles of the Laws of War	21
2.3.2. The Customary Status of the General Principles of the Laws of War	23
2.3.3. What are the General Principles of the Laws of War?	24
2.3.3.1. Humanity	25
2.3.3.2. Military Necessity	25
2.3.3.3. Distinction	26
2.3.3.4. Proportionality	27
2.3.4. The General Principles of the Laws of War Today: How Effective?	28
Chapter 3 The Japanese Civil War	31-70
3.1. Introduction	31
3.2. Background	32
3.3. The Progress of the Japanese Civil War	35
3.4. The Recognition of Belligerency by Major Powers and its Effect	37
3.4.1. The Sovereignty of Japan and the Legitimacy of Government	37
3.4.2. The Collective Declaration of Neutrality of 18 February 1868	40
3.4.3. The Involvement of Foreign Ships	46
3.4.4. The <i>Stonewall</i>	48
3.4.5. The Withdrawal of Military Advisers	48
3.4.6. The End of the War in the North and the Cessation of Neutrality	50
3.4.7. The Position of the Armed Group in Hakodate: Insurgents or Pirates?	52
3.5. The Conduct of Warfare in the Japanese Civil War	56
3.5.1. The Use of a False Flag	56
3.5.2. Visit and Search	57
3.5.3. The Protection of the Wounded, Sick and Shipwrecked	59
3.5.4. The Protection of Prisoners of War	63
3.5.5. The Protection of Foreigners	64
3.6. The Aftermath of the Japanese Civil War	66
3.6.1. Amnesty	66

3.6.2.	The Laws of War and Meiji Japan	68
3.6.3.	The Relevance of the Japanese Civil War to the Present Time	69
Chapter 4 Custom and International Humanitarian Law on Non-International Armed Conflict		71-121
4.1.	Role of Custom in International Humanitarian Law on Civil War	71
4.2.	Relation Between Conventional and Customary Rules	73
4.2.1.	Introduction	73
4.2.2.	Customary Rules	74
4.2.3.	Compatibility of Conventional and Customary Rules	75
4.2.4.	Conventional Rules	76
4.3.	General Discussion on Practice and <i>Opinio Juris</i>	77
4.4.	Prerequisites of Practice and <i>Opinio Juris</i>	82
4.4.1.	Generality	82
4.4.2.	Uniformity	83
4.4.3.	Continuity	84
4.4.4.	Relevance of the Prerequisites to <i>Opinio Juris</i>	85
4.4.5.	Considerations about the Prerequisites in Humanitarian Law	86
4.5.	Subjects of Practice and <i>Opinio Juris</i>	88
4.5.1.	Introduction	88
4.5.2.	States	89
4.5.3.	Dissident Groups	89
4.5.4.	Individuals	91
4.5.5.	International Organisations	93
4.6.	Evidence of Practice	97
4.6.1.	Ratification	97
4.6.2.	Measures of National Implementation	100
4.6.3.	Actual Practice	102
4.6.4.	Abstention	103
4.6.5.	Statement	105
4.7.	Evidence of <i>Opinio Juris</i>	106
4.7.1.	Acceptance of International Humanitarian Law by Belligerents	106
4.7.2.	Denial and Justification by Belligerents for Their Own Conduct	107
4.7.3.	Recognition of Belligerents' Conduct by Third States	108
4.7.4.	Acquiescence of Belligerents' Conduct by Third States	108
4.7.5.	Protest against Belligerents' Conduct by Third States	110
4.7.6.	Acceptance of Humanitarian Law by States in Peacetime	110
4.8.	Ascertainment of Customary Rules	111
4.8.1.	Introduction	111
4.8.2.	The ICJ	112
4.8.3.	<i>Ad Hoc</i> International Tribunals	113
4.8.4.	International Criminal Court	114
4.8.5.	Domestic Courts	115
4.8.6.	Publicists	116
4.8.7.	Diplomatic Conferences	118
4.9.	Exception to the Effect of Customary Rules	119
4.9.1.	Introduction	119
4.9.2.	Persistent Objectors	119
4.9.3.	New States	120
Chapter 5 Custom and Protocol II, Part I: Material Field of Application		122-151
5.1.	The Laws of War Before 1949	122
5.2.	The Regime of the 1949 Geneva Conventions in the 1950s and 1960s	123
5.3.	Drafting Protocol II in the Diplomatic Conference of 1974 to 1977	125

5.3.1.	Article 1 (Draft Article 1)	125
5.3.2.	Article 3 (Draft Article 4)	126
5.4.	Subsequent Practice and <i>Opinio Juris</i>	127
5.4.1.	Afghanistan (1989-)	127
5.4.2.	Bougainville, Papua New Guinea (1990-)	130
5.4.3.	Chechnya, Russia (1994-96)	131
5.4.4.	El Salvador (1981-1992)	134
5.4.5.	Liberia (1989-1997)	138
5.4.6.	Rwanda (1996)	140
5.4.7.	Somalia (1988-)	142
5.4.8.	Sri Lanka (1983-)	143
5.4.9.	The Former Yugoslavia (1992-1995)	145
5.5.	Examination of Customary Status	148
5.5.1.	Article 1(1)	148
5.5.2.	Article 1(2)	149
5.5.3.	Article 3	150
Chapter 6 Custom and Protocol II, Part II: Humane Treatment		152-189
6.1.	The Laws of War Before 1949	152
6.2.	The Regime of the 1949 Geneva Conventions in the 1950s and 1960s	153
6.3.	Drafting Protocol II in the Diplomatic Conference of 1974 to 1977	156
6.3.1.	Article 2 (Draft Article 2)	156
6.3.2.	Article 4 (Draft Articles 6 and 32)	156
6.3.3.	Article 5 (Draft Article 8)	158
6.3.4.	Article 6 (Draft Articles 9 and 10)	160
6.4.	Subsequent Practice and <i>Opinio Juris</i>	163
6.4.1.	Afghanistan	163
6.4.2.	Bougainville	165
6.4.3.	Chechnya	166
6.4.4.	El Salvador	168
6.4.5.	Liberia	170
6.4.6.	Rwanda	173
6.4.7.	Somalia	175
6.4.8.	Sri Lanka	177
6.4.9.	The Former Yugoslavia	178
6.5.	Examination of Customary Status	179
6.5.1.	Article 2	179
6.5.2.	Article 4	180
6.5.3.	Article 5	187
6.5.4.	Article 6(1) to (4)	188
Chapter 7 Custom and Protocol II, Part III: Wounded, Sick and Shipwrecked		190-210
7.1.	The Laws of War Before 1949	190
7.2.	The Regime of the 1949 Geneva Conventions in the 1950s and 1960s	191
7.3.	Drafting Protocol II in the Diplomatic Conference of 1974 to 1977	192
7.3.1.	Article 7 (Draft Article 12)	192
7.3.2.	Article 8 (Draft Articles 13)	193
7.3.3.	Article 9 (Draft Article 15)	194
7.3.4.	Article 10 (Draft Article 16)	194
7.3.5.	Article 11 (Draft Article 17)	196
7.3.6.	Article 12 (Draft Article 18)	196
7.4.	Subsequent Practice and <i>Opinio Juris</i>	197
7.4.1.	Afghanistan	197

7.4.2.	Bougainville	198
7.4.3.	Chechnya	198
7.4.4.	El Salvador	201
7.4.5.	Liberia	202
7.4.6.	Rwanda	203
7.4.7.	Somalia	204
7.4.8.	Sri Lanka	205
7.4.9.	The Former Yugoslavia	206
7.5.	Examination of Customary Status	206
Chapter 8 Custom and Protocol II, Part IV: Civilian Population		211-241
8.1.	The Laws of War Before 1949	211
8.2.	The Regime of the 1949 Geneva Conventions in the 1950s and 1960s	212
8.3.	Drafting Protocol II in the Diplomatic Conference of 1974 to 1977	214
8.3.1.	Article 13 (Draft Article 26)	214
8.3.2.	Article 14 (Draft Article 27)	216
8.3.3.	Article 15 (Draft Article 28)	217
8.3.4.	Article 16	218
8.3.5.	Article 17 (Draft Article 29)	219
8.3.6.	Article 18 (Draft Articles 14, 33 and 35)	219
8.4.	Subsequent Practice and <i>Opinio Juris</i>	221
8.4.1.	Afghanistan	221
8.4.2.	Bougainville	222
8.4.3.	Chechnya	223
8.4.4.	El Salvador	225
8.4.5.	Liberia	226
8.4.6.	Rwanda	228
8.4.7.	Somalia	229
8.4.8.	Sri Lanka	230
8.4.9.	The Former Yugoslavia	231
8.5.	Examination of Customary Status	233
8.5.1.	Article 13 and Article 4(2)(d)	233
8.5.2.	Article 14	235
8.5.3.	Article 15	237
8.5.4.	Article 16	237
8.5.5.	Article 17	238
8.5.6.	Article 18	238
Chapter 9 Custom and “Implementation”		242-264
9.1.	Introduction	242
9.2.	Treaty Obligations and “Implementation”	243
9.3.	Implementation	245
9.3.1.	Dissemination	245
9.3.1.1.	Diplomatic Conference	245
9.3.1.2.	The Importance and Recent Development of Dissemination	246
9.3.2.	The International Committee of the Red Cross	247
9.4.	Enforcement	251
9.4.1.	Reciprocity and Belligerent Reprisal	251
9.4.2.	War Crimes	254
9.4.3.	Internal Reports	257
9.4.4.	The United Nations	258
9.5.	Reconciliation	259
9.5.1.	Diplomatic Conference	259

9.5.2.	The Recent Development of Reconciliation	260
9.5.3.	The Problems of Reconciliation	261
9.5.4.	The Prospects of Reconciliation	262
Chapter 10 Conclusions and Recommendations		265-282
10.1.	Conclusions	265
10.2.	Recommendations	267
10.2.1.	International Humanitarian Law in Danger	267
10.2.2.	The Importance of Domestic “Implementation”	268
10.2.3.	Towards a Unified and Plain Humanitarian law	272
10.2.4.	Approach Based on Morality, Tradition and Culture	280
Bibliography		283-299
Books		283
Articles		289
Electronic Information		298
Conferences		299

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ABBREVIATIONS

<i>AJIL</i>	<i>American Journal of International Law</i>
<i>AULR</i>	<i>American University Law Review</i>
ASIL	American Society of International Law
BRA	Bougainville Revolutionary (Republican) Army
<i>CILSA</i>	<i>Comparative and International Law Journal of Southern Africa</i>
Common Article 1	Article 1 common to the 1949 Geneva Conventions
Common Article 3	Article 3 common to the 1949 Geneva Conventions
Cmd., Cmnd.	(British Government) Command Papers
C.P.J.	Correspondence Politique Japon
ECOMOG	Economic Community of West African States Monitoring Group
ECOWAS	Economic Community of West African States
<i>EJIL</i>	<i>European Journal of International Law</i>
FLN	Front de Libération Nationale
FMLN	Frente Farabundo Martí para la Liberación Nacional
GAOR	General Assembly Official Record
<i>Harvard ILJ</i>	<i>Harvard International Law Journal</i>
HMSO	Her/His Majesty's Stationery Office
ICJ	International Court of Justice
<i>ICLQ</i>	<i>International and Comparative Law Quarterly</i>
ICRC	International Committee of the Red Cross
<i>ICRC's Commentary, the</i>	<i>Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949</i>
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
<i>ILM</i>	<i>International Law Materials</i>
<i>IRRC</i>	<i>International Review of the Red Cross</i>
J.D.D.	Japanese Diplomatic Documents
<i>Keesing's</i>	<i>Keesing's Contemporary Archives/ Keesing's Record of World Events</i>
LPC	Liberia Peace Council
<i>NILR</i>	<i>Netherlands International Law Review</i>
LTTE	Liberation Tigers of Tamil Eelam
NPFL	National Patriotic Front of Liberia
<i>NYIL</i>	<i>Netherlands Yearbook of International Law</i>
<i>Pictet's Commentary</i>	<i>Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field: Commentary</i>
OR	<i>Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts</i>
PCIJ	Permanent Court of International Justice
PNG	Papua New Guinea
Protocol I	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts
Protocol II	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts
<i>RADIC</i>	<i>Revue Africaine de Droit International et Comparé</i>
RPF	Rwandan Patriotic Front
RUF	Revolutionary United Front

SCOR	Security Council Official Record
SNA	Somali National Alliance
SNM	Somali National Movement
SSDF	Somali Salvation Democratic Front
Statute for the former Yugoslavia	Statute for the International Tribunal
Statute for Rwanda	Statute of the International Tribunal for Rwanda
Statute of the ICJ	Statute of the International Court of Justice
SWB	Summary of World Broadcasts
Tamil Tigers	Liberation Tigers of Tamil Eelam
ULIMO	United Liberation Movement for Democracy
ULIMO-J	United Liberation Movement of Liberia for Democracy
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNHCR	United Nations High Commissioner for Human Rights
UNICEF	United Nations Children's Fund
UNOMIL	United Nations Observer Mission in Liberia
USC	United Somali Congress
<i>Virginia JIL</i>	<i>Virginia Journal of International Law</i>

CHAPTER 1

INTRODUCTION

1.1. INTRODUCTION

“We must do something!” This is an outcry which was heard all over the world during the last decade of the twentieth century, when so many calamities were observed in civil wars. The most successful instance of this exclamation was anti-personnel landmines campaigns. Indeed, the result was more than “something”: a treaty was concluded which would totally ban anti-personnel landmines in all armed conflicts.¹ International lawyers, too, argued that “something must be done” in legal terms, and the establishment of the Rome Statute, which would eventually lead to the creation of the International Criminal Court,² was indeed more than something: something which had been considered for as long as fifty years.³

“Something must be done”, and indeed something was usually done to certain conflicts and certain war criminals. The war in the former Yugoslavia probably attained much attention during the last decade, and something was done to prosecute war criminals. In contrast, international forces led by the United States directly intervened in Somalia, but they left without solving its civil war. Worst of all, the international community paid close attention to Somalia only when “something was being done”. After the withdrawal of the multinational forces, less focus has been

¹ Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, *reprinted in* 36 *ILM* 1507 (1997).

² Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (17 Jul. 1998), *reprinted in* 33 *ILM* 999 (1998). According to Article 126 of the Statute, sixty ratifications are required for the formal establishment of the International Criminal Court. Throughout this thesis, this Statute is referred to as “the Rome Statute”.

³ For instance, an international criminal court was envisaged in Art. 6 of the Genocide Convention. Convention on the Prevention and Punishment of the Crime of Genocide. Adopted by the General Assembly of the United Nations on 9 December 1948, 78 *UNTS* 277 (1951).

placed on this continuing conflict. On the other hand, nothing or very little has been done about many other internal strifes. The Secretary-General in his report avowed:

In conclusion, the Special Envoy pointed out that since Liberia is a small country, with a small population, the world does not seem to pay much attention to the suffering of its people.⁴

Similarly, the ICRC's *Annual Report* stated:

The Afghan conflict continued to take its deadly toll, largely ignored by the rest of the world.⁵

To sum up, it appears that there are now two opposing phenomena. On the one hand, attention is concentrated on certain internal conflicts, and international legal instruments are devised to cope with the problems which occurred in those conflicts. On the other hand, focus is not placed upon the rest, and those who are affected in such neglected conflicts continue to suffer. In addition, the invention of international agreements does not necessarily assist the victims in well-known conflicts, not to mention those in less well-known ones. As the following chapters show, the victims in the former Yugoslavia underwent the sufferings which were not moderated by the accords by the parties to the internal strife to "internationalise" the conflict.⁶

⁴ Security Council, *Seventh progress report of the Secretary-General on the United Nations Observer Mission in Liberia*, para. 6, U.N. Doc. S/1994/1167 (14 Oct. 1994).

⁵ The ICRC, *Annual Report 1994*, at 103.

⁶ See *infra*. Chs. 5-8, in particular Ch.5.

1.2. THE PURPOSE OF THIS THESIS

International humanitarian law⁷ is a branch of public international law which applies to situation of armed conflicts. In international war where States fight with each other, the number of international treaties has been extensively codified since the mid-nineteenth century, while in civil war where fighting takes place within a boundary of a State,⁸ there had been only a fragment of customary law regulating the conduct of warfare before the end of the Second World War. It was only with the adoption of Article 3 common to the Geneva Conventions in 1949⁹ that the first written provision applicable to civil conflicts was created. However, this concise article was not adequate in the post-Second World War period when many of the armed conflicts were not international but non-international, and thus it was necessary to establish a set of rules in this area. In 1977 therefore Protocol II additional to the 1949 Geneva

⁷ The terms “the laws of war”, “the law of armed conflict” and “international humanitarian law” are used interchangeably. However, when this author deals with historical aspects, particularly before the end of the Second World War, the term “the laws of war” is exclusively used. Regarding the term “international humanitarian law”, see *Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Geneva, 24 May - 12 June 1971), I, Introduction*, at 25-26 CE/1b (1971). As to the term “the laws of war”, see, *The Laws of War*, at 1, 2 (Adam Roberts and Richard Guelff eds., 3rd ed. with revisions and additions, 2000).

⁸ The terms “non-international armed conflict”, “civil war”, “civil conflict”, “internal war”, “internal conflict”, “civil strife” and “internal strife” are used interchangeably. As to internal strife or civil strife, see A.J. Thomas, Jr., in “Panel: International Law and Civil Wars - I”, 61 *Proceedings of the ASIL* 1, 23 (1967).

⁹ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949, 75 *UNTS* 31-83 (1950).

Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949, 75 *UNTS* 85-133 (1950).

Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, 75 *UNTS* 135-285 (1950).

Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1945, 75 *UNTS* 287-417 (1950).

Throughout this thesis, the four Geneva Conventions of 1949 are respectively referred to as “Geneva Convention I”, “Geneva Convention II”, “Geneva Convention IIP” and “Geneva Convention IV”.

Throughout this thesis, Article 3 common to the 1949 Geneva Conventions is referred to as “Common Article 3”.

Convention¹⁰ was introduced as the first international treaty which is solely applicable to non-international armed conflict.

In 2001, more than 140 States are parties to Protocol II,¹¹ and these States are hence bound by the treaty. However, with careful examination, one can easily notice that a State which faces conflict in its territory tends to avoid the ratification of the Protocol,¹² and the only international instruments that bind such a State are Common Article 3 and customary international law. Accordingly, the study of the contents of custom becomes important in order to assist victims in internal strife where the State involved is not a party to the Protocol, and the purpose of this thesis is therefore to ascertain the customary status of Protocol II additional to the 1949 Geneva Conventions.

The ascertainment of custom in non-international armed conflicts would also contribute to the theoretical development and actual application of international law. Regarding the former aspect, there are virtually no scholars who sought to establish the customary status of Protocol II, and this thesis therefore would contribute to international humanitarian law by demonstrating customary rules in Protocol II. For instance, textbooks on international humanitarian law usually refer to treaties and custom as two important tools, but they seldom show what custom is in international war not to mention non-international armed conflicts. Accordingly, this thesis would

¹⁰ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 *UNTS* 609-699 (1979). Throughout this thesis, this Protocol is referred to as "Protocol II".

¹¹ See "Geneva Convention of 12 August 1949 and Additional Protocols of 8 June 1977: ratifications, accessions and successions" (29 August 2000), which can be found in the ICRC's homepage at www.icrc.org.

¹² States, such as Afghanistan, Papua New Guinea, Somalia, Sudan and Sri Lanka are not parties to Protocol II, even though there is no evidence to suggest that these States have avoided the ratification of the treaty because they have been confronted by internal conflicts.

be a guiding tool to demonstrate the existence of custom in civil conflicts by showing how it has been formed.

Concerning the application of international humanitarian law, international and domestic courts could consult with the outcome of the investigation of this thesis.¹³ Article 8 of the Rome Statute provides Common Article 3 and a detailed list of “other serious violations of the laws and customs applicable in armed conflicts not of an international character”, and all of the rules which this author finds customary in this thesis are included in this provision. Nevertheless, the International Criminal Court may use the methods this thesis applies, namely investigation into *opinio juris* and State practice, and ascertain customary rules which are created after its entry into force. As regards *ad hoc* international tribunals and domestic courts, they need to rely on customary rules if the State concerned is not a party to Protocol II, and here the result of this thesis could be referred to.

Lastly, the ICRC is conducting research into customary rules of international humanitarian law, which was endorsed by the 26th International Conference of the Red Cross and Red Crescent.¹⁴ This project was originally intended to study customary rules governing non-international armed conflicts, since there are only a limited number of treaty provisions and custom was therefore thought to be a useful tool since it binds all States.¹⁵ The study turned into a research into both international and non-international armed conflicts, but the original idea of the study indicates the importance of analysis into custom in non-international armed conflicts.

¹³ See Jean-Marie Henckaerts, ‘Study on customary rules of international humanitarian law: Purpose, coverage and methodology’, *IRRC*, Sept. 1999, at 660, 661-662.

¹⁴ *Id.*

1.3. THE APPROACH OF THIS THESIS

Among the limited number of authorities on the customary status of international humanitarian law, *Abi-Saab* relies on general international law instead of custom, and considered it unnecessary to prove the existence of *opinio juris* and State practice.¹⁶ *Cassese* conducts extensive investigation into the relationship between treaties and customary international law before examining each provision of both Protocols.¹⁷ *Kalshoven* argues that the same “standards of civilization” are applicable to both international and non-international armed conflicts, as discussions and resolutions after 1945, he claims, indicate.¹⁸ *Meron* focuses on case law, particularly the *Nicaragua* Judgment in his publication.¹⁹

The approach of this author towards research into this area of law is quite different from such scholars. First he applies the theory of customary law to various civil wars; in other words, he attempts to observe if there are practices and *opinio juris* that are necessary for the formation of custom. This method of ascertaining customary law is so fundamental, yet virtually no scholar has tried to apply the theory into practice, and many of them focus upon only one element, *opinio juris* or other sources, such as resolutions. Second, in this thesis this writer undertakes to bring more light to civil wars other than well-known conflicts, such as the one in the former Yugoslavia. As has been already mentioned, there have been numerous writings as well as judgments

¹⁵ *Id.*, at 660-661.

¹⁶ *Georges Abi-Saab*, “The 1977 Additional Protocols and General International Law: Some Preliminary Reflections”, in *Humanitarian Law of Armed Conflict: Challenges Ahead*, 115, 121-122 (*Astrid J.M. Delissen & Gerard J. Tanja* eds., 1991).

¹⁷ *Antonio Cassese*, “The Geneva Protocols of 1977 on the Humanitarian Law of Armed Conflict and Customary International Law”, 3 *UCLA Pacific Basin Law Journal* 55 (1984).

¹⁸ *Frits Kalshoven*, “Applicability of Customary International Law in Non-International Armed Conflict”, in *Current Problems of International Law* 267, 280 (*Antonio Cassese* ed., 1975).

¹⁹ *Theodore Meron*, *Human Rights and Humanitarian Law in Customary Law*, Ch. I (1989).

on the conflict occurred in the former Yugoslavia,²⁰ and therefore authorities tend to focus on this particular case. However it should be emphasised that the war is one of the many internal conflicts that have taken place recently, and paying disproportionate attention to it would be even harmful to the customary regulations in times of civil war, which should be equally applicable to all internal conflicts. The study on customary rules by the ICRC has not been published yet, but it appears that the research covers a wide range of State practice and *opinio juris*, which might be relevant to this author's methods.²¹

1.4. THE CHAPTERS IN THIS THESIS

Now, this author turns his focus on each chapter of this thesis. In the following chapter, he first discusses the recognition of belligerency. Conventional belief held by international lawyers about the laws of war in civil conflicts before 1945 is that these laws were applicable only when the belligerency of a rebel group was recognised, but the present writer will demonstrate in Chapter 2 that, unlike such conventional belief, the recognition of belligerency was more concerned with the law of neutrality than with the rules of conduct of hostilities, and that virtually no customary law applicable to civil wars had existed before the end of the Second World War. Having said so, he then argues that the general principles of the laws of war have always covered both internal and international wars and that these principles still play a significant role today because of a modicum of existing customary humanitarian law in civil conflicts.

²⁰ See e.g. Christopher Greenwood, "International Humanitarian Law and the *Tadic* Case", 7 *EJIL* 265 (1996).

²¹ Henckaerts, *supra*. note 13, at 664-666. But *id.*, at 668 (the study appears to have found that "there are more rules of customary international law relating to non-international armed conflict than originally expected", and this is contrary to the finding of this thesis.)

After clarifying the state of the law until the mid-twentieth century, this author examines the Japanese Civil War in the light of the laws of war in Chapter 3. Research into this Civil War would support the proposition that the recognition of belligerency was of limited significance in terms of the conduct of hostilities. There are three reasons why this civil war is examined in this thesis. First, few readers outside Japan have knowledge about the Civil War, and its analysis would be of academic consequence. Second, the Civil War observed features common to many of today's internal conflict, e.g. the severe treatment of captured samurai and reconciliation after the end of hostilities. Third, the war was a pertinent example of the explicit recognition of belligerency, which has rarely occurred in practice.

In Chapter 4, the theory of customary international law is construed in the light of the law of armed conflict applicable to civil war. Only when the relationship between these two branches of law is clarified, can one proceed to the detailed discussion of the customary status of Protocol II. The centre of this chapter is practice and *opinio juris*, the two fundamental elements of custom. Even though most scholars as well as judicial judgments agree that the two components are indispensable, they do not necessarily show of what they actually consist. Therefore this author elucidates what constitutes State practice and *opinio juris* in international humanitarian law in time of internal conflict.

Then, Chapters 5 to 8 discuss each article of Protocol II. The method of discussion is historical. First, the laws of war before 1949 is briefly referred to, and then the state of law from 1949 to 1970 is focused. Two instruments, namely Common Article 3 and a series of General Assembly resolutions of 1970 concerning humanitarian law are particularly investigated. The latter is important because the twenty-fifth session of the UN General Assembly was the only occasion when the UN considered humanitarian

law at length. Third, debate in the Diplomatic Conference is examined to show whether the customary status of each provision of Protocol II was confirmed as customary by a majority of the States participating in the Conference. Fourth, recent practice and *opinio juris* are analysed. There have been so many civil wars in recent history, and discussing all of them is just not plausible. Thus, this author limits the scope to the conflicts in Afghanistan, Bougainville (Papua New Guinea), Chechnya (Russia), El Salvador, Liberia, Rwanda, Somalia, Sri Lanka and the former Yugoslavia. Such limitation does not, however, prevent the use of materials of other civil conflicts, international wars and internal disturbances whenever necessary and relevant.

Chapter 5 examines the customary status of each provision in Part I of Protocol II; Chapter 6 in Part II; Chapter 7 in Part III; and Chapter 8 in Part IV. In Chapter 9, “implementation” of international humanitarian law is discussed.²² However, as a matter of convenience, Article 2 of Protocol II providing personal field of application is discussed in Chapter 6; Article 4(2)(d) regarding terrorism in Chapter 8; and Article 6(5) concerning amnesty in Chapter 9. In Chapter 10, this thesis will be summarised and concluded.

1.5. THE LIMITATIONS OF THIS THESIS

It is essential to list the topics which are not discussed in this thesis. First the theory of customary international law itself is an extremely vast, controversial area of law, and the space in Chapter 4 does not allow minute discussion of the general theory of custom to be undertaken. Consequently, discussion in this chapter centres on customary international law in humanitarian law on non-international armed conflict.

²² In this chapter, to avoid confusion, the word “implementation” *with quotation marks* includes implementation, enforcement and reconciliation while implementation without quotation marks signifies implementation only.

The general argument of custom is mentioned briefly for guidance at the beginning of each section, but the rest devotes to discussion of customary international law in the context of the laws of war on non-international armed conflict.²³ *Jus cogens* and the law of armed conflict are a controversial issue, but this topic is not considered in this thesis either because of the nature of *jus cogens* as treaty law.²⁴

Second, even though Protocol II picks up only one form of non-international armed conflicts and does not make a comprehensive definition of such conflict,²⁵ this author does not attempt to define or categorise non-international armed conflicts,²⁶ because the purpose of this thesis is to discuss the customary status of Protocol II. Having said so, Chapter 5 will address what constitutes “armed conflict not of an international character” in Common Article 3, since Protocol II “develops and supplements [Common] Article 3”²⁷ and discussion on the material field of application of Common Article 3 is necessary in order to clarify the material field of application of Protocol II.

Third, the problems of genocide and crimes against humanity are not within its scope,²⁸ while it is worth pointing out that the differentiation of the three categories would be essential because of the increasingly confused use of the terms.

Finally this thesis does not discuss human rights law. There has been debate among scholars about the relationship between human rights law and humanitarian law,²⁹ and

²³ Discussion about custom in international armed conflict is, however, undertaken wherever relevant.

²⁴ As to *jus cogens* and humanitarian law, see e.g. H.H.G. Post, “Some Curiosities in the Sources of the Law of Armed Conflict Conceived in a General International Legal Perspective”, 25 *NYIL* 83, 114-115 (1994). As to general discussion of *jus cogens*, see e.g. Danilenko, “International *Jus Cogens*: Issues of Law-Making”, 2 *EJIL* 42 (1991).

²⁵ See Georges Abi-Saab, “Non-International Armed Conflicts”, in UNESCO, *International Dimensions of Humanitarian Law* 217, 237 (1988).

²⁶ Regarding the categorisation of non-international armed conflicts, see Hilaire McCoubrey and Nigel D. White, *International Organizations and Civil Wars*, at 19-22 (1995).

²⁷ Protocol II, Article 1(1).

²⁸ As to genocide, crimes against humanity and war crimes, see David Turns, “War Crimes without War? - The Applicability of International Humanitarian Law to Atrocities in Non-International Armed Conflict”, 7 *RADIC* 804 (1995).

it is true that Common Article 3 and Part II of Protocol II were greatly influenced by the development of human rights.³⁰ The present author, however, is of opinion that the customary human rights law, however fundamental it may be, does not necessarily guarantee the same status in humanitarian law.³¹ The laws of war is applied to situations of extreme severity, and under certain circumstances it is not prohibited for States and rebels by the laws to deprive persons of their most important right, the right to life. Therefore international humanitarian law remains to be distinct from human rights law, even though admittedly there is influence, particularly from the latter on the former.

²⁹ See e.g. Louise Doswald-Beck and Sylvain Vité, "International Humanitarian Law and Human Rights Law", *IRRC*, Mar.-Apr. 1993, at 94; Françoise Hampson, "Human Rights and Humanitarian Law in Internal Conflicts", in *Armed Conflict and the New Law* 55 (Michael A. Meyer ed., 1989).

³⁰ Doswald-Beck & Vité, *id.*, at 112-113.

³¹ The customary prohibition of slavery and recruitment of child soldiers in civil war situation are, therefore, two exceptions, which is discussed in *infra*. Ch. 6.

CHAPTER 2

THE RECOGNITION OF BELLIGERENCY AND THE GENERAL PRINCIPLES OF THE LAWS OF WAR

2.1. INTRODUCTION

Were the laws of war applied to civil war before 1945? This simple question is not only of historical, but also of contemporary significance. Considering the historical implication, today it is generally assumed that the recognition of belligerency was necessary for the application of the laws of war to civil war in the pre-Second World War period.¹ However, in practice, such recognition, particularly *de jure* one, rarely took place, and the legal importance of the recognition of belligerency needs investigation. Besides, there were humanitarian activities in civil conflicts, i.e. the Spanish Civil War, even in absence of the formal recognition of belligerency, and the prerequisite that the belligerency of rebels should be recognised before the application of humanitarian rules may not be self-evident.

As for the contemporary meaning of the question, had there been laws of war applicable to civil wars before the end of the Second World War, they should have taken the form of customary law, since there had been no written international treaty specifically to regulate such wars until the emergence of Common Article 3.² If so, the following questions should be asked. What were the contents of the custom? Was the custom the same as the custom on international wars? Have the customary rules continued to govern non-international armed conflict until today?

¹ See James E. Bond, *The Rules of Riot*, at 49 (1974).

² See *id.*, at 33-34.

2.2. RECOGNITION OF BELLIGERENCY

2.2.1. OPINIONS OF EARLY WRITERS

Early writers did not mention the recognition of belligerency at all, and asserted that the general principles of the laws of war regulated a civil war.³ For instance, de Vattel was one of the first scholars who thoroughly explained the conduct of warfare of the time.⁴ He made the following remark in 1758, which may sound quixotic today:

... it is perfectly clear that the established laws of war, those principles of humanity, forbearance, truthfulness, and honor, which we have earlier laid down, should be observed on both sides in a civil war.⁵

About one hundred years later, Wheaton considered “all the rights of war as against each other, and even as respects neutral nations” to be applicable to both parties to civil war according to “the general usage of nations”.⁶ Similarly Woolsey wrote:

With civil wars international *jus* has nothing to do. But the same rules of natural justice and humanity, which are applied to the question of the justice of ordinary wars, and to the mode of conducting them, apply here also. In no kind of wars is retaliation more sure, and none are generally so cruel and uncivilizing, so that strict rules of war are here more necessary than any where else.⁷

³ As to general discussion on early writings, see e.g. L.C. Green, “What Is - Why Is There - The Laws of War?”, 5 *Finnish Yearbook of International Law* 99, 119-124 (1994).

⁴ See Green, *id.*, at 123.

⁵ Emer de Vattel, *The Law of Nations or the Principles of Natural Law: Applied to the Conduct and to the Affairs of Nations and of Sovereigns, Vol. III, Translation of the Edition of 1758 By Charles G. Fenwick With an Introduction by Albert de Lapradelle*, Book III, §294 (Michel E. Slatkine and Jiri Toman reprint eds., 1983) (James Brown Scott ed., 1916) (1758).

⁶ Henry Wheaton, *Elements of International Law*, § 296 (James Brown Scott ed., 1936) (Edition of Richard Henry Dana, Jr., ed. by George Grafton Wilson, 1866). Dana’s edition having been published in 1866, the main text was identical to an edition published in 1846. See *id.*, at 17a.

⁷ Theodore D. Woolsey, *Introduction to the Study of International Law, Designed as an Aid in Teaching, and in Historical Studies*, §136 (1860).

2.2.2. THE AMERICAN CIVIL WAR AND ITS AFTERMATH

The American Civil War observed the recognition of belligerency of the Confederacy. In April 1861 Lincoln declared blockade of ports,⁸ which has been regarded by many authors as recognition of belligerency of the Confederates by the lawful Government.⁹ The British declaration of neutrality followed the proclamation of the President, recognising the existence of hostilities “between the Government of the United States of America and *certain States styling themselves the Confederate States of America*”.¹⁰ Other States, such as France,¹¹ also recognised the belligerency of the Southern States.¹²

State practice during the American Civil War influenced scholars of international law, but it is questionable whether the recognition of belligerency became a firmly established rule during or soon after the Civil War. It seems that Twiss was one of the earliest writers who mentioned the recognition of belligerency.¹³ In 1863 he wrote:

Further, where there is a State of War *de facto* between parties, which cannot be preceded by a Declaration, as for instance in the extreme case of a Civil War, where part of a Nation has erected a distinct and separate government, the existence of a State of War, under such circumstances, is of necessity recognised by foreign Powers... .¹⁴

⁸ Reprinted in Williams Edward Hall, *A Treatise of International Law*, at 41 (Higgins ed., 8th ed., 1924).

⁹ E.g. Erik Castrén, *Civil War*, at 46 (1966).

¹⁰ House of Commons Parliamentary Papers, 1862 [2902] Vol. LXII. 1, mf 67.514, Correspondence relating to the Civil War in the United States of America, No. 35, Incl. Proclamation by the Queen. (Emphasis added).

¹¹ See 3 Alexander-Charles Kiss, *Répertoire de la Pratique Française en Matière de Droit International Public*, Doc. No. 128 (1965).

¹² Castrén, *supra*. note 9, at 45 and n.4.

¹³ Travers Twiss, *The Law of Nations Considered as Independent Political Communities. On the Rights and Duties of Nations in Time of War*, §§38, 239 (1863).

¹⁴ *Id.*, §38, (1863). The recognition of belligerency by a lawful government appears to have been closely related to the declaration of war, because the legitimate authorities could not declare war on a group

Notwithstanding this explicit statement, in the following part of his publication, he elucidated the recognition of belligerency only in reference to neutrality and did not explain whether such recognition would influence the conduct of hostilities.¹⁵ In addition, while Lieber's Code of 1863 was silent on the recognition of belligerency, it declared the applicability of the general principles and the laws of war to civil war.¹⁶

Opinions opposing the application of the laws of war or their principles to civil war appeared after the American Civil War. One of such views was an Editorial Comment of the *American Journal of International Law*:

[I]t would seem that there should be no insuperable difficulty of adapting the principles of [the 1906 Geneva Conventions] to a state of war existing within a state if as an essential precedent action the belligerency of the insurgents and of their establishment of a provisional government be recognized.¹⁷

According to this article, insurgents should receive the recognition of belligerency, pronounce their willingness to observe the laws of war, and request the Red Cross for assistance, before the Red Cross began to undertake its operations.¹⁸ This opinion seems to be in accordance with the fact that it was only in the International Conference

existing in its own territory. As to the declaration of war, see Christopher Greenwood, "The Concept of War in Modern International Law", 36 *ICLQ* 283 (1987).

¹⁵ Twiss, *id.*, §239, (1863).

¹⁶ Instructions for the Government of Armies of the United States in the Field, Section X, *reprinted in The Laws of Armed Conflicts*, No. 1, (Deitrich Schindler and Jiri Toman eds., 3rd. rev. and completed ed., 1988). Throughout this thesis, these Instructions are referred to as "Lieber's Code".

¹⁷ "The Red Cross in Civil Wars", 5 *AJIL* 438, 440 (1911) (the article also stated that the satisfaction of these strict requirements would be necessary for safe operations conducted by the Red Cross). As to ICRC activities in civil conflicts since its foundation in 1863, see generally Michael Veuthey, "Implementation and Enforcement of Humanitarian Law and Human Rights Law in Non-International Armed Conflicts: The Role of the International Committee of the Red Cross", 33 *AULR* 83, 84-89 (1983).

¹⁸ "The Red Cross in Civil Wars", *id.*, at 440.

of the Red Cross in 1921 when the Red Cross, particularly National Societies, considered assistance to victims of civil war their duty.¹⁹

In spite of such reluctance to regulate conduct of hostilities in civil war, many scholars, in fact, referred to the recognition of belligerency in relation to either declaration of war or neutrality rather than to the conduct of hostilities.²⁰ Dana only argued the recognition of belligerency by third States and its consequences.²¹ Twiss did not modernise his argument about the recognition of belligerency in the second edition of *The Law of Nations*.²² Woolsey, in the sixth edition of his *Introduction*, expounded the section concerning civil war, part of which was quoted above, in a more elaborate way than in the first edition.²³ He wrote:

With internal wars international law comes into contact so far as the laws of war, that is, of humanity and natural justice, are concerned, and also in the bearings of the war upon the interests and rights of foreign states... .

The same rules of war are required in such a war as in any other - the same ways of fighting, the same treatment of prisoners, of combatants, of non-combatants, and of private property by the army where it passes; so also natural justice

¹⁹ See International Committee of the Red Cross / International Federation of Red Cross and Red Crescent Societies, *Handbook of the International Red Cross and Red Crescent Movement*, at 784-786 (13th ed., 1994) [hereinafter *Red Cross Handbook*]. As to this Conference, see Georges Abi-Saab, "Non-International Armed Conflicts", in UNESCO, *International Dimensions of Humanitarian Law* 217, at 219 (1988). In the International Conference held in 1912 discussion of the problem of civil wars was refused. See Jean S. Pictet, *Red Cross Principles*, at 34 (1956).

²⁰ Sir Travers Twiss, *The Law of Nations Considered as Independent Political Communities. On the Rights and Duties of Nations in Time of War*, §239 (2nd ed. rev., 1875). This section is identical to the same numbered section in Twiss' first edition. See Twiss, *supra*. note 13, §239 (1863).

²¹ Wheaton, *supra*. note 6, at 29, n.15 and 314, n.153.

²² Twiss, *supra*. note 20, §§38, 239 (1875). These sections are identical to the corresponding sections of the first edition.

²³ Theodore D. Woolsey, *Introduction to the Study of International Law, Designed as an Aid in Teaching, and in Historical Studies*, §143 (6th ed. rev. enl., 1888).

demands the same veracity and faithfulness which are binding in the intercourse of all moral beings.²⁴

In this sixth edition, Woolsey inserted new sections regarding the recognition of belligerency, but it was discussed in the context of neutrality.²⁵ For instance he explained both the British proclamation of neutrality and President Lincoln's declaration of blockade, but his argument was limited to rules, such as blockade and captures of vessels, and did not extend to the actual conduct of warfare.²⁶

Apart from discussion about the recognition of belligerency, it seems that the codification of the laws of war, which started around the American Civil War, influenced the exclusion of their application to civil wars. The laws of war having developed as a branch of public international law, the humanitarian treaties have been codified by States and consequently they have been applicable to war between the ratifying States.²⁷ For instance, it was unthinkable that rebel groups, such as the Confederates, were allowed to partake of treaty-making procedures. The 1864 Geneva Convention implicitly referred to the problem of applicability; the treaty did not explicitly provide the scope of application, but usages of language, such as "Generals of the belligerent Powers", indicated the applicability of the convention to international war.²⁸ However, such vaguely worded ambits of application might have left room for interpretation, as Gustav Moynier, a founding member of the Institute of International Law, claimed that the 1864 Geneva Convention should be obeyed "in all

²⁴ *Id.*

²⁵ *Id.*, §§179-181.

²⁶ *Id.*, §180.

²⁷ See Frits Kalshoven in "Should the Laws of War Apply to Terrorism", 79 *Proceedings of ASIL* 109, 115 (1985).

²⁸ Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, *reprinted in supra.* note 16, No. 36, Article 5. Throughout this thesis, this Convention is referred to as "the 1864 Geneva Convention".

circumstances” because it was “a sort of declaration of humanitarian faith, a moral code”.²⁹

Then, the St. Petersburg Declaration proclaimed that the treaty would be invoked “in time of war between civilized nations”.³⁰ After that Declaration no multilateral treaty had referred to civil war,³¹ until 1949 when Common Article 3 was successfully inserted in the Geneva Conventions. Today certain conventions specialising in particular areas, such as the banning of landmines, cover both international and non-international armed conflicts, but disparity in the degree of protection continues to exist between the conventions applicable to international wars and the only multilateral treaty applicable to civil wars, namely Protocol II.

2.2.3. THE SPANISH CIVIL WAR AND ITS AFTERMATH

There was intense debate about the applicability of the laws of war to the Spanish Civil War in absence of the recognition of belligerency of the Nationalists.³² The fact is that neither the Spanish Government nor third parties to the war recognised the belligerency of the insurgents,³³ and discussion centred upon two points, i.e. maritime rights of the belligerents³⁴ and the policy of non-intervention.³⁵ What was lacking was

²⁹ Statement by Gustave Moynier, *reprinted in* André Durand, “The role of Gustave Moynier in the founding of the Institute of International Law (1873)”, *IRRC*, Nov.-Dec. 1994, at 543, 558. (The original text in italic). The source of the statement is not given in the article.

³⁰ Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight, *reprinted in The Laws of Armed Conflicts, supra.* note 16, No. 9.

³¹ Woolsey criticised the exclusion of civil war from the range of 1874 Brussel Declaration because such omission would “[leave] the parties in a civil war wholly unprotected”. Woolsey, *supra.* note 23, §142 (1888).

³² The following are major works about the legal aspects of the Spanish Civil War published during or just after the strife. Norman J. Padelford, *International Law and Diplomacy in the Spanish Civil Strife* (1939); George A. Finch, “The United States and the Spanish Civil War”, 31 *AJIL* 74 (1937); James W. Garner, “Questions of International Law in the Spanish Civil War”, 31 *AJIL* 66 (1937); Vernon A. O’Rourke, “Recognition of Belligerency and the Spanish War”, 31 *AJIL* 398 (1937); James W. Garner, “Recognition of Belligerency”, 32 *AJIL* 106 (1938); C.G. Fenwick, “Can Civil Wars Be Brought under the Control of International Law?”, 32 *AJIL* 538 (1938).

³³ See e.g. Garner, “Questions of International Law”, *id.*, at 66.

³⁴ See *id.*, at 71-73; O’Rourke, *supra.* note 32, at 402-8.

deliberation about rules concerning conduct of hostilities. Indeed the Spanish Government and the junta of Burgos formally accepted ICRC delegates.³⁶ The former described the ICRC mission as “that of protecting and gaining respect for the Red Cross emblem by the two parties and of facilitating the humanitarian work of the said institution”.³⁷ The latter was more explicit, as “It states its readiness to observe and respect, as it has always done and as it still does at every moment, the [1929] Geneva Convention relating to the wounded, sick and prisoners”.³⁸ As Cassese points out, there was foreign pressure on both parties to observe certain rules of warfare, but such a demand was made outside the framework of recognition of belligerency.³⁹ In practice, the ICRC reported difficulties in conducting their activities, e.g. visits to prisoners of war, but its delegates were still able to visit prisoners, which was followed by improvements in conditions of captives.⁴⁰ It appears to the present author that the recognition of belligerency was understood by authorities of the time to be more related to the law of neutrality than of conduct of hostilities.

In 1947 Lauterpacht published *Recognition in International Law* in which he fully explained the recognition of belligerency.⁴¹ In this publication, he dismissed the contention that the recognition of belligerency by a foreign State would contribute to ensuring the application of the laws of war in civil war because “experience shows”, he argued, “after an initial stage of severity ..., the parties to the civil struggle tacitly

³⁵ See Garner, *id.*, at 66-71; O'Rourke, *id.*, at 408-11; Fenwick, *supra*. note 32.

³⁶ *General Report of the International Red Cross Committee on its activities from August, 1934 to March, 1938*, Doc. No. 12a., at 126-128, (1938) [hereinafter *General Report*]. This document in the French text is referred to by Antonio Cassese, “The Spanish Civil War and the Development of Customary Law Concerning Internal Armed Conflict”, *Current Problems of International Law* 287, at 294 and n.8 (Antonio Cassese ed., 1975).

³⁷ *General Report, id.*, at 127.

³⁸ *Id.*, at 128.

³⁹ Cassese, *supra*. note 36, at 293-294.

⁴⁰ *General Report, supra*. note 36, at 113-115, (1938).

⁴¹ Hersch Lauterpacht, *Recognition in International Law* (1947).

accept and act upon most of the rules of war which have secured consent”.⁴² With adoption of the 1949 Geneva Conventions, Common Article 3 came into being, whose application is subject to only the existence of “armed conflict of not international character”.

2.2.4. WERE THE LAWS OF WAR APPLICABLE TO CIVIL WAR?

It has been demonstrated that the recognition of belligerency was more concerned with the law of neutrality and maritime rights than the law regarding the conduct of hostilities. Dana concentrated on third parties’ recognition of insurgents as belligerents,⁴³ and Twiss⁴⁴ and Woolsey⁴⁵ took similar views. With the arrival of the twentieth century, Oppenheim mentioned the recognition of belligerency of an insurgent group granted by both licit authorities and foreign States,⁴⁶ but he explained the consequence of such neutrality only in the context of neutrality.⁴⁷ Finally, Lauterpacht even regarded the “humanitarian argument” that humanitarian activities would follow the recognition of belligerency by third parties as “deceptive”.⁴⁸ Among today’s scholars who mention the recognition of belligerency, Abi-Saab points out that the recognition of belligerency of a rebel group by a rightful government conferred all the belligerent rights to the group, while such recognition by a third party gave it the status as a neutral.⁴⁹ Moir argues that, while the law of neutrality became applicable

⁴² *Id.*, §63.

⁴³ Dana’s notes in Wheaton, *supra*. note 6, at 29 n.15 and 314 n.153.

⁴⁴ Twiss, *supra*. note 20, §239 (1875).

⁴⁵ Woolsey, *supra*. note 23, §§179-181 (1888).

⁴⁶ L. Oppenheim, 2 *International Law*, §59 (H. Lauterpacht ed., 1935).

⁴⁷ *Id.*, §298.

⁴⁸ Lauterpacht, *supra*. note 41, §63.

⁴⁹ Abi-Saab, *supra*. note 19, at 218. See also Frits Kalshoven in “Should the Laws of War Apply to Terrorism”, *supra*. note 27, at 115 (stating that “recognition of belligerency by the incumbent government continued to be regarded as a precondition for application of the laws of war...”).

when third States recognise the belligerency of insurgents,⁵⁰ “recognition of belligerency tended to encourage the observance of the humanitarian rules of warfare, whereas an absence of recognition did the opposite”.⁵¹

It would be reasonable to conclude that the recognition of belligerency either by a legitimate or foreign government did play a little part in the conduct of hostilities between the warring parties, while the laws of war were to a certain extent applied and humanitarian activities took place in civil conflict when the magnitude of the conflict became severe, as the ICRC conducted its activities during the Spanish Civil War. Therefore, the laws of war, particularly the “Geneva” law, became applicable to internal war only after Common Article 3 was established, and the undertaking to ascertain customary law in this area should date back to 1949.

2.3. THE GENERAL PRINCIPLES OF THE LAWS OF WAR

2.3.1. SOURCES OF THE GENERAL PRINCIPLES OF THE LAWS OF WAR

There are three sources of the general principles of the laws of war. Part of the general principles of the laws of war originated from natural law and therefore they are ethical expectations.⁵² Positivism prevailed in the nineteenth century,⁵³ but the general principles as moral expectations remained continuously applicable to civil wars. De Vattel is regarded as an early positivist,⁵⁴ but he argued: “A lawful end confers a right only to those means which are necessary to attain that end. Whatever is done in excess

⁵⁰ Lindsay Moir, “The Historical Development of the Application of Humanitarian Law in Non-International Armed Conflicts to 1949”, 47 *ICLQ* 337, 341 (1998).

⁵¹ *Id.*, at 346 (footnote omitted).

⁵² The theoretical problems of naturalism and positivism are out of the scope of this thesis. See *International Rules* (Robert J. Beck et al ed., 1996); Hilare McCoubrey, “Natural Law, Religion and the Development of International Law”, in *Religion and International Law* 177 (Mark W. Janis and Carolyn Evans eds., 1999).

⁵³ See Abi-Saab, *supra*. note 19, at 218.

⁵⁴ *International Rules*, *supra*. note 52, at 56.

of such measures is contrary to the natural law, and must be condemned as evil before the tribunal of conscience”.⁵⁵

Another part emanated from principles, which were incorporated in domestic instruments, e.g. military manuals. The most pertinent example would be Lieber’s Code, which included such principles as military necessity,⁵⁶ proportionality,⁵⁷ humanity⁵⁸ and distinction.⁵⁹ The British military manual refers to the principles that the use of force is justified “to the extent necessary for the realisation of the purpose of war”, and the principles of humanity and of chivalry.⁶⁰ The new German military manual alludes to military necessity and humanity as two major principles, and also to others, such as the principle of military objectives and the prohibition of unnecessary sufferings.⁶¹

The third category of the general principles is the principles developed by the Red Cross Movement.⁶² Pictet referred to the following as the Fundament Principles of the Red Cross: Humanity, Equality, Due Proportion, Impartiality, Neutrality, Independence, and Universality.⁶³ The Preamble of the Statutes of the International Red Cross and Red Crescent Movement adopted in 1986 provides the Fundamental Principles of Humanity, Impartiality, Neutrality, Independence, Voluntary Services,

⁵⁵ See de Vattel, *supra*. note 5, Book III, §137. McCoubrey found “The combination of naturalist and positivist elements” in de Vattel’s work. McCoubrey, *supra*. note 50, at 185.

⁵⁶ Lieber’s Code, Articles. 14-16.

⁵⁷ Lieber’s Code, Articles 27-28 (providing retaliation, though the principle of proportionality can be read, particularly from Article 28).

⁵⁸ *Id.*, Article 152.

⁵⁹ *Id.*, Articles 22, 155.

⁶⁰ The War Office, *The Law of War on Land being Part III of the Manual of Military Law*, para. 3 (1958).

⁶¹ *The Handbook of Humanitarian Law in Armed Conflict*, §§130-132 (Dieter Fleck ed., 1995).

⁶² As to the concise history of the Red Cross principles, see Jean-Luc Blondel, “The Fundamental Principles of the Red Cross and Red Crescent: Their origin and development”, *IRRC*, Jul.-Aug. 1991, at 349.

⁶³ Jean S. Pictet, *Red Cross Principles*, at 11-91 (1956).

Unity and Universality.⁶⁴ The Red Cross' fundamental principles are construed in the context of Red Cross activities. For instance, Pictet held that "the general principle of humanity" assumed broader implication than "the principle of humanity", discussed in his work.⁶⁵ The principle of proportionality, which he suggested, was interpreted in such a way as to apportion help "according to the relative importance of individual needs and in their order of urgency".⁶⁶

Attempts to combine the three types of the general principles would be not only extremely difficult but also damaging to the uniqueness of each principle. However, the common feature of the three categories would be moral expectations⁶⁷ to be observed by States, rebels and the Red Cross. As discussed, natural law tradition is based upon morality, while the Red Cross principles also assume the ethical responsibility of the organisation, as well as the legal one as incorporated in its Statute. Domestic instruments embodying principles may be of legal significance, but they often cannot disassociate themselves from morality, as Lieber's Code indicates.

2.3.2. THE CUSTOMARY STATUS OF THE GENERAL PRINCIPLES OF THE LAWS OF WAR

In the light of international war, the accumulation of State practice and *opinio juris* transformed the general principles of the laws of war into customary.⁶⁸ In terms of

⁶⁴ Statutes of the International Red Cross and Red Crescent Movement, Preamble, *reprinted in Red Cross Handbook*, *supra*. note 19, at 417-418.

⁶⁵ Pictet, *supra*. note 63, at 21 n.1.

⁶⁶ *Id.*, at 41.

⁶⁷ See Rosemary Abi-Saab, 'The "General Principles" of humanitarian law according to the International Court of Justice', IRRC, Jan.-Feb. 1987, at 367, 370-371 ("Considerations of humanity" would thus represent general principles, or an ethical or moral basis, applying in all circumstances, in times of peace as well as in times of armed conflict. The more specific "principles of humanitarian law" would be those implementing the principles of humanity in circumstances of actual or potential armed conflict.').

⁶⁸ See Esjörn Rosenblad, *International Humanitarian Law of Armed Conflict*, at 11 (1979) ("Some major principles of international humanitarian law have been recognized in customary and treaty law as well as in codification efforts").

civil war, however, only part of the general principles has become customary international law because of a lack of State practice and *opinio juris*, as well as treaty provisions. This view partly agrees with Kalshoven who argues that the same “standards of civilizations”, or in other words “certain basic precepts of international humanitarian law”, ought to be applied to both international and internal conflicts.⁶⁹ According to him, those precepts include the principles of the protection of civilians and of the prohibition of unnecessary sufferings.⁷⁰ However the opinion of the present author differs from that of Kalshoven in that the latter considers the precepts to be customary law without questioning their origin as law.⁷¹ An article of Protocol II can be an interpretation of a general principle of the laws of war,⁷² but the general principles of the laws of war have not amounted to law in the area of non-international armed conflict because of want of practice and *opinio juris*.

2.3.3. WHAT ARE THE GENERAL PRINCIPLES OF THE LAWS OF WAR?

What constitute the general principles of the laws of war vary among writers and relevant institutions.⁷³ Rogers refers to military necessity, humanity, distinction and proportionality, while Roberts and Guelff to limited means of injuring the enemy, proportionality and discrimination.⁷⁴ The British military manual refers to “the principles that a belligerent is justified in applying compulsion and force of any kind”, humanity and chivalry.⁷⁵ Indeed, the general principles of the laws of war are inter-

⁶⁹ Frits Kalshoven, “Applicability of Customary International Law in Non-International Armed Conflicts”, in *Current Problems of International Law* 267, at 272, 280 (Antonio Cassese ed., 1975).

⁷⁰ *Id.*, at 281-283.

⁷¹ *Id.*

⁷² Georges Abi-Saab, “The 1977 Additional Protocols and General International Law: Some Preliminary Reflections”, in *Humanitarian Law of Armed Conflict Challenges Ahead: Essays in Honour of Frits Kalshoven* 115, 120 (Astrid J.M. Delissen and Gerard J. Tanja eds., 1991).

⁷³ See e.g. A.P.V. Rogers, *Law on the Battlefield*, at 1-26 (1996); *Documents on the Laws of War*, at 9-10 (Adam Roberts and Richard Guelff ed., 3rd ed., 2000).

⁷⁴ Rogers, *id.*; *Documents on the Laws of War*, *id.*

⁷⁵ The War Office, *supra*. note 60, para. 3.

related and whether one categorises them into three or four or more does not make a difference. The present writer, however, uses Rogers' categorisation, for his list of the principles of the laws of war appears to be in accordance with the historical development of those principles.

2.3.3.1. HUMANITY⁷⁶

Among early scholars, de Vattel and Woolsey referred to the principle of humanity, and such well-known domestic instruments as Lieber's Code, British and German Military Manuals all allude to this principle.⁷⁷ In addition, "If the Red Cross were to have only one principle", Pictet argued, "this [the principle of humanity] would be it".⁷⁸ Rogers concisely interprets this principle as "a guiding principle which puts a brake on undertakings which might otherwise be justified by the principle of military necessity".⁷⁹ Without humanity, it might be militarily necessary to kill the prisoners of war so that enemy population could be reduced in number, but the principle of humanity could prevent such atrocity.⁸⁰ One principle which originates from this general principle of humanity is the prohibition of rendering unnecessary sufferings,⁸¹ which was embodied in the St. Petersburg Declaration.

2.3.3.2. MILITARY NECESSITY⁸²

As the "General principle of the rights of a sovereign against his enemy in a just war", de Vattel referred to the principle of military necessity, since a State was, he argued,

⁷⁶ Rogers, *supra*. note 73, at 6-7.

⁷⁷ See de Vattel, *supra*. note 5, Book III, §294; Woolsey, *supra*. note 7, §136 (1860); the War Office, *supra*. note 60, para. 3; *The Handbook of Humanitarian Law in Armed Conflict*, *supra*. note 61, §131.

⁷⁸ Pictet, *supra*. note 63, at 14.

⁷⁹ Rogers, *supra*. note 73, at 7.

⁸⁰ *Id.*, at 7.

⁸¹ Pictet, *supra*. note 63, at 17-18.

⁸² Rogers, *supra*. note 73, at 3-6.

entitled “to make use of all the means necessary to attain it” to pursue the purpose of a just war.⁸³ As only instruments necessary to weaken an enemy can be taken, this principle incorporates another principle that the means and methods to injure the enemy is limited.⁸⁴

Balance must be struck between military necessity and humanity; international humanitarian law is premised on the existence of armed conflict, and disregarding military necessity would be against the premise of the law.⁸⁵ However international humanitarian law does not always give the military a free hand to decide what is militarily necessary.⁸⁶ For instance, Article 14 of Protocol II, which prohibits the starvation of civilian populations, leaves no room for military necessity.⁸⁷ Moreover, as this thesis presents, States and rebels tend to deny the existence of or their involvement in atrocities, and it is indeed rare to resort to this principle by claiming that it was militarily necessary to kill, for instance, detainees.

2.3.3.3. DISTINCTION⁸⁸

War having been waged between regular troops, de Vattel contended, those who did not participate in hostilities “have nothing to fear from the sword of the enemy”.⁸⁹ Woolsey explained the same principle in different words; he argued “That war is waged between governments by persons whom they authorize, and is not waged

⁸³ De Vattel, *supra*. note 5, Book III, §136. Wheaton and Woolsey also referred to this principle. Wheaton, *supra*. note 6, §§343, 345; Woolsey, *supra*. note 7, §125 (1860).

⁸⁴ De Vattel, *id.*, §§139-140. Roberts and Guelff regard this principle that “means of injuring the enemy is not unlimited” as one of “the most fundamental customary principle”. *Documents on the Laws of War*, *supra*. note 73, at 9.

⁸⁵ See Rogers, *supra*. note 73, at 7.

⁸⁶ See *id.*

⁸⁷ This Article is not customary, as discussed in *infra*. Ch. 8.

⁸⁸ Rogers, *supra*. note 73, at 7-14.

⁸⁹ De Vattel, *supra*. note 3, Book III, §147.

against the passive inhabitants of a country”.⁹⁰ This principle was codified in the St. Petersburg Declaration, and it has been particularly the case with distinction between military and civilian objects.⁹¹ Even though Protocol II does not use the term “the principle of distinction” as such, this principle is incorporated in Part IV of Protocol II,⁹² in particular Article 13.

2.3.3.4. PROPORTIONALITY⁹³

The principle of proportionality developed with close relation to reprisals⁹⁴ and the prohibition of causing unnecessary damages, particularly, to civilians. According to earlier writers, the obligations of the laws of war were reciprocal, and the disobedience of the laws brought retaliation.⁹⁵ De Vattel considered it permissible to kill, in retaliation to the killing of prisoners by an enemy general, the same number of enemy prisoners whose rank is the same as those who were killed by the general.⁹⁶ As a more recent example, the German Military Manual states:

Reprisals shall not be excessive in relation to the offence committed by the adversary and shall be preceded by a warning. They must be the last resort, when all other means to stop the illegal behaviour have failed and the warning has not been heeded.⁹⁷

⁹⁰ Woolsey, *supra*. note 7, §125 (1860). Wheaton also referred to this principle, even though he argued in the context of military necessity. Wheaton, *supra*. note 6, §345.

⁹¹ Rogers, *supra*. note 73, at 7.

⁹² According to Rosenblad, Articles 7 and 14 to 18 of Protocol II contain this principle. See Rosenblad, *supra*. note 68, at 101 and n.266.

⁹³ Rogers, *supra*. note 73, at 14-19.

⁹⁴ Belligerent reprisals is discussed in *infra*. Ch. 9.

⁹⁵ Woolsey, *supra*. note 7, §§125-126 (1860); de Vattel, Book III, *supra*. note 5, §§137, 142.

⁹⁶ De Vattel, *id.*, §142. Woolsey took a more cautious approach, but he made a few small, but interesting changes in his text. Compare Woolsey, *supra*. note 7, §126 (1860) with Woolsey, *supra*. note 23, §132 (1888).

⁹⁷ *The Handbook of Humanitarian Law in Armed Conflict*, *supra*. note 61, §478. It, however, prohibits reprisals against certain categorised persons. *Id.*, §479.

It also provides:

Attacks on military objects must not cause loss of civilian life which is excessive in relation to the concrete and direct military advantage anticipated.⁹⁸

This principle may be abused to excuse a brutal act which can take form as an act of reprisal, but it is true that without the principle there would be more plight of victims, as civilians are protected from excessive damages by the proportionality principle.⁹⁹ Thus, this principle is valid to make a balance between the principles of humanity and military necessity.¹⁰⁰

2.3.4. THE GENERAL PRINCIPLES OF THE LAWS OF WAR TODAY: HOW EFFECTIVE?

The Martens clause, which originally appeared in Hague Convention IV of 1907, is also incorporated into Protocol II.¹⁰¹ The Preamble of Protocol II provides:

... 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...

In the Diplomatic Conference, there were objections to the insertion of the Martens clause in Protocol II, which enjoyed considerable support.¹⁰² A proposal to delete the

⁹⁸ *Id.*, §509.

⁹⁹ See Antonio Cassese, "Means of Warfare: The Traditional and the New Law", in *The New Humanitarian Law of Armed Conflict* 161, 165 (Antonio Cassese ed., 1979).

¹⁰⁰ Rogers, *supra*. note 73, at 14.

¹⁰¹ As to this clause, see e.g. *The Handbook of Humanitarian Law in Armed Conflict*, *supra*. note 61, §129 and its commentary; Rogers, *supra*. note 73, at 6-7.

¹⁰² The Nigerian proposal to delete a preamble was rejected (32/19/27). 9 OR, CDDH/I/SR.76, para. 18, at 476. Throughout this thesis, the *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974-1977)* are abbreviated as "OR". The above figures (32/19/27) represent the voting result, as 32 States in favour, 19 against with 27 abstentions. Throughout this thesis, voting results in the Diplomatic Conference are referred to in this way.

phrase “the dictates of the public conscience” also received substantial backing.¹⁰³ According to Indonesia, this phrase “is not completely clear and is confusing from the legal point of view”.¹⁰⁴ The adoption of the Preamble was made by consensus,¹⁰⁵ but strong opposition to the inclusion of the Martens clause in Protocol II reveals that it was not customary at the time of the Diplomatic Conference.

Indeed, doubt should be cast to the proposition that the Martens clause ought to be customary only because the Martens clause has been inserted into humanitarian law over and over, including the 1949 Geneva Conventions.¹⁰⁶ The Martens clause in Protocol I¹⁰⁷ refers to “the protection and authority of the principles of international law derived from established custom” while the Preamble of Protocol II omits this phrase.¹⁰⁸ *The ICRC’s Commentary* explains that this Preamble does not deny the existence of “established custom”,¹⁰⁹ and that “the principles of international law apply in all armed conflicts” according to the Martens clause.¹¹⁰ However, whether or not there is the Martens clause in a humanitarian treaty, custom is applicable to all States.¹¹¹ Besides, the general principles of the laws of war are more moral expectations than law, and whether they are inserted in the Martens clause or not, they are ethically expected to be conformed to by both States and rebels. In practice, the Martens clause has not been invoked in non-international armed conflict, and its usefulness seems to be limited.

¹⁰³ The proposal was rejected (35/21/21). 9 OR, CDDH/I/SR.76, para. 28, at 477-478.

¹⁰⁴ Indonesia, 9 OR, CDDH/I/SR.77, ANNEX, at 500.

¹⁰⁵ 7 OR, CDDH/SR.54, para. 43, at 170

¹⁰⁶ Articles 63(I)/62(II)/142(III)/158(IV).

¹⁰⁷ Article 1(2), Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 UNTS 3 (1979). Throughout this thesis, this Protocol is referred to as “Protocol I”.

¹⁰⁸ See Green, *supra*. note 3, at 140.

¹⁰⁹ *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, para. 4435 (Yves Sandoz, Christophe Swinarski, and Bruno Zimmermann, eds., 1987). Throughout this thesis, this Commentary is referred to as “*the ICRC’s Commentary*”.

¹¹⁰ *Id.*, para. 56. (Footnotes omitted).

Notwithstanding the contention that the Martens clause is not customary and does not have to be customary, the general principles of the laws of war can play an important part in ameliorating victims of internal strife. The significance of these principles is that they can be morally applicable to areas which are not regulated by specific rules based on convention and/or custom.¹¹² For instance, the principle of the protection of civilians¹¹³ is codified in Article 13 of Protocol II,¹¹⁴ and this general provision can cover large areas which are not explicitly regulated by international humanitarian law. In Chapter 8, it is argued that this provision is not customary, primarily because of a lack of practice, but even in an internal conflict not covered by Protocol II, it is expected that legitimate authorities and a dissident group observe the general principles of the laws of war. Although the Martens clause has not been resorted to either by States or rebels in civil war, “principles” have been invoked on various occasions. For instance, in its judgments, the ICJ resorted to “elementary considerations of humanity”¹¹⁵ and “the principles of humanitarian law”.¹¹⁶ In conclusion, it would be necessary to pay more attention to the general principles of the laws of war, since the customary rules on internal war are, as the following chapters demonstrate, still limited today.

¹¹¹ *Documents on the Laws of War*, *supra*. note 73, at 7.

¹¹² But see Cassese, *supra*. note 99, at 165-6 (arguing that the general principles are vaguely worded and being sceptical of their implementation).

¹¹³ This principle originates from all four general principles of the laws of war.

¹¹⁴ *The ICRC's Commentary*, §4761. However, the present author considers that Article 13 is not customary because of a lack of practice. See *infra*. Ch. 8.

¹¹⁵ *Corfu Channel case, Judgment of April 9th, 1949, ICJ Report 1949, p. 4, at 22.*

¹¹⁶ *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, ICJ Reports 1986, p. 14, para. 215.* See analysis on the general principles made by Rosemary Abi-Saab, *supra*. note 67.

CHAPTER 3

THE JAPANESE CIVIL WAR¹

3.1. INTRODUCTION²

On January 28, 1868 war broke out between the Imperial and Shogun Forces near Kyoto, the then capital of Japan. The war spread northwards and continued until the last remainder of the Shogun Forces was defeated on Hokkaido on May 18, 1869. The political consequences of the Civil War are noteworthy: after the war the new Imperial regime was firmly established and modern Japan began to emerge.

The Civil War is also significant from the perspective of the laws of war. First, the Civil War is one of the rare examples in which third parties to the conflict explicitly recognised the belligerency of both the Government and rebel forces. Furthermore, the war was waged in accordance with the laws of war, to a certain degree. For instance,

¹ For this chapter, the author often relies on diplomatic documents of Great Britain, France and the USA as well as those of Japan.

Concerning Japanese documents, he uses Gaimusho Chosabu [Ministry of Foreign Affairs, Research Department] (ed.), *Dai Nippon Gaiko Monjo [Japanese Diplomatic Documents]* [hereinafter J.D.D.].

Regarding British documents, he uses General Correspondence, Japan, F.O. 46, which is held on microfilm by the Library of the Historiographical Institute of the University of Tokyo. The description of each document is in accordance with *Historical Documents Relating to Japan in Foreign Countries, Vols. VI, The United Kingdom, Part I (1966); Vol. VII, The United Kingdom, Part II (1967)*.

Regarding American documents, he uses General Records of the Department of State (R.G. 59), Diplomatic Correspondence, Despatches from United States Minister to Japan, which is held on microfilm by the Library of the Historiographical Institute of the University of Tokyo. The description of each document is in accordance with *Historical Documents Relating to Japan in Foreign Countries, Vol. IX, The United States of America, Part I (1968)*.

Regarding French documents, he uses Correspondence Politique Japon [hereinafter C.P.J.], 1854-1871, part of which is reproduced in a typewritten form as *Documents sur la Relation diplomatique Franco-Japonais, 1854-1871, quie etaient choisis des Correspondences du Ministère des Affaires Etrangères de la France par M. Takematsu OTSUKA, en 1929* and which is held by the Library of the Historiographical Institute of the University of Tokyo. The description of each document is in accordance with *Historical Documents Relating to Japan in Foreign Countries, Vol. XIII, France (1965)*.

² In this thesis, the present author follows the Japanese system of order of names in which surnames come first, given names second. He also uses the most well-known given names because it was not uncommon for the Japanese to change their given names at that time. With respect to the calendar, Japan was using the lunar calendar during the Civil War but in this account the writer uses the Gregorian calendar unless otherwise indicated. Regarding the Japanese titles of publications and Japanese names of institutional

Japanese and English doctors cared for the wounded and sick on the battlefield. In naval battles, the tactics of using false flags were employed. Such facts being of great historical significance, the purpose of this work is to elaborate how the laws of war of that time were applied in the Japanese Civil War.

3.2. BACKGROUND

In 1600 Tokugawa Ieyasu established a new Shogun regime (Shogunate or *bakufu*) which was dominated by the Tokugawa clan and continued for 260 years.³ During the Edo period, as this Tokugawa era is called,⁴ Japan maintained a strict isolationist policy. All trade was banned except with the Netherlands and China.⁵ Domestically, in spite of the supremacy of the Tokugawa family, Japan was divided into about 200 domains or *han* ruled by feudal lords or daimyo, each of which was virtually independent. A rigid class system was established in which the samurai ruled over the farmers, craftsmen and merchants. Japan was generally peaceful, both domestically and internationally, during most of the Edo period. However, a new era began when Commodore Perry of the United States of America arrived in Japan in 1853 and forced the Shogun Government to sign a treaty that established trade with the United States.⁶ The Shogun regime reluctantly signed treaties with the USA and later with Great Britain, France, Russia and

editors, the author translates them into English and places the translation in square brackets after the original Japanese titles or names.

³ Shogun was usually referred to as “Tycoon” in diplomatic documents and treaties.

⁴ Edo was renamed Tokyo and the city became the capital of Japan in 1868. Edo was referred to as Yedo or Yeddo in diplomatic documents and treaties.

⁵ Although the Shogunate feared invasion by European States, it allowed trade with the Netherlands because it considered Protestantism less ambitious than Catholicism.

⁶ Treaty of Peace and Amity Between the United States of America and the Empire of Japan, (signed in 1854, ratifications exchanged in 1855) [hereinafter 1854 US-Japan Treaty], Gaimusho Joyakukyoku [The Ministry of Foreign Affairs, Treaties Bureau], *Kyujoyaku Isan [Recueil des traités et conventions entre le Japon et les puissances étrangères]*, Vol 1-1, at 1 (1930). See also Convention Between Great Britain and Japan, (signed in 1854, ratifications exchanged in 1855) [hereinafter 1854 Anglo-Japan Treaty], *id*, Vol. 1-2, at 1 (1934). The title of the above treaty series is given both in Japanese and French.

the Netherlands in 1858.⁷ But many of the samurai were infuriated by these forced treaties, which led to movements against the Tokugawa Government. The Satsuma and Choshu *han* played the most important role in these movements.⁸ Earlier, both the Satsuma and Choshu had taken extreme anti-foreign attitudes, which resulted in wars with foreign Powers,⁹ but after the wars the two daimyo began to establish friendly relationships with them, particularly with Great Britain because they realised the economic, military and naval superiority of European Powers. The domestic conflict worsened and Tokugawa Yoshinobu, the last Shogun, returned power to Emperor Meiji on November 9, 1867¹⁰ and the restoration of Imperial rule was declared on January 3, 1868.¹¹ Nevertheless, tension between the Imperial and Shogun sides continued to exist and on January 27, 1868 war broke out.

In spite of the general hatred of foreigners which existed in Japan during this tumultuous time, the influence that Britain and France had on Japanese politics is significant.¹² Britain had commercial interests in Japan and strong ties with the

⁷ See Treaty of Amity and Commerce Between the United States of America and the Empire of Japan, (signed in 1858, ratifications exchanged in 1860), *id.*, Vol. 1-1, at 13; Treaty of Peace, Amity and Commerce Between Great Britain and Japan, (signed in 1858, ratifications exchanged in 1859) [hereinafter 1858 Anglo-Japan Treaty], *id.*, Vol. 1-2, at 8; and *Traité de paix, d'amitié et de commerce entre le Japon et la France*, (signed in 1858, ratifications exchanged in 1859), *id.*, Vol. 1-1, at 813. Hereinafter, the USA and major European Powers that signed treaties with Japan are referred to as "Treaty Powers" and their representatives in Japan as "Foreign Representatives".

⁸ The Satsuma *han* is today's Kagoshima prefecture that is located in the southern part of Kyushu, while the Choshu *han* is today's Yamaguchi prefecture in the southern part of Honshu. Choshu was also referred to as Choshu in diplomatic documents and treaties.

⁹ In retaliation to the killing of a British subject by Satsuma's samurai, British men-of-war attacked the city of Kagoshima, Satsuma, in 1863 and this resulted in the burning of a large area of the city. In the same year, Choshu bombed foreign vessels and in return American, British, Dutch and French ships attacked the cannons in Choshu and occupied the surrounding areas. See Sir Ernest Satow, *A Diplomat in Japan*, 84-133 (Charles E. Tuttle 1983) (1921). Satow began his career as interpreter for the British Legation in Japan in 1862 and returned to Britain as Secretary in 1869. He worked as a diplomat three times in Japan and was Resident Minister in Tokyo between 1895 and 1900.

¹⁰ J.D.D., Vol. 1-1, Doc. No. 1, Nov. 9, 1867. Emperor was usually referred to as Mikado in diplomatic documents and treaties.

¹¹ F.O. 46-91, No. 9, Encl. 5: Imperial decree abolishing the Taikunate & other offices.

¹² See Ikei Masaru, *Zohō Nihon Gaikoshi Gaisetsu [The History of Japanese Diplomacy, revised and enlarged]*, at 24-31 (1989).

Imperial side, especially with the Satsuma and Choshu.¹³ Sir Harry S. Parkes, the British Minister, was the first foreign minister who submitted his credence to the Emperor¹⁴ and he also persuaded his colleagues to withdraw neutrality that worked against the Imperial Government.¹⁵ France, on the other hand, supported the *bakufu*¹⁶ and for example she assisted it to build an arsenal in Yokosuka and sent military instructors who trained samurai of the Shogunate.¹⁷ Léon Roches, the French Minister, was a vigorous supporter of the Shogun and stated, even after Tokugawa Yoshinobu returned his power to the Emperor and the war broke out, that “[t]he Tycoon has neither renounced to govern nor execute the Treaties. Far from this, one could rather believe that he would be ready to extend them, and to put himself at the head of the foreign party.”¹⁸ Roches was, however, replaced by Max Outrey in May 1868 because a new French Foreign Minister was less enthusiastic about a relationship with Japan, and Roches’ policy towards the Shogun Government came to an end.¹⁹ Regarding the American policy towards Japan, despite the fact that it was the USA that had opened up the country, her diplomatic influence was limited due to her preoccupation with her own civil war.²⁰ Nevertheless, Robert B. Van Valkenburgh, the American Minister and a veteran of that war, reported the progress of the Japanese Civil War in considerable detail in his despatch to Seward, Secretary of State. Furthermore, his amicable attitude towards the northern daimyo and the exiled retainers is quite different from that of his British and French counterparts.

¹³ One of the best works that illustrate the British policy on Japan would be Satow, *supra* note 9. See also Ikei, *id.* at 28-31.

¹⁴ See *infra*. 3.4.1. The Sovereignty of Japan and the Legitimacy of Government.

¹⁵ See *infra*. 3.4.6. The End of the War in the North and the Cessation of Neutrality.

¹⁶ See Ikei, *supra* note 12, at 28.

¹⁷ See Takahashi Kunitaro, *Oyatoi Gaikokujin 6 Gunji [Foreigners Employed by the Imperial Government, Vol. 6, Military]*, at 72-170 and 171-208 (1969).

¹⁸ R.G. 59, R. 9, No. 11, Encl. 1: Memorandum addressed to his colleagues by Mr. Léon Roches. Kobé, Feb. 6, 1868. [Translator unknown.]

¹⁹ Ikei, *supra* note 12, at 30-31.

²⁰ *Id.*, at 24.

3.3. THE PROGRESS OF THE JAPANESE CIVIL WAR

The purpose of this research is to examine the extent to which the laws of war were applied during the Japanese Civil War and a detailed account of the engagements should be found elsewhere.²¹ However, it is necessary here to explain the progress of the Civil War briefly in order to examine its legal aspects. The Japanese Civil War can be divided into four main stages: operations in Toba-Fushimi, Edo, the north and Hakodate. The battle at Toba-Fushimi near Kyoto was won by the Imperial Forces mainly because the Satsuma and Choshu had better arms and their morale was high.²² The battle was heavily fought with weapons of the latest models, as evidenced by the Shogun Government's statement that "there were a good many killed and wounded" and that artillery, cannon and musketry were used.²³ Similarly, the US legation reported that "the losses on both sides were very large principally in officers" and that the latest breechloading rifles and rifled artillery were used.²⁴ The battle at Toba-Fushimi was virtually the only significant battle at the early stage of the Civil War, followed by small and relatively insignificant skirmishes that continued until the Imperial Forces arrived in Edo.

Tokugawa Yoshinobu having submitted to the Emperor, Katsu Kaishu and Saigo Takamori, representing the Shogun and Imperial Governments respectively, came to an agreement that the Edo castle, the residence of the Tokugawas, would be peacefully

²¹ See, for instance, Oyama Kashiwa, *Boshin Sensoshi, Joge [History of the Japanese Civil War, Vols. 1&2]* (1968).

²² Ishii Takashi, *Boshin Senso Ron, [The Japanese Civil War]*, at 104-105 (1986). Griffis wrote apparently in favour of the Imperial Government: "Two thousand riflemen and artillerists, with arms and tactics in modern style directed by Saigo opposed ten thousand men cased in helmets and armor and equipped, for the most part, with arrow, sword, and spear." William Elliot Griffis, *The Mikado*, at 127 (1915).

²³ See F.O. 46-91, No. 13, Encl. 9: Japanese Government account of engagement at Fushimi and Yodo. [translated by Satow.] The original in J.D.P., Vol. 1-1, Doc. No. 82, Jan. 28, 1868. No date was shown in the British document but according to the Japanese document it was produced on Jan. 28, 1868.

transferred to the Imperial Forces. The peaceful hand-over of the castle was achieved, but there were a small number of retainers of the *bakufu* who were not satisfied with this transfer and on July 4, 1868 they fought against the Imperial Forces at Ueno, only a few kilometres north of the castle. The retainers were, however, overwhelmed by both the number and weaponry of the Imperial Forces and the battle resulted in the latter's complete victory in one day.²⁵

Many feudal lords in the northern part of Honshu, headed by the Aizu *han*,²⁶ were discontented with the new Imperial Government and they formed an alliance, even though their confederation had neither firm political principles nor unified military organisation, a situation which resulted in the defection of some daimyo from the alliance.²⁷ On the Echigo front, the Imperial Forces had to fight during the entire summer of 1868 in order to defeat the Nagaoka clan, who resisted fiercely. After the victory, however, the Imperial Forces were able to concentrate their power on the last stronghold of the northern daimyo, Aizu, which had been the main enemy of the Imperial Forces since the battle at Toba-Fushimi, and the Aizu *han* surrendered on November 6, 1868.

After the triumph of the Imperial Forces at Edo, a group of discontented retainers of the Shogun, headed by Enomoto Takeaki, seized eight vessels of war that had belonged to the *bakufu*.²⁸ These retainers, who regarded themselves as exiled *kerais* (retainers), sailed to the north on October 4, 1868 and attacked and occupied Hakodate on

²⁴ See R.G.59, R. 9, Portman to W.H. Seward. Yokohama, Feb. 15, 1868. This document is not numbered.

²⁵ See F.O. 46-95, No. 169, Encl. 3: Statement and list of hostilities in Yedo [n.d.].

²⁶ Aizu was referred to as Aidzu in diplomatic documents

²⁷ Regarding this alliance, see Hoshi Ryoichi, *Ouetsu Reppan Domei [The Alliance of Northern Han]* (1995).

²⁸ See F.O. 46-97, No. 260, Encl. 2: Statement by [Higashi Kuze Chiujo]. Oct. 10, 1868.

December 8, 1868.²⁹ The Imperial Forces were unable to react quickly because of the severe winter of Hokkaido and it was only in May 1869 that they began to undertake operations against the insurgents both on land and at sea, among which operations the Battles of the Miyako and Hakodate Bays are well-known.³⁰ There were foreign residents in Hakodate because it was an open port³¹ and therefore the Treaty Powers paid great attention to the conflict there. The Imperial Forces successfully advanced both from land and sea and Enomoto surrendered on June 27, 1869.

3.4. THE RECOGNITION OF BELLIGERENCY BY MAJOR POWERS AND ITS EFFECT

3.4.1. THE SOVEREIGNTY OF JAPAN AND THE LEGITIMACY OF GOVERNMENT

What is peculiar about the recognition of belligerency in the Japanese Civil War is that the sovereignty of Japan was not well-defined and the Foreign Representatives did not necessarily agree about which Government was legitimate, the Imperial or the Shogun Government.³² The early treaties were signed between the Shogun and Great Powers and therefore the Shogun was considered to be the sovereign of Japan.³³ For example, in the treaty of 1858 between Japan and Great Britain, the term “His Majesty the *Tycoon* of Japan” was used to equal “Her Majesty the Queen of the United Kingdom of Great Britain and Ireland.”³⁴ Furthermore, Article 2 of the British Order in Council of

²⁹ The exiled *kerais* issued a proclamation explaining their intention to the foreign representatives. See “Document Circulated among all the Foreign Consuls at Hakodate on 6th Dec. Translation. The Exiled Tokugawa Kerai to the Representatives of European Powers”, *The Japan Times' Overland Mail* (Yokohama), Dec. 30, 1868, Vol. 5., No. 82, at 316, *reprinted in Nihon Shoki Shimbun Zenshu [Early Newspapers in Japan]* [hereinafter *Early Newspapers*], Vol. 20 (Kitane Yutaka ed., 1989), at 10.

³⁰ See e.g. “Naval Engagement in Miaco Bay”, *The Japan Times' Overland Mail* (Yokohama), May 14, 1869, Vol. 7, No. 92, at 117, *reprinted in Early Newspapers, id.*, Vol. 22 (1990), at 197; and “The Fall of Hakodate”, *The Japan Times' Overland Mail* (Yokohama), Jul. 12, 1869, Vol. 7, No. 96, *reprinted in id.*, Vol. 23 (1990), at 277.

³¹ See e.g., 1854 US-Japan Treaty, Article II and 1854 Anglo-Japan Convention, Article I.

³² See Osatake Takeshi, *Kokusaihoyori Mitaru Bakumatsu Gaikoshi [Diplomacy of the later Period of the Shogunate, in the light of International Law]*, at 26 (1930).

³³ See *id.* at 32.

³⁴ 1858 Anglo-Japanese Treaty, Preamble. Emphasis added. The Tycoon means the Shogun.

March 9, 1865 stipulated that “[t]he term “Japan” means the dominions of the *Tycoon* of Japan.”³⁵ In contrast, the Court in Kyoto had been fiercely opposed to establishing relationships with foreign States, but in 1865 Emperor Komei³⁶ issued a promulgation which stated that “[the] Imperial consent is given to the Treaties.”³⁷ Now, the British Minister stated that the Emperor “established his supremacy from a foreign point of view” by confirming those early treaties.³⁸ The American Minister also wrote that his Government recognised the supreme authority of the Emperor and “held the Tycoon only as subordinate” when the Emperor ratified the treaties in 1865.³⁹ In fact, administration continued to be conducted by the Shogun since the Emperor did not form his own Government. However, soon after the Imperial restoration and the fighting in Toba-Fushimi, Emperor Meiji declared:

Henceforward we shall exercise supreme authority both in the internal and external affairs of the country. Consequently the title of Emperor should be substituted for that of Tycoon which has been hitherto employed in the Treaties. ... It is desirable that the Representatives of all the Treaty Powers should recognize this announcement.⁴⁰

³⁵ Order in Council for the Exercise of Jurisdiction in China and Japan 9th March 1865, Art. 2. House of Commons Parliamentary Papers 1865 Vol. LVII [3497] 403, mf 71.441, at 3. (Emphasis added). Parkes informed the Japanese Government that the Order substituted the term “Mikado” for “Tycoon,” which was received with “satisfaction” by the Government. See F.O. 46-111, No. 158, Aug. 9, 1869, and Encl. 1: Parkes to Date Chiunagon. Yedo, Jul. 29, 1869.

³⁶ Emperor Komei was the father of Emperor Meiji.

³⁷ House of Commons Parliamentary Papers, 1866 [3615] Vol. LXXVI 427, mf. 72.593 or 594, Correspondence respecting Affairs in Japan: 1865-66. No. 79, Incl. 3, Mikado’s Sanction of the Treaties, and Gorojio’s Engagement for its Promulgation, Nov. 24, 1865.

³⁸ F.O. 46-92, No. 62. Osaka, March 19, 1868. (confidential)

³⁹ R.G.59, R. 9, No. 11. Hiogo, Feb. 18, 1868.

⁴⁰ F.O. 46-91, No. 23, Encl. 2, Proclamation by the Mikado, Feb. 3, 1868. (Translation)

This declaration brought controversy among the Foreign Representatives because they understood that the Imperial Government demanded recognition.⁴¹ The French, Italian and Prussian representatives were opposed to such recognition even though the British representative was in favour.⁴² Britain became the first State that formally recognised the Imperial Government when Parkes submitted his credence to Emperor Meiji on May 22, 1868.⁴³ The effect of this formal recognition can be observed in the difference of wording between the British neutrality notification of February, and the May Order of the Queen in Council.⁴⁴ In the former, the contending parties were referred to as “His Majesty the Mikado and the Tycoon”⁴⁵ but in the latter as “the Mikado and *other belligerents* within the Japanese dominions”.⁴⁶ This usage of these terms clearly indicates that in the above Order the British Government regarded the Imperial Government as legitimate. Furthermore, the Order used the words, “whereas Her Majesty is at peace with *the Government of Japan*.”⁴⁷ Even though the Order did not specify which party to the Civil War was “the Government of Japan”, it is obvious that the Imperial Government was such Government because the Shogunate was merely “other belligerents”. The Dutch, French and Italian Representatives submitted their

⁴¹ Kajima Morinosuke, *Nihon Gaikoshi, Dai 1 kan, Bakumatsu Gaiko [The History of Japanese Diplomacy, Vol. 1, Diplomacy at the end of the Edo Period]*, at 251 (Kajima Heiwa Kenkyujo [Kajima Peace Institute] ed., 1970).

⁴² *Id.*

⁴³ J.D.D., Vol. 1-1, Doc. No. 279, May 22, 1868; Kajima, *id.*, at 275. A letter of credence was to be addressed “to the sovereign ... or State to whom the minister is delegated.” See Henry Wheaton, *Elements of International Law*, § 217 (James Brown Scott ed., 1936) (Edition of Richard Henry Dana, Jr., ed. by George Grafton Wilson, 1866).

⁴⁴ The notification and Order will be discussed later. Regarding the Order, it was issued on May 14, 1868 but this was before Parkes submitted his credentials to Emperor Meiji on May 22. However, note that the letter of credence was issued on February 14 at Osborne by Queen Victoria and the delivery of the credence to Japan took a considerable time. Therefore the Order would have been passed with the knowledge of the credentials.

⁴⁵ “Official Notification”, *Supplement to the Hiogo and Osaka Herald* (Hiogo), Feb. 22, 1868, Vol. I, No. 8, (no page number given), reprinted in *Early Newspapers*, *supra* note 29, Vol. 13 (1988), at 34.

⁴⁶ J.D.D., Vol. 1-1, Doc. No. 376, Jul. 13, 1868. Emphasis added.

⁴⁷ *Id.*

respective letters of credence to Emperor Meiji on January 4, 1869.⁴⁸ The American and German Representatives had the audience of the Emperor next day even though they did not submit any letters of credence.⁴⁹ However, the American Minister regarded the Imperial Government as “the Government [of the Empire of Japan]”,⁵⁰ while in his address to the Emperor, the German Minister stated that he “would like to be trusted by Your Majesty [the Emperor of Japan]”⁵¹ Judging from the wording, the above addresses could mean that Germany and the USA recognised the Imperial Government.

3.4.2. THE COLLECTIVE DECLARATION OF NEUTRALITY OF 18 FEBRUARY 1868

On February 8, 1868 the Emperor proclaimed:

It is thus plain that hostilities were begun by him, and therefore that Yoshinobu is in open rebellion. This and the continual deception practised on the Imperial Court, are traitorous and unprincipled acts, and the patience of the Imperial Court being entirely exhausted, it is unavoidably necessary to decree his punishment.⁵²

This proclamation announced the commencement of war to the Japanese people, and on February 14 the Imperial Government notified the Treaty Powers that “[i]n consequence of the revolt of Tokugawa Yoshinobu, Ninwaji no Miya, a Prince of the Blood ... has been appointed Commander in Chief of the army of execution” and requested the

⁴⁸ J.D.D., Vol. 1-2, Doc. No. 691, Jan. 4, 1869.

⁴⁹ J.D.D., Vol. 1-2, Doc. No. 698, Jan. 5, 1869.

⁵⁰ J.D.D., Vol. 1-2, Doc. No. 693, Jan. 4, 1869. Van Valkenburgh had already submitted his letter of credence to the Shogun on May 4, 1867 when the latter was still in charge of the Japanese Government. See J.D.D., Vol. 1-2, Appendix 3, at 1.

⁵¹ See J.D.D., Vol. 1-2, No. 698, Jan. 5, 1869. Translated from Japanese by the author. It seems that Von Brandt did not submit a letter of credence either to the Imperial or Shogun Government. See *id.*, Appendix 3, at 40-41.

⁵² “Proclamations by the Mikado. Translation.”, *The Japan Herald Market Report & Mail Summary*, No. 51, Mar. 26, 1868, reprinted in *Early Newspapers*, *supra* note 29, Vol. 13, at 5. It appears that this proclamation was originally issued on January 31, but it was publicly announced on February 8. See its original in J.D.D., Vol. 1-1, No. 85, Jan. 31, 1868.

Powers to “take measures in order to the [sic] preservation of strict neutrality”.⁵³ On the other side, as soon as the battle at Toba-Fushimi began, the Shogunate sent the following letter to the British Minister:

We beg you therefore to notify your countrymen that they strictly observe those provisions of the Treaty for the regulation of Trade which provide against the sale of arms and vessels of war to any persons but *the Japanese Government* In time of peace these stipulations are not of much weight, but when *civil war* has arisen, they are of the highest importance.⁵⁴

The Treaty Powers were reluctant to interfere with Japanese domestic affairs because they feared the disruption of trade with Japan.⁵⁵ The recognition of belligerency was especially relevant to a case where a State and a rebel group in a civil conflict were maritime because the commercial interests of foreign States could be damaged by the conflict.⁵⁶ After Japan had abandoned her isolationist policy by signing treaties with Great Powers, their commercial activities with Japan became frequent, and the Shogunate and several daimyo began to purchase or even make men-of-war.⁵⁷ Thus, having received the above requests by both parties to the conflict, France, Great Britain,

⁵³ F.O. 46-91, No. 29, Encl.: Higashi Kuze no Shōshō to Parkes. Feb. 14, 1868. According to a note attached to the original Japanese document, whether the letter had been sent to each of the six Foreign Representative was not certain and it was concluded that this request for neutrality was probably made at a gathering of the Foreign Representatives. See the original document in J.D.D., Vol. 1-1, No. 115, Feb. 14, 1868.

⁵⁴ F.O. 46-91, No. 13, Encl. 6: Matsudaira Buzen no Kami, Itakura Iga no Kami and Sakai Uta no Kami to Parkes. Jan. 27, 1868. Emphases added.

⁵⁵ Kajima, *supra* note 41, at 259. See also Gordon Daniels, “The Japanese Civil War (1868) - A British View”, 1 *Modern Asian Studies* 241, at 241 (1967).

⁵⁶ Wheaton, *supra* note 43, Dana’s note 15, at 30-31. See also Sir Travers Twiss, *The Law of Nations Considered as Independent Political Communities. On the Rights and Duties of Nations in Time of War*, §239 (2d ed. rev., 1875).

⁵⁷ Satsuma started to build the first Japanese man-of-war in 1853. See Koshaku Shimazuke Hensanjo [Institute of the Family of Prince Shimazu] (ed.), *Sappan Kaigunshi [History of the Navy of the Satsuma Han]*, Vol. 1, at 787 (1968).

Italy, the Netherlands, Prussia and the USA issued the “Official Notification” [of neutrality] on 18 February 1868.⁵⁸ The British declaration was as follows:

WHEREAS the Undersigned [Sir Harry S. Parkes] has been officially informed that hostilities have commenced in this country between His Majesty the Mikado and the Tycoon, and whereas a strict and impartial neutrality should be observed by all British subjects in the contest between the said contending parties, the Undersigned, Her Britannic Majesty’s Envoy Extraordinary and Minister Plenipotentiary in Japan, hereby calls upon all Subjects of Her Majesty to abstain from taking part in any operations of war against either of the contending parties, or in aiding or abetting any person in carrying on war for or against either of the said parties, and to avoid the infringement of any British Law or Statute made and provided for the purpose of maintaining neutrality in foreign or civil contests or of the Law of Nations relating thereto.⁵⁹

As regards this collective declaration of neutrality, the following points need further analysis. First, the notification acknowledged the existence of war between the Emperor and the Shogun. However, documents reveal that the Shogun himself submitted to the Emperor at an early stage of the Civil War and sought to avoid any confrontation with the Imperial Government, while the *bakufu* asked for the observance of neutrality by the Treaty Powers. The Shogun’s Minister for Foreign Affairs told Sidney Locock, Secretary of the British Legation, that “[the Shogun] did not consider

⁵⁸ The American notification was published in *The Japan Times’ Overland Mail* (Yokohama), Feb. 27, 1868, Vol. V., No. 60, at 57, reprinted in *Early Newspapers*, supra note 29, Vol. 13, at 49. The other notifications were published in *Supplement to The Hiogo and Osaka Herald* (Hiogo), Feb. 22, 1868, Vol. I, No. 8, (no page number given), reprinted in *id.* at 34-36. Cf. The Dutch notification alone was issued on 19 February.

⁵⁹ Official Notification, *Supplement to the Hiogo and Osaka Herald* (Hiogo), Feb. 22, 1868, Vol. I, No. 8, (no page number given), reprinted in *id.*, at 34. The Foreign Enlistment Act was attached to this notification and this will be discussed later.

himself at war with the Mikado: consequently he had no intention of availing himself on [sic] any of the rights of a belligerent power.”⁶⁰ The Minister further stated that the Shogun had been retired from public affairs,⁶¹ which was a form of punishment in Japan. Moreover, the Shogun regime claimed that it was at war with the Satsuma *han*. Soon after the battle of Toba-Fushimi, the American Legation sent a letter to the *bakufu*, asking, “With whom is the Japanese Government now engaged in war” and whether Satsuma was the only actor fighting with the Shogunate.⁶² The *bakufu* replied that Satsuma alone was fighting at that moment,⁶³ even though the fact was that the battle of Toba-Fushimi was being fought by others as well as mainly Satsuma and Choshu on the Imperial side.⁶⁴ Both parties to the war relied on *daimyo* who offered their forces to whichever supported.⁶⁵

It can be argued that the Treaty Powers considered that the war was being fought between the Imperial and Shogun Governments, while at the same time they knew that it was mainly the samurai of various *daimyo* who were fighting on both sides. Recognising all the *daimyo* who participated in the war as belligerents was simply impossible, and considering the war to be a struggle between the old and new Governments would have been the most realistic approach. Earlier in 1864, after the

⁶⁰ F.O. 46-92, No. 53, Encl. 2: Sidney Locock to Parkes. Yokohama, March 6, 1868. However, Parkes was doubtful about the Shogun’s intention and he wrote that “It is not improbable that the Taikun is in a very uncertain frame of mind.” F.O. 46-92, No. 54. Hiogo, March 11, 1868.

⁶¹ F.O. 46-92, No. 53, Encl. 2: Sidney Locock to Parkes. Yokohama, March 6, 1868.

⁶² See J.D.D., Vol. 1-1, No.79, Jan. 28, 1868. Note that this letter was addressed to the Shogunate, not to the Imperial Government.

⁶³ See R.G.59, R. 9, No. 7, Encl. 3: Itakura and Sakai to Van Valkenburgh, Jan. 28, 1868.

⁶⁴ An official account of the battle refers to the Satsuma, Aki and Choshu *han* on the Imperial side and to the Matsuyama, Aizu, Kuwana, Ogaki, Oshi, Shimizu, and Yoshida *han* on the Shogun side. See R.G.59, R. 9, Portman to W.H. Seward. Yokohama, March 2, 1868. Encl. 1: Official account of the recent action between Kyoto and Osacca by Okubo Sazen no Sho.

⁶⁵ It was after the Civil War that the Imperial Government obtained its own armed forces. With respect to the Shogunate, it had its own forces, *Hatamoto* and *Gokenin*, but the role they played in the Civil War was small and the Shogunate too relied on *han*, especially Aizu and other northern *han*.

war between the Choshu *han* and the four Powers,⁶⁶ Sir Rutherford Alcock, the then British Minister, sent a memorandum to Choshu in which he stated that “There cannot be 20 or 100 petty Sovereigns and Princes in a country, with all of whom separate Treaties must be made, each to be valid only within the narrow limits of their own territories. This could only lead to confusion.”⁶⁷ The Shogunate took the responsibility of Choshu’s conduct and paid indemnity to Britain, France, the Netherlands and the USA.⁶⁸ This document demonstrates that the Treaty Powers did not consider each daimyo the sovereign of his territory.

To what extent the two conflicting parties had knowledge of international law is another point to discuss. The *bakufu* damaged its status as the legitimate Government of Japan by confirming the existence of war and requesting the declaration of neutrality from the Treaty Powers.⁶⁹ This damaging effect to the Shogun Government was beneficial to the Imperial Government because the status of the Government was still at most *de facto* in international law.⁷⁰ However, the Imperial Government lacked proper information on international law, either; for instance, at the outset of the Civil War the representatives of the Imperial Government had to enquire of the British and Prussian Representatives how to prevent foreign vessels from carrying the troops of the Shogunate, and also asked them to withdraw the foreign military instructors from the *bakufu*.⁷¹ For both

⁶⁶ See *supra*. note 9.

⁶⁷ Memorandum, Delivered by the British Minister in Japan, to the Prince of Choshu’s Officers, Relative to the Maintenance by Force by the Treaty Powers of Foreign Trade with Japan, (V. State Papers, Vol. LXIII, p. 867), *reprinted in* Gaimusho Joyakukyoku, *supra* note 6, Vol. 1-1, at 229.

⁶⁸ See Shimonoseki Convention, (signed and ratified by the *Bakufu* in 1864), *reprinted in id.* at 222.

⁶⁹ See F.O. 46-91, No. 13, Encl. 6: Matsudaira Bugen no Kami, Itakura Iga no Kami and Sakai Uta no Kami to Parkes. Jan. 27, 1868. Regarding the beneficial effect of the recognition of belligerency on the side of the insurgents, see Lindsay Moir, “The Historical Development of the Application of Humanitarian Law in Non-International Armed Conflicts to 1949”, 47 *ICLQ* 337 (1998).

⁷⁰ Kajima, *supra* note 41, at 257.

⁷¹ R.G. 59, R. 9, No. 10, Encl. 8: Memo of interview between Parkes and Von Brandt with the envoy of the Mikado. Feb. 11, 1868. In the same meeting, the representatives answered that the declaration of war and notification of existence of war would be necessary.

parties, the neutrality of third States signified the end of outside assistance.⁷² Osatake rightly argued that the request for neutrality by both parties had been partly because both welcomed foreign assistance to their respective sides but feared assistance to their respective enemies,⁷³ and they would have considered only the latter consequence. The acquisition of up-to-date arms from the Treaty Powers was essential in order to win the Civil War and thus the decision of both governments to ask for the observance of strict neutrality was not sophisticated. The USA refused to hand over the *Stonewall*, an iron steamer which was originally purchased by the Shogun regime, to either contending side because of her neutrality policy.⁷⁴ The above evidence suggests that the warring Governments were not knowledgeable on international law. Both belligerents' requesting foreign States to declare neutrality was probably a rare case in the international law of that time. However, one should bear in mind the fact that it was only about fifteen years since Japan had begun her diplomacy in a modern sense.

The third point is the question of which authorities issued the notifications of February 1868. Some Japanese authors have argued that normally it would have needed the foreign governments to recognise belligerency because such recognition would be of political importance, but that in the Japanese Civil War it was the Foreign Representatives stationed in Japan who declared neutrality.⁷⁵ The reason for this irregularity is that Japan is far from Europe and waiting for instructions would have missed the appropriate time for the Treaty Powers to declare neutrality.⁷⁶ For instance, the French Minister admitted in his despatch to the Foreign Minister that because of the

⁷² For the inadequate knowledge of international law on the Imperial side, see Kajima, *supra* note 41, at 252, 253.

⁷³ Osatake, *supra* note 32, at 278.

⁷⁴ Kajima, *supra* note 41, at 259.

⁷⁵ Tachi Sakutaro, "Book Reviews. Osatake: Diplomacy of the later Period of the Shogunate, in the light of International Law", 26 *The Journal of International Law and Diplomacy* 189, 193 (1927); and Kajima, *id.* at 256-257.

distance from Europe the Foreign Representatives had to declare and withdraw their neutrality under their responsibility.⁷⁷ Britain, on the other hand, published the Order of the Queen in Council of 14 May 1868 regarding the observance of neutrality in the Japanese Civil War with the effect that the Order replaced the neutrality notification of February with notification to come into force from July 13, 1868.⁷⁸ The Japanese Ministry of Foreign Affairs asked Ernest Satow, after the Civil War, why it took a considerable time to issue the formal declaration of neutrality, and he answered that it was necessary to have the Queen's recognition of neutrality which was proclaimed by the British Minister on his own responsibility.⁷⁹ In conclusion, it can be maintained that the legitimacy of the collective notification of February 1868, however irregular it was, was not overturned. Apart from the official British Order of May, a lack of evidence could mean that other Treaty Powers did not issue official notification similar to the British Order. However, such absence of official declaration did not nullify the original notification and the Governments of the Treaty Powers did not raise questions of the legitimacy of the notification later.

3.4.3. THE INVOLVEMENT OF FOREIGN SHIPS

Soon after the outbreak of the Civil War, two men-of-war belonging to the Shogunate were approached by two British military steamers that, having already "moved as if the situation were to lead to war [between the Japanese and British ships]," "weighed anchors again, revolved around the *Kaiyomaru* a few times, began to undertake

⁷⁶ Kajima, *supra* note 41, at 257.

⁷⁷ C.P.J., Tome 18, [7] M. Outrey au marquis de la Valette, Ministres des Affaires Étrangères. Yokohama, 10 fév. 1869 (Direction politique No. 6).

⁷⁸ J.D.D., No. 376, Vol. 1-1, Jul. 13, 1868.

⁷⁹ *Meiji Boshin Kyokugai Churitsu Tenmatsu [Neutrality in the Japanese Civil War]*, at 7 (Otsuka Takematsu ed., 1932).

exercises, shoot several bullets, and was just going to bomb [the Japanese ships].”⁸⁰ Sawa Tarozaemon was asked about response to a possible attack by the British ships and answered that “probably Satsuma and Choshu asked the British ships to act However, it is prohibited in public international law to attack a ship of a friendly nation without reason Therefore be assured that nothing will happen.”⁸¹ There is no evidence to suggest that there was a direct engagement between a military ship of a Treaty Power and either of the contending parties, and the above case was, while it was an indirect involvement, probably exceptional. Regarding foreign vessels other than men-of-war, the American Minister reported that he had told his British counterpart that British steamers were involved in carrying troops of southern daimyo but that the British Minister had taken no action.⁸² In the same letter, however, he admitted that there was a violation of neutrality by an American steamer which was detained by the *Iroquois*, an American man-of-war.⁸³ Another occasion to mention is that the *Helen Black*, British ship, was reported to have left Yokohama with arms for Hakodate, and the authorities at Kanagawa asked their counterparts at Hakodate not to allow the arms to land.⁸⁴ The Imperial Government demanded that the British Minister deal with the ship because the *Helen Black* carried arms and had also tried to load rice at an unopened port in the north for the Hakodate rebels.⁸⁵ Parkes later notified Date, the Principal Japanese Minister for Foreign Affairs, that this important case would be heard by the Judge of the Supreme Court of China and Japan.⁸⁶ The Judge found the captain of the

⁸⁰ *Sappan Kaigunshi*, *supra* note 57, Vol. 3, at 139-149. Translated from Japanese by the author.

⁸¹ *Id.* at 140. Translated from Japanese by the author. The British ships did not attack the Japanese ships.

⁸² R.G. 59, R. 10, No. 59. Yokohama, Jun. 14, 1868.

⁸³ *Id.*

⁸⁴ J.D.D., Vol. 2-1, No. 140, May 5, 1869. According to the Japanese document, the captain of the ship lied that she was sailing to Hyogo.

⁸⁵ J.D.D., Vol. 2-1, No. 247, Jul. 2, 1869.

⁸⁶ J.D.D., Vol. 2-1, No. 287, Jul. 29, 1869.

ship guilty of “smuggling or trading in non-opened Ports, in contravention of the [1858 Anglo-Japanese] Treaty” and fined him one thousand dollars.⁸⁷

3.4.4. THE *STONEWALL*

Having declared the observance of strict neutrality, the Foreign Representatives issued a memorandum to the effect that the delivery of a vessel of war to a belligerent party in the Japanese Civil War would be contrary to their neutrality.⁸⁸ It became therefore explicit that the *Stonewall* could not be handed over to the contending parties in the war. The Imperial Government, having realised the value of the iron steamer, was irritated by the American policy not to hand over the *Stonewall* to the newly established Government. During the conflict in the north, Higashikuze, the Minister of Foreign Affairs, asked the American Minister “whether [the Minister] could now deliver the *Stonewall* to the Mikado’s Government”, and the Minister answered in the negative.⁸⁹ However, when he issued a notification of withdrawal of neutrality on February 9, 1869,⁹⁰ he showed his readiness to make arrangements to deliver the ship to the Imperial Government in his letter of the same date to Higashikuze.⁹¹

3.4.5. THE WITHDRAWAL OF MILITARY ADVISERS

Before the Civil War, the *bakufu* was employing naval instructors from Britain and military instructors from France to strengthen its forces, which required

⁸⁷ J.D.D., Vol. 2-2, No. 408, Sept. 30, 1869.

⁸⁸ R.G. 59, R. 9, No. 13, Encl. 1: Memorandum by Parkes and other Representatives of Foreign Powers. Hiogo, Feb. 28, 1868.

⁸⁹ R.G. 59, R. 11, No. 97. Sept. 18, 1868.

⁹⁰ R.G. 59, R. 11, No. 12, Encl. 3: Notification of the cessation of the state of war in Japan issued by Van Valkenburgh. U.S. Legation, Yokohama, Feb. 9, 1869.

⁹¹ R.G. 59, R. 11, No. 12, Encl. [4]: Van Valkenburgh to Higashi Kuze. U.S. Legation, Yokohama, Feb. 9, 1869. The date of actual delivery is not certain but in his letter of March 8 1869, he wrote that the ship had been delivered. See R.G. 59, R. 11, No. 19. March 8, 1869.

modernisation.⁹² After the outbreak of the Civil War, whether those instructors should be recalled to their respective States became a diplomatic problem between the Imperial Government, and Britain and France. In the British official notification of neutrality it was explicitly prohibited for British subjects to be involved in the Civil War, and extracts from the Foreign Enlistment Act were attached to the notification for the above purpose.⁹³ Therefore Parkes decided to withdraw British instructors from the Shogun Government because their use would be against the British policy of neutrality.⁹⁴ Parkes wrote that the naval instructors to the Imperial Government would return to England on October 7, 1868 because the war still continued and neutrality needed to be observed.⁹⁵

At first Roches was opposed to the withdrawal of the French military instructors who were employed by the Shogunate because of his policy favouring the regime.⁹⁶ His successor, Outrey, received a letter from Higashikuze in which the Imperial Government which had taken over the armed forces of the Tokugawas requested him to withdraw the French instructors in Japan because of “the unusual crisis that we are going through”.⁹⁷ Outrey decided that the withdrawal of the instructors should take place on September 13, 1868 although he disagreed with the conditions that the

⁹² Both Imperial and Shogun Governments employed foreign instructors from Treaty Powers. See generally Takahashi, *supra* note 17.

⁹³ J.D.D., Vol. 1-1, Doc. No. 151, Mar. 8, 1868.

⁹⁴ F.O. 46-92, No. 53, Encl. 1: H. Parkes to Capt. Tracy. Hiogo, Feb. 29, 1868. Parkes wrote to the effect that Captain Tracy and other instructors should move from Edo to Yokohama. In this letter, Parkes referred to the Shogunate as “the Government of Japan”.

⁹⁵ F.O. 46-97, No. 233. Parkes to Stanley. Yokohama, Oct. 7, 1868.

⁹⁶ C.P.J., Tome 16, [21] L. Roches au marquis de Moustier. Yokohama, 25 mai 1868. (Direction politique No. 113)

⁹⁷ C.P.J., Tome 17, [12] M. Outrey au marquis de Moustier. Yokohama, 12 sept. 1868. (Direction politique No. 16), Annexe I: Higashi Kouze à M. Outrey. [Yokohama], 11 sept. 1868. Traduction. The original French wording is “la crise particulière que nous traversons”. Higashikuze later made it clear that the reasons for their asking the withdrawal of the military instructors were the existence of war and the neutrality policy of the Treaty Powers. See C.P.J., Tome 17, [9] M. Outrey au marquis de Moustier. Yokohama, 18 sept. 1868. (Direction politique No. 18), Annexe II: Higashi Kouze Djiu-Djiô à M. Outrey. [Yokohama], 28 j. 7m. (14 sept.) 1868. Traduction.

Imperial Government offered for breaking of the contracts concerning the instructors.⁹⁸ Some French officers, on the other hand, remained with the Shogun side. Brunet, captain of artillery, resigned himself to joining the forces of the northern daimyo,⁹⁹ a decision which was regarded by Outrey as an embarrassment to French diplomacy.¹⁰⁰ Before the exiled retainers surrendered to the Imperial Government, Brunet and several French officers had surrendered and were collected and taken to Yokohama by a French man-of-war.¹⁰¹ Outrey informed the Vice-Minister of Foreign Affairs that the French officers who fought with Enomoto had left Yokohama for Saigon except for the two wounded who were being treated in Yokohama.¹⁰²

3.4.6. THE END OF THE WAR IN THE NORTH AND THE CESSATION OF NEUTRALITY

The Imperial Government seized all of Edo, the “capital” of the Shogunate, when the battle at Ueno resulted in its complete victory. Following this, the Imperial Government constantly requested the Treaty Powers to withdraw the neutrality they were observing. For instance, Higashikuze in his meeting with the American Minister in September 1868 consistently solicited the latter for the retraction of the declaration of neutrality in the hope of the possible handover of the *Stonewall*, even though Higashikuze acknowledged that war existed between “the Mikado’s Government on the one side and Aizu and other Northern Daimios [sic] on the other.”¹⁰³ Van Valkenburgh, however, was strongly against withdrawing its neutral policy “as long as war continues in

⁹⁸ C.P.J., Tome. 17, [9] M. Outrey au marquis de Moustier. Yokohama, 18 sept. 1868. (Direction politique No. 18), Annexe I: M. Outrey au Ministre [Higashi Kouze?]. Yokohama, 13 sept. 1868. Copie.

⁹⁹ C.P.J., Tome. 17, [29] M. Outrey au marquis de Moustier. Yokohama, 11 nov. 1868. (Direction politique No. 31), Annexe I: Brunet à Chanoine. Yokohama, 4 oct. 1868. Copie.

¹⁰⁰ C.P.J., Tome 17, M. Outrey au marquis de Moustier. Yokohama, 16 déc. 1868. (Direction politique No. 39).

¹⁰¹ C.P.J., Tome 18, M. Outrey au marquis de Lavalette. Yokohama, 1 juillet 1869. (Direction politique No. 19).

¹⁰² See J.D.D., Vol. 2-1, Doc. No. 219, Jun. 20, 1869.

¹⁰³ R.G. 59, R. 11, No. 97. Sept. 18, 1868.

Japan.”¹⁰⁴ Moreover, the leading daimyo of the northern alliance explained to Van Valkenburgh that they could not submit to the new Government because Imperial orders were not trusted, as they explained: “[t]he Mikado is young and his government inchoate and imperfect and very unscrupulous subjects taking advantage of this widely seized the governmental power and friely [sic] use it as they please.”¹⁰⁵ Van Valkenburgh replied to this letter that the United States would continuously observe strict neutrality.¹⁰⁶ Other Treaty Powers also continued to maintain their neutrality policy.

The Imperial Government sent a statement to the Foreign Representatives on December 8, 1868, proclaiming that “[o]ur country is therefore entirely tranquillized and the mind of our Emperor is at ease.”¹⁰⁷ On January 15, 1869, an interview was held between the Foreign Representatives and Iwakura Tomomi,¹⁰⁸ in which the latter entreated the former to withdraw the neutrality proclamation, since peace was restored on Honshu and those who were occupying Hakodate were “only a small band of outlaws.”¹⁰⁹ A series of discussions was held by the Foreign Representatives in which the British representative was in favour of the withdrawal of the neutrality while his American, Prussian and Italian counterparts were opposed to such withdrawal because of the existence of conflict in Hakodate.¹¹⁰ Nevertheless, the Ministers became more

¹⁰⁴ R.G. 59, R. 11, No. 138. Dec. 24, 1868.

¹⁰⁵ R.G. 59, R. 11, No. 93, Encl. 1: Ashina Yukie Morikauge, Sendai, Irobe Nagato Hisanaga, Yonesawa, Kadgjiwara Heima Kagemasa, Aidzu, Ishiwara Soyemon Thiunagon, Shonai and Kawai Keinoské Akiyoshi, Nagaoka, to [Van Valkenburgh]. [n.d.]

¹⁰⁶ R.G. 59, R. 11, No. 93, Encl. 2: Van Valkenburgh to Ashina, Irobe, Kadgjiwara, Ishiwara and Kawai. U.S. Legation, Yokohama, Sept. 10, 1868. Judging from the above three documents, it was likely that the American minister was in favour of the northern daimyo.

¹⁰⁷ F.O. 46-99, No. 318, Encl.: Date Chiunagon and Higashi Kuze Chiujo to H. Parkes, 10th month.

¹⁰⁸ His position was equivalent to today's Prime Minister.

¹⁰⁹ R.G. 59, R. 11, No. 9, Encl. [7]: Memorandum on the interview between the Representatives of England, France, Holland, Italy, Prussia, and the U.S.A. and Iwakura Uhiôye no Kami, Minister for Foreign Affairs, held at the British Legation, Yokohama on Jan. 15, 1869.

¹¹⁰ C.P.J., Tome 18, [7] M. Outrey au marquis de la Valette, Ministres des Affaires Étrangères. Yokohama, 10 fév. 1869. (Direction politique No.6)

harmonious on this issue and decided that they would come to a decision on February 9, after they had examined a report from Hakodate which they expected to arrive on February 6 or 7.¹¹¹ The Foreign Representatives having studied the new information which arrived in Yokohama on February 7, they decided to withdraw the neutrality,¹¹² and finally they issued notifications on February 9, 1869 to the effect that the hostilities in Japan had ceased to exist and hence the notifications concerning neutrality were withdrawn.¹¹³

3.4.7. THE POSITION OF THE ARMED GROUP IN HAKODATE: INSURGENTS OR PIRATES?

The definition of piracy is controversial today,¹¹⁴ and so was it in the mid-nineteenth century.¹¹⁵ Wheaton wrote that “[p]iracy is defined by the text-writers to be the offence of depredating on the seas without being authorized by any sovereign State, or with commissions from different sovereigns at war with each other.”¹¹⁶ Dana stated that piracy *jure gentium* was an act “committed on the high seas” by those who were “free from lawful authority.”¹¹⁷ Twiss argued that “A violation of the peace of the High Seas is either an act of Piracy or an act of War, according as such an act is done with the design of robbery, or with the object of prosecuting a Right.”¹¹⁸

The exiled *kerai* sent the Foreign Representatives a notification, stating that some southern daimyo were conducting brutality against people “asserting their pretention as the order of Mikado” and that therefore the exiled retainers would resort to force in

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ The American, British, Dutch, French, Italian and Prussian notifications are *reprinted* in J.D.D., Vol. 1-2, No. 753, Feb. 9, 1869.

¹¹⁴ See D.J. Harris, *Cases and Materials on International Law*, at 432-433 (5th ed., 1998).

¹¹⁵ Wheaton, *supra*. note 43, Dana’s note 83, at 162-163.

¹¹⁶ *Id.* §§122-124 (footnote omitted).

order to assist northern daimyo.¹¹⁹ Higashikuze, as a response to the action of the exiled retainers, issued a statement in which “their having decamped regardless of the will of their master [Tokugawa Yoshinobu] and without any reason” was regarded as “acts of piracy.”¹²⁰ *The Japan Times’ Overland Mail* was a strong supporter of the contention that Enomoto and his followers were pirates. The newspaper had stated that they acted contrary to the will of Tokugawa Yoshinobu, their former master, and therefore they should have been punished as pirates.¹²¹ Later, however, it argued that the exiled retainers were a *de facto* authority as long as they remained in Hakodate and therefore only pirates *lege fori*: once they left Hakodate however, as in the case of the battle of the Miyako Bay, they should be considered to be pirates *jure gentium*.¹²²

There was a conference among the Foreign Representatives about their positions regarding the exiled retainers, but a collective memorandum was not drafted because of disagreement.¹²³ Such disagreement was, for instance, reflected in the following incident: the exiled retainers’ ship saluted foreign ships and the salute was not returned by the British and French ships but was accepted by the American, Prussian and Russian consular authorities.¹²⁴ The British and French ministers alone issued a memorandum on the question of the exiled retainers, among which comments they referred to the retainers’ status as follows:

¹¹⁷ *Id.*, Dana’s note 83, at 163.

¹¹⁸ Twiss, *supra* note 56, §239.

¹¹⁹ F.O. 46-97, No. 244, Encl. 1: Northern Officers to Foreign Ministers. Yedo, Oct. 4, 1868.

¹²⁰ F.O. 46-97, No. 260, Encl. 2: Statement by [Higashi Kuze Chiujo]. Oct. 10, 1868. Parkes considered the purpose of that statement “to declare Enomoto an outlaw”. F.O. 46-97, No. 260. Yokohama, Oct. 15, 1868.

¹²¹ “The Descent on Yezo”, *The Japan Times’ Overland Mail* (Yokohama), Dec. 30, 1868, at 314, reprinted in *Early Newspapers*, *supra* note 29, Vol. 20, at 9

¹²² “What is a Pirate?”, *The Japan Times’ Overland Mail* (Yokohama), May 28, 1869, at 128, reprinted in *Early Newspapers*, *supra* note 29, Vol. 22, at 261.

¹²³ C.P.J., Tome 17, [38] M. Outrey au marquis de Moustier. Yokohama, 16 déc. 1868. (Direction politique No. 39) In this document it was emphasised that the American, Italian and Prussian Representatives were not in favour of the Imperial Government, in contrast to the British representative.

1. Les soussignés [Ministres plénipotentiaires de France et d'Angleterre] sont d'opinion que la situation des Kerais exilés et des huit bâtiments qui se sont présentés dans Vulcano-bay, ne constitue pas, d'après données parvenues jusqu'à ce jour, les conditions nécessaires pour leur accorder les droits de belligérents proprement dits. ...¹²⁵

The captain of H.M.S. *Satellite* wrote that the exiled retainers would be recognised as “authorities de facto” by him and the British Consul,¹²⁶ while the American Minister suggested to the Consul in Hakodate that, should a conflict occur at or near the city, “[he] will observe a strict neutrality, transacting all necessary business with the *government de facto*, ...”¹²⁷ The American Consul therefore issued the following notification to captains and agents of American ships on December 11, 1868:

You are hereby warned and forbid [sic] to transport soldiers, munitions of war, or other articles contraband of war, to or from this Port [of Hakodate]. You are also to maintain strict neutrality between the present contending parties, under the severest penalties in such cases made and provided.¹²⁸

The American Minister seemed to have favoured the cause of the exiled *kerai* as he stated that they “form[ed] a strong political organization, commit[ted] no depredation,

¹²⁴ F.O. 46-106, No. 11, Encl. 1: Memorandum by F.O. Adams on observations with reference to his late visit to Hakodate. [n.d.].

¹²⁵ C.P.J., Tome 17, [38] M. Outrey au marquis de Moustier. Yokohama, 16 déc. 1868. (Direction politique No. 39), Annexe IV: Mémoire de M. Outrey et H. Parkes. [s.d.] According to a British document, the reason why only Britain and France made this statement is that other Powers did not have any vessel to send to protect the foreigners residing in Hakodate. See F.O. 46-99, No. 316. Yokohama, Dec. 16, 1868. However, according to a French document, there was a disagreement in the conference. See C.P.J., Tome 17, [38] M. Outrey au marquis de Moustier. Yokohama, 16 déc. 1868. (Direction politique No. 39)

¹²⁶ F.O. 46-99, No. 329, Encl. 4: Ed. White. Captain of H.M.S. *Satellite*, to the Military Commanders of the exiled *Kerais* of Tokugawa. Hakodate, Dec. 23, 1868.

¹²⁷ F.O. 46-99, No. 316, Encl. 10: Van Valkenburgh to E. Rice, Legation of United States. Yokohama, Dec. 12, 1868. Emphasis added.

¹²⁸ F.O. 46-99, No. 330, Encl. 3: Notification by E.E. Rice. United States Consul. Dec. 11, 1868.

and [met] with the cordial support of the people, particularly of their clan.”¹²⁹ In practice, on May 12, 1869, when Imperial troops on board an American steamer were going to land, an American battleship approached.¹³⁰ The captain of the battleship demanded that no soldier land because the American Minister had ordered that a ship hoisting an American flag not be engaged in activities within three miles of a battlefield, according to international law.¹³¹ In addition, the captain stated that the American Government was maintaining neutrality in the Japanese Civil War.¹³² As has been noted, the American Minister had already withdrawn his country’s commitment to the neutrality notification, but it appears that he considered the situation to be as if the war and neutrality continued to exist.

The Japanese Government in a letter of December 22, 1868 admitted that Government officials were not present in Hakodate and made a request to British merchants to “abstain from visiting [Hakodate] until it returns to its allegiance.”¹³³ The British Minister issued the following notification on January 15, 1869:

So long as the disturbances above-named [in Hakodate] shall remain unsettled, or until such order time as may hereafter be publicly notified by the Undersigned [Parkes], no British subject may land or embark, or attempt to land or embark, at Hakodate, troops, arms or munitions of war, or may convey in any British ship or vessel to or from the said port, or land or embark, or attempt to land or embark at

¹²⁹ R.G. 59, R. 11, No. 134. Dec. 18, 1868.

¹³⁰ Soga Junzo, *Hakodate Datsuzoku Tsuito Shuki [Memorandum on Suppressing the Exiled Rebels in Hakodate]*, reprinted in *Sappan Kaigunshi*, *supra*. note 57, Vol. 3, Appendix, at 522.

¹³¹ *Id.*

¹³² *Id.*

¹³³ F.O. 46-99, No. 337, Encl. 1: Higashi Kuze Chijo to H. Parkes. Dec. 22, 1868. See also R.G. 59, R. 11, No. 138, Encl. [1]: Higashi Kuze to Van Valkenburgh. Dec. 22, 1868.

the same port, Japanese passengers in any greater number than one man to every ten tons of register tonnage of such ship or vessel.¹³⁴

One could hold that the exiled retainers were short of being belligerents even though the generalisation of their status would be difficult because of disagreement that existed among the Foreign Representatives. The British and French Ministers did not recognise the belligerency of the armed group led by Enomoto, but they did not treat them as pirates either. Indeed, there is no case in which a British or French battleship dealt with a man-of-war of Enomoto as a pirate. The American Minister and Consul, on the other hand, appeared to be more supportive of the rebels and the above evidence could suggest that they regarded the exiled retainers as belligerents. However, the Americans did not, in fact, recognise the belligerency probably because they needed to accord with the British and French. Lastly, concerning the Imperial Government's attitude towards the exiled *kerai*, notwithstanding Higashikuze's opinion that the rebels were piratical, it is doubtful that there existed domestic law that could regulate piracy either *jure gentium* or *lege fori*. It is certain that the insurgents in Hakodate were criminals in the eyes of the Imperial Government but that they could have been regarded as pirates in Japanese law would be difficult to sustain.

3.5. THE CONDUCT OF WARFARE IN THE JAPANESE CIVIL WAR

3.5.1. THE USE OF A FALSE FLAG

It is generally agreed that the use of a false flag is a legitimate ruse of maritime warfare according to customary law.¹³⁵ Woolsey claimed that the use of means to deceive an

¹³⁴ Official Notification of January 15, 1869, issued by Harry S. Parkes. Originally published in the *Japan Herald* that no longer exists and appeared in *The Hiogo and Osaka Herald* (Hiogo), Jan. 30, 1869, at 28, reproduced in *Early Newspapers*, *supra* note 29, Vol. 20, at 230. Parkes withdrew this notification

enemy regarding a combatant's own movement is not prohibited, even though this writer did not mention the use of a false flag.¹³⁶ Although there were several instances of the use of false flags in the Japanese Civil War, the most well-known case took place in the naval battle at Miyako Bay.¹³⁷ On the morning of May 6, 1869, when eight Imperial vessels gathered in Miyako Bay, the *Kaiten*, a man-of-war belonging to the exiled *kerai*, approached the Imperial Fleet alone with the American flag flying.¹³⁸ The *Kaiten* came closer to the *Stonewall*, suddenly lowered the American flag and hoisted the Japanese one, and began to attack the ship.¹³⁹ Ando clearly explained why the *Kaiten* hoisted the American flag:

According to the maritime law, even if a battleship hoists a foreign flag, it is not prohibited to [attack an enemy ship] should the battleship replace the flag by its own flag before opening fire. Therefore we deceived the enemy by flying the American flag.¹⁴⁰

3.5.2. VISIT AND SEARCH

It was generally agreed that a belligerent had the right to visit and search neutral ships at sea and to capture those ships which carried goods to the belligerent's enemy.¹⁴¹ The question of visit and search became a matter of controversy between the exiled retainers

on July 9, 1869. See F.O. 46-110, No. 141, Encl. 5: Notification of Parkes to revoke notification of Jan. 15, 1869. Yokohama, July 9, 1869. [p.m.] Extract from newspaper whose name is not specified.

¹³⁵ See *The Law of Naval Warfare*, at 46 (N. Ronzitti ed., 1988); L. Oppenheim, *International Law: A Treatise, Vol. II*, § 211 (H. Lauterpacht ed., 7th ed., 1952).

¹³⁶ Theodore D. Woolsey, *Introduction to the Study of International Law*, § 127 (1860).

¹³⁷ Another example was a man-of-war of the Imperial Forces hoisting what appeared to be a Russian flag, which resulted in the protest of the Russian Consul in Hakodate. See F.O. 46-98, No. 295. Yokohama, Dec. 2, 1868 (confidential) and Encl.: R. Eusden to H. Parkes, Hakodate, Oct. 28, 1868 (confidential).

¹³⁸ *Arai Ikunosuke Miyakoko Kaisenki* [*The Records of Maritime Warfare in the Port of Miyako by Arai Ikunosuke*] and *Ando Taro Miyakoko Kaisenki* [*The Records of Maritime Warfare in the Port of Miyako by Ando Taro*], reprinted in *Sappan Kaigunshi*, *supra* note 57, Vol. 3, at 413 and 421 respectively, especially at 417 and 424. The two were on board the *Kaiten*.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 424. Translated from Japanese by the author.

¹⁴¹ See Wheaton, *supra* note 43, §524.

and Treaty Powers during the conflict in Hakodate.¹⁴² The retainers argued that in the port of Hakodate they could visit British ships on their arrival should there be no H.B.M.'s steamers in the port and that they could detain British ships should those ships violate neutrality.¹⁴³ In other ports which were not open to foreigners, they maintained, they could visit any British vessels and could arrest the vessels should there be proof that those vessels carried "troops, munitions of war and generally whatever may be included in the term contraband of war."¹⁴⁴ On the high seas, they stated furthermore, the same right as in unopen ports would be "carefully" used when there was a suspicion on British vessels.¹⁴⁵ The British and French ministers responded to these claims by stating that visit and search on a British or French ship was not allowed in the port of Hakodate and on high seas because the exiled retainers did not have belligerent rights, and that such ships could be dealt with by the retainers only in accordance with the Regulations attached to the French and English treaties.¹⁴⁶

The problem of visit and search by the exiled *kerai* was rather theoretical because there is a lack of evidence of the real enforcement of these rights but there were a few cases in which the Imperial Forces detained neutral ships. One instance was the seizure of the *Peiho*, an American steamer, by the Imperial officers who replaced its American flag

¹⁴² The question of visit and search was not a great issue in the war until the northerners surrendered because as Parkes stated to Prime Minister Iwakura, "Both [Imperial and Shogun governments] were belligerents, and had rights accordingly, such as those of blockade, searching ships etc. ..." F.O. 46-106, No. 5, Encl.: Minute of interview between the Hoshō (Prime Minister) Iwakura and Parkes at Yedo, Jan. 9, 1869.

¹⁴³ F.O. 46-99, No. 331, Encl. 3: Enomoto Kamajiro, Admiral of the Navy of Tokugawa, and Otori Keiske, Major General, to the Captain of H.B.M.'s Ship *Satellite*. Hakodate, 11th month 17 day, 1 at year Meiji.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ F.O. 46-106, No. 6, Encl. 1: Memorandum on Tokugawa *kerais* by Parkes and Max Outrey. Yokohama, Jan. 1, 1869. The relevant stipulations of the British and French treaties were reprinted in the same document: the article of the British treaty reads that 'If any British ships shall smuggle, or attempt to smuggle, goods in any of the new opened harbour of Japan, all such goods shall be forfeited to the Japanese Government, and the ship shall pay a fine of one thousand dollars for each offence.' See *id.*

with the Japanese one on May 28, 1869 at Aomori Bay.¹⁴⁷ Van Valkenburgh, the American Minister, strongly protested at the seizure of the ship and even described “the seizure of this American steamer and her detention under the circumstances as they occurred is a hostile proceeding almost equivalent to a declaration of war”.¹⁴⁸ De Long, the successor to Van Valkenburgh, informed the Imperial Government that the captain of the *Peiho* claimed about fifty thousand dollars for the detention.¹⁴⁹ In the same letter, he also demanded that redress be made against the hauling down of the American flag.¹⁵⁰ The Imperial Government justified its position by maintaining that the captain of the steamer, in conspiracy with Enomoto, had helped the rebels in Hakodate,¹⁵¹ an allegation which was denied by De Long.¹⁵² The *Peiho* case was protracted and was finally solved in 1881 by the Japanese Government’s decision that the case would be settled amicably and the sum of twenty-five thousand yen would be paid to the captain.¹⁵³

3.5.3. THE PROTECTION OF THE WOUNDED, SICK AND SHIPWRECKED

How the wounded and sick on the battlefield are to be protected - which is today one of the important forum on the laws of war - this subject was not specifically discussed in Woolsey’s textbook. Wheaton supported the principle of military necessity and argued that “the inhabitants of the enemy’s country ... who, being in arms, submit and surrender themselves, may not be slain”; but he did not mention the protection of the wounded, sick and shipwrecked.¹⁵⁴ Moreover, in spite of its limited interpretation of

¹⁴⁷ See J.D.D., Vol. 2-2, Doc. No. 262, Jul. 13, 1869.

¹⁴⁸ J.D.D., Vol. 2-2, Doc. No. 375, Sept. 20, 1869.

¹⁴⁹ J.D.D., Vol. 4-1 (1939), Doc. No. 293, Feb. 22, 1871.

¹⁵⁰ *Id.*

¹⁵¹ J.D.D., Vol. 5 (1939), Doc. No. 284, Sept. 19, 1872.

¹⁵² J.D.D., Vol. 5, Doc. No. 285, Sept. 26, 1872.

¹⁵³ Gaimusho [Ministry of Foreign Affairs] ed., *Nippon Gaiko Monjo*, Vol. 13 (1950), Doc. No. 234, May 31, 1881; Doc. No. 235, Oct. 14, 1881.

¹⁵⁴ *Wheaton, supra* note 43, § 343.

military necessity, Lieber's Code did not indicate the protection of the wounded and sick either.¹⁵⁵ The 1864 Geneva Convention should have been the only detailed instrument which provided the protection of the wounded and sick, but no obtainable evidence suggests that officials of both the Imperial and Shogun Governments had knowledge of this treaty.

Soon after the first battle at Toba-Fushimi, the Imperial Government requested Parkes to despatch a British doctor to assist the wounded and sick, and Parkes therefore sent Dr. William Willis near the battlefield in Kyoto.¹⁵⁶ In spite of the general hatred of foreigners in Japan at that time, the invitation to Willis was necessary because there were many wounded soldiers who could not have been saved by traditional Chinese medicine.¹⁵⁷ Willis also assisted some wounded soldiers on the side of the Shogun Government.¹⁵⁸ Then he attended those who were wounded at Ueno, Edo and in the north and were sent to Yokohama.¹⁵⁹ Dr. Sidall, a British doctor, also treated patients first in Yokohama and then in Edo, because of the large number of wounded samurai.¹⁶⁰ Both Willis and Sidall wrote in their reports that the injuries that they treated resulted "almost exclusively" from firearms, not from swords and spears.¹⁶¹ As battle was

¹⁵⁵ See Lieber's Code, Article 16.

¹⁵⁶ F.O. 46-91, No. 41. Hiogo, Feb. 25, 1868. Willis was appointed as "Vice-Consul" in Edo and Kanagawa on January 1, 1868. See J.D.D., Vol. 1-2, Appendix 3, at 28. See also Hugh Cortazzi, *Dr Willis in Japan* (1985). In Cortazzi's work, much of Willis' reports was reproduced. However, there is difference between Cortazzi's reproduced reports and reports reproduced in the microfilm. The author therefore relied on the microfilm even though he referred to Cortazzi's version.

¹⁵⁷ See Koike Ichi, *Zusetsu Nihon no "I" no Rekishi, Jyo, Tsushi Hen [Illustrated History of Medicine in Japan, Vol. 1: Comprehensive History]*, at 212 (1992).

¹⁵⁸ F.O. 46-91, No. 20. Hiogo, Feb. 12, 1868; F.O. 46-91, No. 41. Hiogo, Feb. 25, 1868. It seems that Willis did not produce any report on his assistance to these wounded men on the Shogun side. See also Griffis, *supra* note 22, at 132; and Satow, *supra* note 9, at 315.

¹⁵⁹ F.O. 46-95, No. 190, Encl.: Memorandum regarding wounded Japanese by W. Willis. Yokohama, July 21, 1868. [hereinafter Willis' Memorandum of July 21, 1868]

¹⁶⁰ F.O. 46-108, No. 81, Encl. 1: Report on Japanese Military Hospital by Joseph B. Sidall. Yedo, March 30, 1869 [hereinafter Sidall's Report].

¹⁶¹ F.O. 46-92, No. 46, Encl.: W. Willis to H. Parkes, March 2, 1868. The same description can be found in his report in F.O. 46-106, No. 17, Encl. 1: Memorandum by Dr. Willis on his visit to Wakamatsu and other places to render medical assistance to wounded Japanese, Yedo, Jan. 23, 1869 [hereinafter Willis' Memorandum of Jan. 23, 1869]; Sidall's Report; F.O. 46-98, H. Parkes to E. Hammond. Yokohama, Dec.

exacerbated in Echigo, Higashikuze requested Parkes to allow Willis to render his services in that region also, and Parkes accepted this request on the condition that Willis could also attend prisoners captured by the Imperial Forces.¹⁶² The Imperial Government asked further assistance of Willis in Wakamatsu¹⁶³ and he rendered assistance to wounded and sick soldiers belonging to both the Imperial Forces and the daimyo of Aizu.¹⁶⁴

The British Minister's intention was two-fold, as he wrote to Lord Stanley in agreeing to send Willis to Echigo: "it is to be hoped that by practical teaching of this nature the better feelings of the Japanese may be touched and the horrors of their warfare mitigated if only in a slight degree."¹⁶⁵ From this statement it is obvious that Parkes sent the doctor not only because it accorded with humanity but also because it would suit the British foreign policy of the time.¹⁶⁶ Willis himself wrote that his meeting with Japanese people would, he hoped, "open the way to a more familiar intercourse with foreigners."¹⁶⁷ However, as will be discussed later concerning the prisoners of war, the humanitarian aspect of British medical relief is to be emphasised.¹⁶⁸ Willis consistently complained of the non-existence of prisoners of war to the Japanese authorities.¹⁶⁹ Besides, the fact that the two British doctors saved the lives of injured samurai is

2, 1868. (private) Encl. 1: Memorandum by W. Willis. Shibata, Nov. 18, 1868 [hereinafter Willis' Memorandum of Nov. 18, 1868].

¹⁶² F.O. 46-97, No. 240, Encl. 1: Higashi Kuze to H. Parkes. Yedo, Oct. 2, 1868; Encl. 2: Parkes to Higashi Kuze Chiujo. Yokohama, Oct. 3, 1868. Daniels gave three motives behind Parkes's condition, namely "a desire to keep up an appearance of non-involvement, pure humanitarian sentiment, and a desire to gain popularity for foreigners among Japanese by helping as many as possible." Daniels, *supra* note 55, at 243.

¹⁶³ F.O. 46-98, No. 301, Encl.: Saionji Chiunagon and Mibu Sayemon no Gonnoské to W. Willis. Nov. 19, 1868.

¹⁶⁴ Willis' Memorandum of Jan. 23, 1869.

¹⁶⁵ F.O. 46-97, No. 240. Yokohama, Oct. 7, 1868. It was reported that "PARKES had a political object in view in sending them [Willis and Satow] up." See "Summary", *The Japan Times' Overland Mail* (Yokohama), Feb. 27, 1868, at 49, reprinted in *Early Newspapers*, *supra* note 29, Vol. 13, at 45.

¹⁶⁶ Daniels, *supra* note 55, at 243.

¹⁶⁷ F.O. 46-98, H. Parkes to [E. Hammond]. Yokohama, Nov. 4, 1868. (private) Encl. 4: Memorandum by W. Willis on the occasion of his visit to Kashiwasaki. [hereinafter Willis' Memorandum of Nov. 3, 1868]

¹⁶⁸ See Daniels, *supra* note 55, at 244.

significant, when considering that anti-foreign attitudes were still overwhelming in Japan.

Willis and Sidall were not the only doctors who helped the wounded and sick on the battlefield, and indeed there were some Japanese doctors who contributed to mitigating the conditions of *hors de combat*.¹⁷⁰ In Hakodate, the role played by Takamatsu Ryouun, a doctor who had studied medicine in France, is particularly noteworthy. He was given by Enomoto, the leader of the exiled retainers, charge of the Hakodate Hospital and its branch at the Koryuji Temple,¹⁷¹ where he treated wounded soldiers of both sides equally on the basis of Red Cross principles that he had encountered while in Europe.¹⁷² He explained why he undertook such impartial treatment by stating that “[i]n European States, there is a law that provides the equal treatment of those who are *hors de combat*, friend or foe.”¹⁷³ On June 20, 1869, these two hospitals fell to the Imperial Forces. The Hakodate Hospital was entered by a group of Imperial soldiers who threatened to kill the wounded, but Takamatsu persuaded an officer of Satsuma into protecting the wounded soldiers in the hospital.¹⁷⁴ On the other hand, another group of soldiers broke into the Koryuji branch, killed all the wounded soldiers and burnt the building.¹⁷⁵

The number of available documents concerning the protection of the shipwrecked is limited, but the following example is noteworthy. When the *Choyo*, the Imperial man-of-war, was destroyed by the rebels during the battle of Hakodate Bay on June 20, 1869, the *Pearl*, the British man-of-war, collected twenty-four officers and sailors of the

¹⁶⁹ See *infra* 3.5.4. The Protection of Prisoners of War.

¹⁷⁰ The Japanese doctors included Sato Shochu, Seki Kansai, Akagawa Genreki and Takamatsu Ryouun. See Koike, *supra* note 157, at 213-218.

¹⁷¹ Takamatsu Ryouun, *Toso Shimatsu [Record of Flight]*, reprinted in Takamatsu Ukiji, *Bakusho Furuya Sakuzaemon (ani) Bakui Takamatsu Ryouun (ototo) Den [Biography of Two Brothers, Furuya Sakuzaemon and Takamatsu Ryouun]*, at 243 (1980).

¹⁷² Koike, *supra* note 157, at 218.

¹⁷³ Takamatsu Ryouun, *supra* note 171, at 239. Translated from Japanese by the author.

¹⁷⁴ *Id.* at 329-330.

Choyo and gave medical treatment to them on land.¹⁷⁶ In gratitude, the Emperor granted presents to the captain, doctors and officers who helped the shipwrecked with gratitude.¹⁷⁷

3.5.4. THE PROTECTION OF PRISONERS OF WAR

The protection of captured soldiers in civil war is controversial, and for instance 1977 Protocol II does not use the term “prisoner of war”. Article 56 of Lieber’s Code prohibits the punishment and cruel treatment of prisoners of war, while its Article 153 specifically states that “[t]reating captured rebels as prisoners of war ... neither proves nor establishes an acknowledgment of the rebellious people”. During his trip to help the wounded and sick in the Japanese Civil War, Willis continuously complained of the non-existence of prisoners of war or of wounded soldiers belonging to the Shogunate. He wrote:

It is to be feared that a needless and cruel sacrifice of life characterizes hostile action on both sides, each justifying its acts by the conduct of its opponents. In the recent fight at Yedo all the wounded ronin were beheaded, and I have learnt from a reliable source that an unhappy doctor who lent his services to the ronin was for so doing executed and his head exposed at a place called Sanya near the Yoshiwara in Yedo. I have observed a significant absence of wounded prisoners, and notwithstanding assurances to the contrary from one side of the contending parties I am inclined to believe that a wounded prisoner has little if any compassion extended to him and is as a rule beheaded. ...¹⁷⁸

¹⁷⁵ *Id.* at 330-331.

¹⁷⁶ See J.D.D., Vol. 2-2, Doc. No. 260, Jul. 13, 1869.

¹⁷⁷ See *id.*, Doc. No. 442, Oct. 11, 1869.

¹⁷⁸ Willis’ Memorandum of July 21, 1868.

In almost all reports after this, Willis wrote that he had not seen any prisoner of war or wounded soldier of the Shogun Government.¹⁷⁹ It was in Wakamatsu where Willis finally found captured soldiers of the Aizu clan treated “with great clemency” by the Imperial Army.¹⁸⁰ On the other hand, in his same report on Aizu, Willis gave an account of the cruelty that the Aizu clan had shown to both Imperial soldiers and coolies in their hands.¹⁸¹ One can argue that many of the captured samurai were not treated as prisoners of war and possibly beheaded even though the numbers of those executed would require further in-depth research. It is likely that establishing prisoners of war camps according to the laws of war were unheard of during the Japanese Civil War.

3.5.5. THE PROTECTION OF FOREIGNERS

The protection of foreigners and their property became particularly relevant during the conflict in Hakodate because it was an open port where foreign settlers resided. The exiled retainers sent a declaration stating that their soldiers were forbidden to intrude into residential areas inhabited by Europeans and that they requested consuls to report any disobedience of the above order.¹⁸² Parkes wrote to Eusden, the British Consul in Hakodate, that the exiled retainers should give less than twenty four hours’ notice of attack in order to protect “the interests and safety of British subjects.”¹⁸³ Also, before the commencement of the conflict in Hakodate, the naval commanders of Britain and France recommended on April 20, 1869 that “some distinctive flag be hoisted over

¹⁷⁹ F.O. 46-98, Private letter (Nov. 4, 1868), Encl. 2. Memorandum by W. Willis of a journey from Yedo to Takata. Takata, Oct. 25, 1868; Encl. 3, Willis to Parkes. Kashiwasaki, Nov. 3, 1868; Willis’ Memorandum of Nov. 3, 1868; F.O. 46-100, (No number), Memorandum on the occasion of Willis’ visit to Niigata to render medical assistance to wounded Japanese by W. Willis. Niigata, Nov. 13, 1868; Willis’ Memorandum of Nov. 18, 1868.

¹⁸⁰ Willis Memorandum of Jan. 23, 1869.

¹⁸¹ *Id.*

¹⁸² “Document Circulated among all the Foreign Consuls at Hakodate on 6th Dec. Translation. The Exiled Tokugawa Kerai to the Representatives of European Powers”, *The Japan Times’ Overland Mail* (Yokohama), Dec. 30, 1868, at 316, *reprinted in Early Newspapers, supra* note 29, Vol. 20, at 10.

¹⁸³ F.O. 46-99, No. 316, Encl. 6: H. Parkes to R. Eusden, Yokohama, Dec. 13, 1868.

foreign property” for protection during hostilities.¹⁸⁴ In a circular issued by Eusden on the same day, “a red ensign or a red flag” should be used by British subjects residing in the town because of the above recommendation of the naval commanders.¹⁸⁵ Minami Teisuke, in the notice of commencement of hostilities, stated that a steamship was being sent for the protection of British subjects’ moveable properties¹⁸⁶ and he informed the British commander that the rebels would be attacked “in a short time”.¹⁸⁷ The French Consul on the other hand requested the Imperial Government to protect French factories and any church in Hakodate, and the authorities issued a strict order to that effect.¹⁸⁸

Regarding actual protection of foreign property, Eusden wrote on June 22, 1869:

There was very little looting indeed, I am told, and no wanton destruction of property, except in one case. ... on the whole, I am inclined to the opinion that great respect was shown to property more so than any European Army would have done after taking a town by assault...¹⁸⁹

However, Eusden wrote next day that he had requested the commander-in-chief of the Imperial Forces to issue strict orders to his soldiers not to enter into the houses of foreign residents because he had been informed of looting on the Imperial side: orders to the above effect followed the request.¹⁹⁰ As regards French nationals and their property, the French Interpreter sent a memorandum that pointed out some crimes

¹⁸⁴ F.O. 46-109, No. 103, Encl. 7: Circular by R. Eusden and John N. Duus, H.I.F. M’s Consular Agent to the foreign Consuls. [n.d.]

¹⁸⁵ F.O. 46-109, No. 103, Encl. 6: Circular by Consul R. Eusden. British Consulate, Hakodate, April 20, 1869.

¹⁸⁶ F.O. 46-109, No. 122, Encl. 2: Minami Teisuke to the Captain of H.B.M.’s man of war at the Harbour of Hakodate. 27d. 3m. The British captain replied to the letter. See F.O. 46-99, No. 122, Encl. 3: J.J. Ross, Captain, to Minami Teisuke. H.M.S. *Pearl*, Hakodate, May 9, 1869. Minami also wrote to the British and French consuls at Hakodate to similar effect. See F.O. 46-109, No. 122, Encl. 7: Minami Teisuke to Consul Eusden. 5d. of 4. in Meiji 2nd (May, 1869).

¹⁸⁷ F.O. 46-109, No. 122, Encl. 2, *id.*

¹⁸⁸ J.D.D., Vol. 2-1, Doc. No. 238, Jun. 29, 1869.

¹⁸⁹ F.O. 46-110, No. 139, Encl. 1: R. Eusden to Parkes. Hakodate, June 22, 1869.

committed by Imperial troops, in one of which soldiers broke into the warehouse of a French merchant and threatened him with a sword.¹⁹¹

3.6. THE AFTERMATH OF THE JAPANESE CIVIL WAR

3.6.1. Amnesty

After northern daimyo fighters surrendered, an Imperial edict was issued and the sentence of the rebellious daimyo was determined on January 19, 1869.¹⁹² According to the edict, the Government officials reported to the Emperor that “the crime of [Matsudaira Katamori, Date Yoshikuni and the rest] is equally that of rebellion, and that they deserve capital punishment”.¹⁹³ However, no death sentence was pronounced and punishments peculiar to Japan of the time, such as “perpetual custody”, “retirement into seclusion” and “retirement from public life” were imposed on the defeated daimyo.¹⁹⁴ Moreover, on November 1, 1869, the Imperial Government issued another decree to the effect that pardon was granted to Tokugawa Yoshinobu, Aizu and “all their followers.”¹⁹⁵

During the Civil War, Tokugawa Yoshinobu retired himself and the head of the Tokugawa family was replaced by Tokugawa Iesato, who was granted Shizuoka as the family’s new domain.¹⁹⁶ The real reconciliation between the Imperial Government and

¹⁹⁰ F.O. 46-110, No. 141, Encl. 1: R. Eusden to Parkes. Hakodate, June 23, 1869.

¹⁹¹ J.D.D., Vol. 2-1, Doc. No. 256, [date not given] 1869.

¹⁹² F.O. 46-107, No. 41, Encl. 1: Extract from an extra number of the Yedo Official Gazette [Dajokan Nisshi] published on [Jan.] 24, [1869]; the sentences pronouncement on all the DAIMIOS in rebellion against the Mikado.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ R.G. 59, R. 13, No. 84, Encl.: Notification of the Mikado’s decree granting unconditional pardon or absolution to the late Tycoon issued from the Daijokwan, Oct. 4 - Nov. 3, 1869. Original in *Dajokan Nisshi [Official Gazette]*, No. 103, Sep. 29, 2nd year of Meiji (lunar calendar), reproduced in *Dajokan Nisshi*, Vol. 3, at 534 (Ishii Ryosuke ed., 1980).

¹⁹⁶ J.D.D., Vol. 1-1, No. 382, Jul. 15, 1868. Letters from Higashi Kuze to the Representatives of France, Great Britain, Italy, the Netherlands, Prussia and the USA informing of the grant of a domain to Tokugawa Kamenosuke [Iesato]. Jul. 15, 1868.

the last Shogun was achieved when Tokugawa Yoshinobu was granted a principedom in 1902 for “his old services.”¹⁹⁷ Regarding Aizu, which was regarded as the most culpable of all, it was decided that about 1700 samurai be sent to Takada and 3200 to Tokyo for imprisonment.¹⁹⁸ Kayano Gonbei Naganobu, *karo* of Aizu,¹⁹⁹ was ordered to commit suicide for taking all the responsibility for Aizu’s war with the Imperial Government.²⁰⁰ In 1870 the son of Matsudaira Katamori succeeded his father, was ennobled and given new land in the most northern part of Honshu.²⁰¹ Many samurai of Aizu settled in the new domain but life was so severe that they had to live in extreme poverty.²⁰² Former retainers of Aizu were in general not offered high-ranking positions in the new Meiji Government. One of the exceptions was Shiba Goro, who served in the Imperial Army, played an important part in liberating the siege of the Boxer Rebellion and later became an army general.²⁰³ Matsudaira Katamori himself was released from seclusion on February 14, 1872.²⁰⁴ As regards Enomoto Takeaki, the rebel leader loyal to the Tokugawa to the end, he was granted a viscountship in 1887 because “after he was amnestied, he served for the Hokkaido Development Board in 1872, was appointed Vice-Admiral of the Imperial Navy in 1874, despatched to Russia

¹⁹⁷ Ishin Shiryo Hensankai [Association to Compile Documents on the Meiji Restoration] (ed.), *Fukkoku Kazoku Fuyo [Genealogy of Noble Family, Reissued]*, at 466 (1982). Translated from Japanese by the author. Nobility was established, and the noblemen of Kyoto and the daimyo were given the title *kazoku*, which means “noble”. See F.O. 46-111, No. 163, Encl.: Translation of Japanese Imperial decrees for Kosei Kwan. 6th month. Later in 1884, five classes of nobility, equivalent to the European ones, were established. See *Kampo [Japanese Official Gazette]*, No. 306, Jul. 7, 1884, at 2.

¹⁹⁸ See Aizu Boshin Senshi Hensankai [Association to Compile Documents on the War in Aizu], *Aizu Boshin Senshi [The War in Aizu]*, at 655 (1933).

¹⁹⁹ *Karo* is the high-ranking position under a daimyo.

²⁰⁰ Aizu Boshin Senshi Hensankai, *supra* note 198, at 660. See also *Dajokan Nisshi*, *supra* note 195, at 343.

²⁰¹ *Matsudaira Kafu [Genealogy of the Matsudaira Family]*, reproduced in *Aizu Boshin Senshi Hensankai*, *supra* note 198, at 670-671.

²⁰² Ishimitsu Mahito, *Aru Meiji Jin no Kiroku [Record of a Man of Meiji]*, at 58-75 (1971).

²⁰³ *Id.* at 125-162.

²⁰⁴ *Matsudaira Kafu*, *supra* note 201, at 674.

and China as Envoy Extraordinary and Minister Plenipotentiary, appointed as Minister for Communications in 1885, and as Government Minister several times.”²⁰⁵

3.6.2. THE LAWS OF WAR AND MEIJI JAPAN

The Japanese Civil War was the first major conflict in which Japan was engaged after the Meiji Restoration. The priority of Japanese foreign policy in the Meiji period was to revise the unfair treaties that the Shogunate had signed, so that Japan could have equal relationships with the Great Powers. To achieve this goal, it was thought that the full implementation of the laws of war was an ideal opportunity to demonstrate Japan’s willingness to adopt what were then considered ideas of the exclusively European-oriented community of nations. In the Meiji era, Japan fought such international wars as the Sino-Japanese War, the Boxer Rebellion and the Russo-Japanese War. It was especially in the last war that Japan was praised for her scrupulous observance of the laws of war.

In its philosophical aspect, humanity in warfare was not necessarily an idea held only by the Europeans. Indeed, *Bushido*, the Japanese equivalent of chivalry, imposed heavy duties on warriors.²⁰⁶ Nevertheless, as has already been examined, it was true that those who should have acted with honour did not, for instance, treat captured enemy samurai humanely during the Civil War. Then what was the significance of the Japanese Civil War? The answer is rather complex. After the war the warrior class was abolished and all Japanese people were made equal. Curiously, however, with the abolishing of the samurai, the *Bushido* was idealised and prevailed among former samurai who dominated the Imperial Government. For instance, Admiral Togo and General Nogi,

²⁰⁵ *Fukukoku Kazoku Fuyo*, *supra* note 197, at 166. Translated from Japanese by the author.

who are well-known for their willingness to obey the laws of war during the Russo-Japanese war. Each belonged to low-ranking class of samurai and had fought on the Imperial side during the Japanese Civil War. Even though the victory of the Imperial Government over the Shogunate led to abolishing the samurai, the same victory had the opposite effect of enhancing the *Bushido*, or the way of life of the samurai who no longer existed.²⁰⁷

3.6.3. THE RELEVANCE OF THE JAPANESE CIVIL WAR TO THE PRESENT TIME

The Japanese Civil War took place in 1868 to 1869, and doubt may be cast on the relevance of the war to the present international humanitarian law. However, it has significance today for the following reasons.

First, the Japanese samurai applied the laws of war of the time to a certain extent even when the 1864 Geneva Convention was the only humanitarian instrument to which Japan was not a party, and this shows the importance of custom. Custom being the only tool for those States not party to a treaty, the Japanese Civil War shows an important example about how custom could play a part.

Second, compared with the American Civil War, it may be true that the Japanese Civil War is not as significant as its American counterpart. However, as this author stated in Chapter 1, scholars tend to focus on one particular instance, but he is of opinion that scholars should endeavour to examine other cases which occur at the same time in other places. Therefore, civil wars other than the American Civil War, e.g. the Japanese Civil War, should be focused. In this light, the Japanese Civil War is a rare example in which

²⁰⁶ See Nitobe Inazo, *Bushido: The Soul of Japan* (rev. enlarged, 1969) (1905). See particularly Chapter V, Benevolence, the Feeling of Distress. See also Adachi Sumio, "The Asian Concept", in UNESCO, *The International Dimensions of Humanitarian Law* 13, 14-17 (1988).

²⁰⁷ Shiba Ryotaro, *'Meiji' to Iu Kokka [The State whose Name is 'Meiji']*, Vol. 2, at 117 (1994).

both parties to the Civil War acknowledged the existence of war at early stage, and in addition the parties requested to the third parties that neutrality be observed. Such behaviour of both contending parties to declare the state of war and to request neutrality policy to foreign Powers was probably unheard-of at that time, and this is a unique feature of the Japanese Civil War in comparison with the American Civil War. Concerning the laws of war, what makes the American Civil War especially remarkable was the introduction of Lieber's Code, which greatly influenced the later codification of the laws of war. Even though the Japanese Civil War did not produce such an important document which would influence the later development of the laws of war, however, certain conduct of hostilities in the civil war was unique to the war; such as the use of false flags, and protection of foreigners and the use of red flags for that purpose. Furthermore, British doctors were sent even to remote area of Japan by the Imperial Government to treat wounded and sick samurai, and such dispatch of foreign medical personnel is suggestive of the present activity of the ICRC.

Third, the Japanese Civil War is particularly important in terms of reconciliation, which is provided by Article 6 of Protocol II. Many recent civil conflicts originate from ethnic problems, and the Japanese Civil War may not be a pertinent example since Japan did not have ethnic problem at that time. However, there was hatred among certain *han*, e.g. between Satsuma and Aizu, and the treatment of the defeated could have been severer. Moreover, the Japanese Civil War shows how important reconciliation is; the reconciled Japan achieved industrialisation and modernisation, which would set a precedent for those States which are currently going through a civil war or through a reconciliation process.

CHAPTER 4

CUSTOM AND INTERNATIONAL HUMANITARIAN LAW ON NON-INTERNATIONAL ARMED CONFLICT

4.1. ROLE OF CUSTOM IN INTERNATIONAL HUMANITARIAN LAW ON CIVIL WAR

The Geneva Conventions are today almost universally ratified, and Protocol II is widely ratified even though some of the “specially affected States” are not parties to the Protocol.¹ In consequence, there is a question whether custom is of any significance, which is raised by Baxter:

Hence the paradox that as the number of parties to a treaty increases, it becomes more difficult to demonstrate what is the state of customary international law de hors the treaty.²

There are, however, two major reasons why the role of customary international law is of great value; that is, the informality and binding nature of customary law.

Customary international law can be formed in a flexible manner and it can respond to the reality of the world promptly, while the process of making treaties takes considerable time.³ In domestic jurisdiction, a legislation body can meet and introduce

¹ As to up-to-date information on ratification of IHL, see “Geneva Conventions of 12 August 1949 and Additional Protocols of 8 June 1977: ratifications, accessions and successions” (29 August 2000) [hereinafter “List of Ratifications”] which can be found in the ICRC’s homepage at <http://www.icrc.org/>. As to “specially affected States”, see *infra*. 4.4.1. Generality.

² Baxter, “Treaties and Custom”, 129 *Recueil des Cours* 25, 64 (1970-I). “Baxter’s paradox” is discussed in Edward Kwakwa, *The International Law of Armed Conflict*, at 33 (1992); Theodore Meron, *Human Rights and Humanitarian Law in Customary Law* [hereinafter *Human Rights*], at 50-52 (1989).

³ See *North Sea Continental Shelf, Judgment, ICJ Reports 1969, p. 3* [hereinafter *North Sea Continental Shelf cases*], para. 73; Baxter, *id.*, at 97; Claude Bruderlein, “Custom in international humanitarian law”, *IRRC*, Nov-Dec 1991, at 579, 589; Theodore Meron, “The Continuing Role of Custom in the Formation of International Humanitarian Law” (hereinafter “The Continuing Role of Custom”), 90 (1996) *AJIL* 238-249, 247; Shaw, *International Law*, at 58 (4th ed., 1997); Gennady M. Danilenko, *Law-Making in the International Community*, at 98 (1993).

law to cope with new situations in a relatively short time, but in the international community, the equality of sovereign States prevents such quick response.⁴ Customary international law can be established in an area in which treaty regulations are inadequate or nonexistent. Custom can also be formed by subsequent practice, and the ICJ examined this method in the *North Sea Continental Shelf* cases.⁵ Indeed, many of the humanitarian conventions were formulated after wars in which the introduction of new and unconventional methods of warfare cast doubt on the existing rules. The 1925 Gas Protocol⁶ resulted from the use of gas weapons during the First World War, the 1949 Geneva Conventions from the Second World War and the 1977 Protocols from the Vietnam War.

Now, attention is placed on another role. Customary international law binds all States regardless of ratification of treaties,⁷ and this role may be the more important in international humanitarian law on non-international armed conflict than the former role because of the limited existence of customary international law in this field. Before 1977, there had been no international treaty concerning civil war apart from Common Article 3 which is regarded as a “Convention in miniature”,⁸ and the introduction of Protocol II is, therefore, an encouraging step towards regulating civil war. However, by carefully examining today’s non-parties of Protocol II, one can notice that many of them are indeed facing civil war in their territory.⁹ Hence, the proof of existence of

⁴ State’s consent is necessary in order to bind the State by a treaty. See the Preamble, para. 3 and Article 34 of the Vienna Convention on the law of treaties [hereinafter the Law of Treaties], 1155 UNTS 331 (1980). As to the equality of sovereign States, see Article 2(1) of the UN Charter.

⁵ *North Sea Continental Shelf* cases, para. 75.

⁶ Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, 24 (1930) UKTS, Cmd. 3604.

⁷ See *North Sea Continental Shelf* cases, paras. 70-71; Baxter, *supra*. note 2, at 102-103; Shaw, *supra*. note 3, at 75.

⁸ *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field: Commentary*, at 48 (Jean S. Pictet ed., 1952). Throughout this thesis, this *Commentary* is referred to as “*Pictet’s Commentary*”.

⁹ See “List of Ratifications”, *supra*. note 1.

customary rules contributes to ameliorating the plight of the victims in armed conflict in which a State is not a party to Protocol II.¹⁰

A related question is denunciation. As to the four Geneva Conventions, Articles 63(I)/62(II)/142(III)/158(IV) respectively provide that a State which denounces the Conventions is still obliged to obey customary rules.¹¹ Protocol II has a provision for denunciation in Article 25, but it is silent on customary rules.¹² The reason for this silence is unclear, but it may be that most provisions of Protocol II were at the time of adoption innovative.¹³ The problem of denunciation is theoretical in international humanitarian law, and there has not been any denunciation until today.¹⁴ However, it needs to be emphasised, because of uncertainty in the future development of international relations, that a denouncing State is still obliged to obey customary law under Article 43 of the Vienna Convention of the Law of Treaties.¹⁵

4.2. RELATION BETWEEN CONVENTIONAL AND CUSTOMARY RULES

4.2.1. INTRODUCTION

The accelerated efforts to codify international law in the post-Second World War era have resulted in a number of multi-national law-making conventions, among which are the 1949 Geneva Conventions and 1977 Protocols. Law-making treaties are different

¹⁰ An exception is a persistent objector. See *infra*. 4.9.2. Persistent Objectors. Application of customary rules depends on implementation. See *infra*. Chs. 9-10.

¹¹ See Bruderlein's account on these Articles, Bruderlain, *supra*. note 3, at 582.

¹² It is worth comparing with Article 99 of Protocol I. Even though this article does not mention customary rules, *the ICRC's Commentary* states that "the whole of the relevant customary law" should be observed by a State denouncing Protocol I. *The ICRC's Commentary*, para. 3857. However, this *Commentary* does not allude to such obligations with respect to Article 25 of Protocol II. See *id.*, paras. 4919-4929.

¹³ However, the contrary view is presented by Meron, *Human Rights*, *supra*. note 2, at 6-7.

¹⁴ Indeed, denunciation is non-existent in international humanitarian law. See *Documents on the Laws of War* (Adam Roberts and Richard Guelff eds., 3rd ed., 2000).

¹⁵ See Bruderlein, *supra*. note 3, at 582-583. However, the denunciation of a treaty by a number of States could change customary international law, see Baxter, *supra*. note 2, at 98.

from mere contractual treaties, since the former is aimed at having a general effect.¹⁶ Although the emergence of law-making agreements brings clarity to international law, it reveals the problem of relations between conventional and customary rules. For instance, the ICJ examined the customary status of the 1958 Geneva Conventions¹⁷ on the *North Sea Continental Shelf* cases.¹⁸ This is also a fundamental question of this thesis; when one considers the application of humanitarian law on civil strife, which rule should be relied on, custom or convention?¹⁹ The present author, therefore, discusses the sources of the law of armed conflict on non-international armed conflict before proceeding to the detailed examination of custom.

4.2.2. CUSTOMARY RULES

Despite efforts at codification, there are still certain areas, i.e. the “Hague” law, which are not covered by Protocol II, and in these areas, the prohibition of certain conduct is possible only through custom.²⁰ International humanitarian law on international armed conflict would be of assistance on some occasions, but it cannot be invoked *mutatis mutandi* on the others because of the different nature of the conflict. For instance, the protection of prisoners of war in international war is possibly not applied to the situation of civil conflict, since the legitimate government is almost always extremely reluctant to

¹⁶ See Shaw, *supra*. note 3, at 75.

¹⁷ Convention on the Continental Shelf, 499 *UNTS* 311 (1964).

¹⁸ *North Sea Continental Shelf* cases, paras. 25-85.

¹⁹ Charter of the United Nations and Statute of the International Court of Justice, 67 (1946) *UKTS*, Cmd. 7015 [hereinafter the UN Charter and Statute of the ICJ respectively]. “[T]he general principles of law recognized by civilized nations” provided by Article 38(1)(c) of the Statute of the ICJ can be a source, but the nature of this instrument itself is controversial, and its applicability to IHL is therefore remote. See generally, Shaw, *supra*. note 3, at 77-82, especially, at 78-79.

²⁰ See Meron, “The Continuing Role of Custom”, *supra*. note 3, at 244; Meron, *Human Rights*, *supra*. note 2, at 72. Bond argues that Common Article 3 incorporates certain Hague rules “as limited by reasonable interpretation”. See James E. Bond, *The Rules of Riot*, at 82-83 (1974).

treat the captured rebels as prisoners of war.²¹ The ascertainment of the existence of customary rules therefore needs careful examination of practice and *opinio juris*.

4.2.3. COMPATIBILITY OF CONVENTIONAL AND CUSTOMARY RULES

Treaty provisions can be evolved into customary rules,²² and the ICJ affirmed the three stages of transformation of conventional rules into custom, namely declaratory, crystallising and generating customary international law.²³ These criteria may be useful in particular areas of law, such as the law of the sea and the law of treaties, which have a long history.²⁴ With reference to the laws of war on internal conflict, however, legal regulation of such conflict is a comparatively new area, and moreover most provisions of Protocol II are innovative and are not based on firmly established State practice.²⁵ Under such immature circumstances, importance should be placed on the examination of practice and *opinio juris* to determine the existence of customary rules from the beginning.

When there are two identical rules in different sources, the significance of custom is questioned. The ICJ claimed in the *Nicaragua* case that :

²¹ Regarding the treatment of those who are captured, see *infra*. Ch. 6.

²² Meron, "The Continuing Role of Custom", *supra*. note 3, at 244.

²³ As to crystallising rules, see *North Sea Continental Shelf* cases, para. 69; as to generating rules, para. 71; and as to declaratory rules, para. 81. See Oscar Schachter, "Entangled Treaty and Custom," in *International Law at a Time of Perplexity* 717, at 718 (Yoram Dinstein ed., 1989); Cassese's five categorisation in Antonio Cassese, "The Geneva Protocols of 1977 on the Humanitarian Law of Armed Conflict and Customary International Law", 3 *UCLA Pacific Basin Law Journal* 55, at 58-68 (1984) [hereinafter "The Geneva Protocols"].

²⁴ For instance, the ICJ referred to Article 62 of the Law of Treaties as "a codification of existing customary law". See *Fisheries Jurisdiction (United Kingdom v. Iceland)*, *Jurisdiction of the Court, Judgment*, ICJ Reports 1973, p. 3, para. 36.

²⁵ See the following chapters of this thesis. But cf. *the ICRC's Commentary*, para. 4435 (stating that "the existence of customary norms in internal armed conflicts should not be totally denied").

It will therefore be clear 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.²⁶

The Court, however, found in the same case that custom and Article 51 of the UN Charter do not precisely overlap.²⁷ It can be held that one should at first consider every circumstance,²⁸ and if conventional and customary rules are identical, the role of customary international law becomes future-oriented; that is to say, subsequent practice and *opinio juris* should be taken into account. Should two rules be not identical, these rules may be interpreted and applied differently.²⁹ For instance, Article 18(2) of Protocol II provides “relief actions for the civilian population”. This is more detailed than Common Article 3 which the *Nicaragua* case has confirmed as customary,³⁰ but Article 18(2) does not mention the role of the ICRC. Therefore, there is a difference between these provisions, though this difference does not hamper ICRC activities which are provided by Common Article 3.³¹

4.2.4. CONVENTIONAL RULES

Many provisions of Protocol II are, as this thesis demonstrates, conventional rules, which do not bind non-parties to the treaty and these provisions may be crystallised or generated into customary rules because of the law-making nature of Protocol II. It may appear to some that this approach to draw a firm line between conventional and

²⁶ *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, ICJ Reports 1986, p. 14, para. 179* [hereinafter *Nicaragua* case].

²⁷ *Nicaragua* case, para. 176.

²⁸ See Shaw, *supra*, note 3, at 77.

²⁹ *Id.*, at 83.

³⁰ *Nicaragua* case, para. 216-220.

³¹ See *the ICRC's Commentary*, para. 4891 (stating that “Article 18, paragraph 2, does not in anyway reduce the ICRC’s right of initiative, as laid down in common Article 3 since the conditions of application of the latter remain unchanged” (footnotes omitted)).

customary rules is too strict, and it is indeed not practicable to determine the exact time of the establishment of custom.³² However, the present author considers that crystallising and generating rules are still the law which *should be*, and that they still lack in binding force, for they are not based on practice and *opinio juris*.

At this stage of limited application of Protocol II, one should particularly pay attention to the practice and *opinio juris* of non-parties to the treaty because these two elements would demonstrate the application of a treaty provision which they have not ratified.³³ In this light, the observation of the practice and *opinio juris* of non-parties to Protocol II is of great importance today because many “specially affected” states have not ratified the convention, unlike the 1949 Geneva Conventions.³⁴

4.3. GENERAL DISCUSSION ON PRACTICE AND *OPINIO JURIS*

It is well established and accepted that “international custom” is “evidence of a general practice accepted as law”.³⁵ Customary international law is, therefore, a general *practice* which is accepted as law, in other words, *opinio juris*. Furthermore, the ICJ affirmed that treaty provisions that consist of “a fundamentally norm-creating character” and are accompanied by State practice and *opinio juris*, can be transformed to customary rules.³⁶ Normative rules give rise to rights and obligations to States,³⁷ and obviously international humanitarian law is in the ambit of these rules.³⁸ The

³² See Abi-Saab, “The 1977 Additional Protocols and General International Law: Some Preliminary Reflections” in *Humanitarian Law of Armed Conflict: Challenges Ahead* 115, at 123 (Astrid J.M. Delissen and Gerard J. Tanja eds., 1991).

³³ See Baxter’s account on “multilateral treaties as constitutive of new customary international law”, Baxter, *supra*. note 2, at 57-74.

³⁴ As to “specially affected” States, see *infra*. 4.4.1. Generality.

³⁵ See the Statute of the ICJ, Article 38(1)(c).

³⁶ *North Sea Continental Shelf cases*, para. 70-78.

³⁷ See Weil, “Towards Relative Normativity in International Law?”, 77 *AJIL* 413, at 413 (1983).

³⁸ The provisions of Protocol II are either prescriptive, prohibitive or permissive. See *id*.

normativity of international humanitarian law is therefore evident, and the following discussion concentrates on the other two elements, practice and *opinio juris*.

Although international and domestic courts as well as scholars generally agree with the importance of practice to customary international law, many of them tend to concentrate on statements, resolutions and conventions rather than to examine actual practice.³⁹ The position of the ICJ on practice is ambivalent. In the *Advisory Opinion on Nuclear Weapons*, the ICJ reiterated the importance of both practice and *opinio juris* as “the substance of [customary international] law”.⁴⁰ However, the Court avoided examining the “policy of deterrence”,⁴¹ and it focused on discussing the existence of *opinio juris*.⁴² This attitude of the Court towards practice is merely a repetition of the judgment of the *Nicaragua* case in which the Court stated that “The Court must satisfy itself that the existence of the rule in the *opinio juris* of States is confirmed by practice”,⁴³ but it concentrated on analysing *opinio juris*.⁴⁴

This emphasis on *opinio juris* is primarily because of the difficulty in obtaining information on military operations.⁴⁵ Military information is probably the most

³⁹ See *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, ICJ Reports 1996, p.66* [hereinafter *Advisory Opinion on Nuclear Weapons*]; *The Prosecutor v. Dusko Tadic, a/k/a “Dule”, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, 2 Oct. 1995, reprinted in 35 ILM 32 (1996)* [hereinafter *Tadic case*]. Meron appears to have modified his opinion. He relied on *opinio juris* in “The Geneva Conventions as Customary Law”, 81 *AJIL* 348, at 361, 367, 369 (1987), but he later admits that “operational practice” is essential in “The Continuing Role” *supra*. note 3, at 240-241. See also H.H.G. Post, “Some Curiosities in the Sources of the Law of Armed Conflict in a General International Legal Perspective”, 25 *NYIL* 83, 98 (1994).

⁴⁰ *Advisory Opinion on Nuclear Weapons*, para. 64.

⁴¹ *Id.*, para. 67.

⁴² *Id.*, paras. 67-73.

⁴³ *Nicaragua case*, para. 184.

⁴⁴ See the Court’s findings on customary international law on the use of force and non-intervention, *id.*, paras. 187-209.

⁴⁵ See Dieter Fleck, “The Protocols Additional to the Geneva Conventions and Customary International Law”, 29 *Revue de Droit Militaire et de Droit de la Guerre* 495, 500 (1990); Kwakwa, *supra*. note 2, at 31; Meron, *Human Rights, supra*. note 2, at 41. Wolfke’s contention that “every event of international importance is universally and immediately known” therefore appears too optimistic as regards international humanitarian law on non-international armed conflict. See Karol Wolfke, *Custom in Present International Law*, at 60 (2nd ed., 1993).

classified among government information, and declassification, if any, may take long years.⁴⁶ ICRC delegates, who are present in many civil conflicts, should have valuable information on military situations, but they observe strict confidentiality in order to maintain neutrality.⁴⁷

The Tribunal for the former Yugoslavia discussed:

In appraising the formation of customary rules or subject-matter, reliance must primarily be placed on such elements as official pronouncements of States, military manuals and judicial decisions.⁴⁸

Meron formerly argued that “it is extremely difficult to collect credible evidence of state practice” and thus military manuals would be the most reliable evidence of practice.⁴⁹ Similarly, Schachter argues that the necessity of demonstrating practice is reduced in areas of normative rules if *opinio juris* is “clearly demonstrated and strong”.⁵⁰

In spite of such difficulties inherent to internal conflicts, the present author is of the opinion that specialists in international humanitarian law should endeavour to obtain and examine information on practice, particularly actual practice.⁵¹ The ascertainment of customary international law without concrete evidence of practice would not be convincing to both parties to civil war.⁵² Then, they should carefully find the existence

⁴⁶ As to the difficulty in obtaining information on military operations, see *Tadic* case, para. 99.

⁴⁷ See *infra*. Ch. 9.

⁴⁸ *Tadic* case, para. 99.

⁴⁹ Theodor Meron in “Determining Customary International Law Relative to the Conduct of Hostilities in Non-International Armed Conflicts”, 2 *American University Journal of International Law and Policy* 471, 491-492 (1987) [hereinafter “Determining Customary International Law”]. Meron, however, recognises their inadequacy with respect to civil conflicts when he states “I would hope that future manuals of military law will give more attention to these [internal] conflicts”. See Meron in “A Discussion of Protocol II to the Geneva Conventions of 1949”, *ASIL Proceedings* 613, at 615 (1988) [hereinafter “A Discussion of Protocol II”].

⁵⁰ Schachter, *supra*. note 23, at 733-755.

⁵¹ Meron, “The Continuing Role of Custom”, *supra*. note 3, at 248.

⁵² See Burrus Carnahan in “Determining Customary International Law”, *supra*. note 49, at 489 (in the Humanitarian Law Conference held in 1987 he “cautioned that even though the rules [in the laws of war]

or non-existence of customary international law by examining both practice and *opinio juris*, because established customary international law in effect binds all States, whether or not they have ratified relevant treaties.⁵³ It should be remembered that it is governments and rebel forces that apply the law, and an attempt to find customary international law and apply this custom to real situations without examination of practice would be unrealistic.⁵⁴ For a legitimate government which is almost always reluctant to apply international humanitarian law to civil war, customary international law whose existence is mainly based on *opinio juris* would not be persuasive to apply the law. On the other hand, the rebel organisation which is probably not used to applying international law might find it easier to implement international humanitarian law if there were concrete examples of application in the past.

This writer considers that customary international law is “the law to be” while convention is either/both “the law to be” and/or “the law should be”. The determination of a certain number of States to introduce a new convention to regulate what is not regulated by custom does not automatically oblige the others to conform with it. Therefore, practice and *opinio juris* are necessary for the establishment of customary international law.⁵⁵ Furthermore, in non-international armed conflict, one side almost always regards the other as illegitimate, which often results in exacerbating the conditions of victims. Hence, convincing the parties to a conflict of the existence of customary international law based on persuasive evidence becomes important. In conclusion, Cheng’s critical remark is worth noting:

are very humane and agreeable with fellow diplomats, they must be credible for soldiers to follow them”). A participant in the same Conference contended that “any attempt to state the law abstracted from state practice often appears unrealistic to the people who actually apply the law”. *Id.*, at 487.

⁵³ Law of the Treaties, Article 34.

⁵⁴ *Supra.* note 52.

⁵⁵ See Meron, “The Continuing Role of Custom”, *supra.* note 3, at 248.

In any situation, it is absolutely necessary to distinguish between what is the *lex lata* and what is only *lex ferenda*, and not fall into the trap of believing one's own aspirations or those of others, however fashionable, to be the existing law.⁵⁶

The importance of practice having been discussed and emphasised, this prominence does not discard the necessity of *opinio juris* for the formation of custom. A State and a rebel group can act, but it may be acting out of political or humanitarian considerations. The difference between protocol or comity and custom is that the latter is observed as legal obligation,⁵⁷ and therefore the State must consider that it is legally required to conduct itself accordingly. For instance, even though State practice exists to grant temporary asylum to those who escape from civil war, the US Court of Appeals stated:

We are not persuaded, however, that these nations acted in the belief that the practice was required by international law. More plausibly, they acted out of understandable humanitarian concern.⁵⁸

Even if a State is a party to a treaty, the observance of the treaty by the State simply because the State is a party, does not amount to the formation of customary international law because the State is only fulfilling the treaty obligations. The belief of both parties and non-parties that they are bound by customary rules is therefore necessary.⁵⁹

Without *opinio juris* as one of the requirements for the establishment of custom, there should be very few, if any, customary rules even on international wars, because of the

⁵⁶ Bin Cheng, "How Should We Study International Law", 13 *Chinese Yearbook of International Law and Affairs* 214, 217 (1994-1995).

⁵⁷ See *North Sea Continental Shelf* cases, para. 77; Michael Akehurst, "Custom as a Source of International Law", 47 *BYIL* 1, 33 (1974-75) [hereinafter "Custom as a Source"]; Andrew Borrowdale, "The future of the law of war: the place of the Additional Protocols of 1977 in customary international law", 14 *Comparative and International Law Journal of Southern Africa* 79, at 84 (1981).

⁵⁸ *Echeverria-Herrnandez v. U.S.I.N.S.*, 923 F. 2d 688, at 693 [Hereinafter *Echeverria-Herrnandez* case].

⁵⁹ Theodor Meron, "The Geneva Conventions as Customary Law", *supra*. note 39, at 366-367; Meron, *Human Rights*, *supra*. note 2, at 53.

fact that violations of the laws of war occur in any armed conflict. The reason why custom does not cease to exist even though there are violations of humanitarian rules is that violating States and rebels legitimise their conducts and third States protest against breaches of humanitarian law.⁶⁰

4.4. PREREQUISITES OF PRACTICE AND *OPINIO JURIS*⁶¹

4.4.1. GENERALITY

This prerequisite stems from Article 38 of the Statute of the ICJ which provides “a *general practice*”.⁶² The ICJ in the *North Sea Continental Shelf* cases emphasised practice of “States whose interests are specially affected”,⁶³ and this principle of “specially affected States” is widely supported by various publicists.⁶⁴ International law does not demonstrate the components of “specially affected States” in a legal light,⁶⁵ and they differ from one area of international law to another, and each case should be examined.⁶⁶ For instance, Switzerland is clearly a “specially affected State” with reference to the customary status of the law of neutrality,⁶⁷ but it is not so as regards the customary status of the use of continental shelf. In the laws of war on non-international armed conflict, “specially affected States” could be defined as Great Powers and those States which face civil war.⁶⁸ Concerning the former, these States are not likely to

⁶⁰ See *infra*. 4.7.2. Denial and Justification by Belligerents for Their Own Conduct; 4.7.5 Protest against Belligerents’ Conduct by Third States.

⁶¹ See Danilenko, *supra*. note 3, at 94-98.

⁶² Emphasis added.

⁶³ *North Sea Continental Shelf* cases, para. 74.

⁶⁴ See Baxter, *supra*. note 2, at 66; Meron, *Human Rights*, *supra*. note 2, at 75; Shaw, *supra*. note 3, at 63; Wolfke, *supra*. note 45, at 78-79.

⁶⁵ Danilenko, *supra*. note 3, at 96.

⁶⁶ See cf. Borrowdale, *supra*. note 57, at 84 (arguing that even though “widespread and representative participation in a practice” might lead to the establishment of custom, to what extent such participation is necessary cannot be prescribed and “this must be judged in each case”).

⁶⁷ Meron, “The Continuing Role of Custom”, *supra*. note 3, at 249.

⁶⁸ See Meron, *id* (referring to “nuclear powers, other major military powers, and occupying and occupied states” as “specially affected states”).

encounter civil conflict,⁶⁹ but they can exercise influence on the international community.⁷⁰ It is not plausible to exactly define which States are Great Powers, but they at least include the Permanent Members of the Security Council, advanced industrialised States and regional Powers.⁷¹ The practice of these States usually takes a form other than actual wartime practice, such as publishing military manuals, legislating military law,⁷² and acts of protest against violations.

States which face civil conflict are “specially affected”⁷³ even though many of them are not so in peacetime. Military activities become a main element of practice of these States, though other forms of practice should not be disregarded. For instance, many States facing civil conflicts in the 1990s were not parties to Protocol II, and such large abstention from ratification would function against the creation of customary rules through the Protocol.⁷⁴

4.4.2. UNIFORMITY

Practice must be “virtually uniform”⁷⁵ because absolute uniformity is not possible.⁷⁶ One deviation from uniform practice should be considered to be a breach,⁷⁷ but this point is often disregarded in international humanitarian law since it is the spectacular

⁶⁹ It is however difficult to deny the possibility of civil war in Great Powers. As a matter of fact, China, France (in Algeria) and Russia (in Chechnya) experienced internal armed conflict *after* the Second World War.

⁷⁰ See Meron, “The Continuing Role of Custom”, *supra*. note 3, at 249. But see Abi-Saab, *supra*. note 32, at 118-119; Akehurst, “Custom as a Source”, *supra*. note 57, at 23 (Akehurst contends that it is publicity, rather than the power of States, that affect other States’ practice, but it seems to the present writer that the power of States make publicity more likely).

⁷¹ Meron, “The Continuing Role of Custom”, *supra*. note 3, at 249; Meron, *Human Rights*, *supra*. note 2, at 75-76.

⁷² As to the influence of standards of “leading nations”, see Post, *supra*. note 39, at 98 and n.46.

⁷³ Meron, “The Continuing Role of Custom”, *supra*. note 3, at 249; Meron, *Human Rights*, *supra*. note 2, at 75-76.

⁷⁴ See Meron, *Human Rights*, *id.*, at 76.

⁷⁵ *North Sea Continental Shelf* cases, para. 74. See also Akehurst, “The Hierarchy of the Sources of International Law”, 47 *BYIL* 273, 276 (1974-75); Borrowdale, *supra*. note 57, at 83.

⁷⁶ Brownlie considers “substantial uniformity” to be indispensable. See Ian Brownlie, *Principles of Public International Law*, at 5 (5th ed. 1998).

violations of international humanitarian law that are more often remembered,⁷⁸ and a breach of the law tends to be seen as the norm rather than an exception.⁷⁹ Schachter writes:

Some of the norms referred to, particularly the rules on force and the humanitarian rules of war, are brittle and prone to violation. It makes sense to recognize that in these cases breaches are likely and that the rules would vanish if such breaches were considered as 'State practice' creating new rules. This is an additional reason to minimize the necessity of uniform and consistent practice when there is a strong *opinio juris* or the peremptory nature of the rule.⁸⁰

In non-international armed conflict the existence of customary international law is still limited, and a breach of international humanitarian law does not automatically become a violation of customary international law. Furthermore, if a State is not a party to Protocol II, it is not responsible for a violation of this treaty, even though the State and/or rebels may be morally responsible for the general principles of the laws of war and condemned by the international community.

4.4.3. CONTINUITY

The ICJ judged in the *North Sea Continental Shelf* cases that customary international law can be formed "even without the passage of any considerable period of time",⁸¹ and

⁷⁷ *Nicaragua* case, para. 186.

⁷⁸ Michael Harris Hoffman, "The customary law of non-international armed conflict: evidence from the United States Civil War", *IRRC*, Jul-Aug 1990, at 322, 341.

⁷⁹ See Meron, *Human Rights*, *supra*. note 2, at 61 (arguing that "To balance the greater visibility of violations, it is therefore necessary that any inquiry into international practice should focus on cases of conduct consistent with a norm").

⁸⁰ Schachter, *supra*. note 23, at 735.

⁸¹ *North Sea Continental Shelf* cases, para. 73.

most scholars agree with this formulation.⁸² This is especially true in the areas where technological advancement plays a considerable part, such as air and space law, and the law of armed conflict also belongs to these areas since military technology progresses rapidly. However, a State confronting civil war is extremely reluctant to apply humanitarian law, and this unwillingness hinders the establishment of custom. Furthermore, a gap exists between the time when the practice is conducted and when information on the practice becomes available. Therefore, the ascertainment of customary international law takes a considerable time even though the custom has formed long before the ascertainment.

4.4.4. RELEVANCE OF THE PREREQUISITES TO *OPINIO JURIS*

The above three conditions are almost always discussed in terms of State practice, but they are also relevant to *opinio juris*. As to generality and “specially affected States”, their opinion can greatly influence the creation of custom.⁸³ Referring to uniformity, States facing a civil conflict often express different views on the same subject,⁸⁴ and conflicting opinions makes the establishment of customary law, as well as its ascertainment, difficult.⁸⁵ Therefore, *opinio juris* must be “virtually uniform”. Apropos of continuity, even one statement could bind a State, and it does not have to be continuously expressed. However, as mentioned above, statements are often

⁸² See Akehurst, “Custom as a Source”, *supra*. note 57, at 16; Borrowdale, *supra*. note 57, at 83; Brownlie, *supra*. note 76, at 5; Kwakwa, *supra*. note 2, at 64 and n.105; Shaw, *supra*. note 3, at 60; Wolfke, *supra*. note 45, at 59.

⁸³ See Schachter, *supra*. note 23, at 730-731. But see Maurice Mendelson, “The Subjective Element in Customary International Law”, 66 *BYIL* 177, 186 (1995) (Mendelson casts doubt on the role of these States).

⁸⁴ There are a countless number of examples of ambiguous positions taken by both States and rebels. See *infra*. Chs. 5-9.

⁸⁵ Regarding such difficulty, see e.g. *infra*. 4.7.2. Denial and Justification by Belligerents for Their Own Conduct.

inconsistent, and therefore the repetition of pronouncing the same view for a long time would be more ideal for the finding of a firmly held *opinio juris*.

4.4.5. CONSIDERATIONS ABOUT THE PREREQUISITS IN HUMANITARIAN LAW

If a certain rule is persistently observed in an internal conflict by all parties to the conflict, it may be tempting to conclude that the rule has become customary because of the practice. Cassese, for instance, held that certain customary rules had been created during the Spanish Civil War, since “there evolved a general practice among third States and concerned parties, and evidence exists that this practice was recognized as flowing from a legal obligation”.⁸⁶ It, however, seems that he took a different approach when he wrote that “the *repetition of protests by a great number of States* and the *affirmation by some international body representative of the world community*” are scarce for the ascertainment of general principles concerning the prohibition of certain weapons.⁸⁷ The present writer finds the latter argument more appropriate, since customary law binds all States and the observance of a certain rule in only one conflict is not adequate for the establishment of the rule as custom. International lawyers should analyse at least major conflicts in a certain period to determine whether a certain regulation is widely observed.

Another problem is the co-existence of conflicting practice and/or *opinio juris*: in other words, what a government or a rebel group says and does is often inconsistent. Sommaruga as the former President of the ICRC questioned:

⁸⁶ Antonio Cassese, “The Spanish Civil War and the Development of Customary Law Concerning Internal Armed Conflicts”, in *Current Problems of International Law* 287, 315 (Antonio Cassese ed., 1975).

⁸⁷ Antonio Cassese, “Means of Warfare: The Traditional and the New Law”, in *The New Humanitarian Law of Armed Conflict* 161, 171-2 (Antonio Cassese ed., 1979).

The parties to internal conflicts very often publicly declare that the prisoners they hold are treated humanely. Such statements may sound reassuring, but are they to be believed when these same parties refuse to grant the ICRC access to the prisoners in question?⁸⁸

Practice and *opinio juris* must be virtually uniform and also continuous, so opposing practice and/or *opinio juris* neither creates a customary rule nor destroys it. This is especially true of the Salvadoran Civil War, in which both Government and rebel forces did not always follow their eagerness to comply with international humanitarian law.⁸⁹

The last issue to discuss is the influence of a practice which is not known to international lawyers. The Japanese Civil War is the most pertinent instance. It should have influenced the laws of war of the late nineteenth century, for the recognition of belligerency and a certain degree of mitigation of the situation - e.g. the humane treatment of the wounded and prisoners - were observed. The fact is, however, that no influential textbook of international law of that time referred to the civil war, and it did not have any significance upon international law then.

To face this problem, first international lawyers ought to endeavour to obtain as much reliable information as possible. Regarding the Japanese Civil War, a reason for the ignorance may be that Japan was considered to be “half-civilised” by most international lawyers of the time, and the Civil War should not have been so important.⁹⁰ However, even today virtually no literature exists on the legal aspect of this subject, either in Japanese or in other languages, and this can be regarded as negligence on the part of the

⁸⁸ Cornelio Sommaruga, “Respect for international humanitarian law: ICRC review of five years of activity (1987-1991)”, *IRRC*, Jan.-Feb. 1992, at 74, 82.

⁸⁹ See *infra*. Ch. 5.

⁹⁰ See e.g. Theodore D. Woolsey, *Introduction to the Study of International Law, Designed as an Aid in Teaching, and in Historical Studies*, §136 (1860).

international lawyers, considering the importance of the said Civil War. Second, however, if evidence of the observance of certain practice or *opinio juris* cannot be found, such absence of documents should be interpreted as nonexistence of a particular practice or *opinio juris*. For instance, according to Article 15 of Protocol II, it is prohibited to attack dams and dykes. However, there are only a few fragmentary documents about practice of this provision, which should be explicated as lack of information on practice, rather than as abstention.⁹¹

4.5. SUBJECTS OF PRACTICE AND *OPINIO JURIS*

4.5.1. INTRODUCTION

Although international humanitarian law is part of international law, international humanitarian law on non-international armed conflict is remarkable in terms of the subject matter of practice and *opinio juris* since actors other than States play an important role in such conflict. There are four possible candidates to be regarded as subjects of practice; States; dissident groups; individuals; and international organisations.

4.5.2. STATES⁹²

States are the least controversial actor because it is the sovereign State which makes and is bound by international law. Article 34(1) of the Statute of the ICJ provides that “Only States may be parties in cases before the Court” and Articles 3 and 4 of the UN Charter also allow only States to become Members of the UN. The ICJ reaffirmed its position in the *Advisory Opinion on the Nuclear Weapons* that customary international

⁹¹ See *infra*. Ch 8.

⁹² See Danilenko, *supra*. note 3, at 82; Shaw, *supra*. note 3, at 65.

law would be ascertained by examination of “the actual practice and *opinio juris* of States”.⁹³

4.5.3. DISSIDENT GROUPS

In civil conflict, one cannot ignore the existence of dissident groups, but there is difficulty in regarding them as a subject of practice and *opinio juris*. Article 34(1) of the Statute of the ICJ is clear that the State is the only entity which may appear before the Court, which does not leave any room for dissidents. In addition, States in internal conflict are extremely reluctant to undertake any conduct in a way which might imply the recognition of rebel organisations. Hence, though the term “dissident armed forces” is used in Article 1(1) of Protocol II, the whole sentence of this paragraph is written in the passive form without specifying any subject. Besides, Article 3(1) of Protocol II provides that “Nothing in this Protocol shall be invoked for the purpose of affecting the sovereignty of a State”. For instance, the following statement by the official spokesman of the Russian Foreign Ministry shows the common attitude which States take towards rebel groups:

The time has come, I think, quite resolutely to warn [some statesmen abroad] against such attempt [to internationalize the problem]. We proceed from the fact that there is no international legal document, not a single charter of international organizations, which forbids states from defending the constitutional freedoms and rights of their citizens and from undertaking all necessary measures to fight

⁹³ See e.g. *Advisory Opinion on Nuclear Weapons*, para. 64. The Court in this Advisory Opinion referred to the *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, *I.C.J. Reports 1985*, p. 13, para. 27.

against lawlessness, banditism and from restoring law and order on their own territory.⁹⁴

Despite such inconclusive position of dissident groups, it can be submitted that their conduct and opinions should be regarded as formal practice and *opinio juris*. To justify this position, Cassese's argument on the formal applicability of Protocol II to rebel groups is persuading.⁹⁵ He first relies on the effects of treaties on third parties which are codified in the Vienna Convention on the Law of Treaties.⁹⁶ The Convention provides that a treaty binds a third party when there is an intention of the contracting parties to create rights or obligations on third parties and when the rights or obligations are accepted by a third party.⁹⁷ Regarding the first condition, Cassese is of opinion that Article 6(5) of Protocol II provides the duty of "authorities in power... to grant the broadest possible amnesty"; "the authorities in power" could be both the legitimate government when it crushes a rebel group or the rebel group when it successfully defeat the legitimate government; and therefore that this provision sets duty on both government and rebel sides, which logically extends also to other rules of the Protocol.⁹⁸ Regarding the second condition, he argues that each case should be studied in order to determine whether a rebel group, a third party to the Protocol, shows its willingness to observe Protocol II.⁹⁹

⁹⁴ "Russian Foreign Ministry spokesman warns against internationalizing Chechnya problem", broadcast by Ostankino Radio Mayak, Moscow, in Russian, 1452 gmt, 20 Dec. 94, reproduced in BBC Monitoring, *Summary of World Broadcasts*, Part 1 Former USSR, 3rd Ser., 22 Dec 1994, SU/2185, at B/8 (22 Dec. 1994).

⁹⁵ Antonio Cassese, "The Status of Rebels under the 1977 Geneva Protocol on Non-International Armed Conflicts", 30 *ICLQ* 416 (1981).

⁹⁶ *Id.*, 423.

⁹⁷ *Id.*, 423.

⁹⁸ *Id.*, 427.

⁹⁹ *Id.*, 428.

His argument is persuasive for two reasons. First, the contention logically links the Vienna Convention with Protocol II through Article 6(5) of the Protocol. It is consistent to maintain that, as long as Protocol II takes into consideration the possibility of a rebel group to become “the authorities in power” after the conflict, the group should have formal legal status.¹⁰⁰ Second, Cassese focuses on the temporary nature of the rebel group,¹⁰¹ which matches the reality of civil conflict. He correctly states that “rebels *do not become formal parties to the Protocol*” since it is only States that become parties to the treaty, but the temporary character allows rebel groups to be formally bound by the Protocol.¹⁰²

If a rebel group has formal duties and obligations under Protocol II for the above reasons, it is logical to conclude that the group’s practice and *opinio juris* formally contribute to the formation of customary international law, and the examination of such practice and *opinio juris* is worth conducting. The ICTY refers to “the belligerent States, Governments and insurgents” as “factors [that] have been instrumental in bringing about the formation of the customary rules at issue”.¹⁰³ Indeed, the Court cites a statement issued by a rebel group in El Salvador.¹⁰⁴

4.5.4. INDIVIDUALS

Article 6 of the Nuremberg Charter introduced the criminal liability of individuals,¹⁰⁵ and the Tribunal for the former Yugoslavia further affirmed that:

¹⁰⁰ *Id.*, 427.

¹⁰¹ *Id.*, 429.

¹⁰² *Id.*, 429.

¹⁰³ *Tadic* case, para. 108.

¹⁰⁴ *Tadic* case, para. 107.

¹⁰⁵ Charter of the International Military Tribunal in *Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November - 1 October 1949*, at 10-16 (1947).

customary international law imposes criminal liability for serious violations of common Article 3, as supplemented by other general principles and rules on the protection of victims of internal armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife.¹⁰⁶

Notwithstanding such firm confirmation that a person may be liable for his or her war crime, it is doubtful whether practice and opinion in relation to particular individual conduct can substantially contribute to forming or destroying customary law. It is true that individuals today have rights and obligations in certain areas of international law, i.e. human rights and humanitarian law, and they are subjects of these limited fields of law.¹⁰⁷ Moreover, it is individuals, not an unreal State, who physically act and make statements in armed conflict.¹⁰⁸ However, it is States that respond to individuals' acts, and thus these acts can be attributed to States rather than individuals.¹⁰⁹ In addition, considering "individual practice" and "individual *opinio juris*" for the ascertainment of customary rules would bring chaos to both international and domestic courts, for there is an enormous number of cases of such "practice" and "*opinio juris*", and assessing them would simply be impossible.

Regarding individual soldiers, they are agents of either a legitimate government or a rebel group, and their conduct should be regarded as the practice or *opinio juris* of the State or of the rebel group, whether or not they obey order. Civilians may be

¹⁰⁶ *Tadic* case, para. 134.

¹⁰⁷ See Shaw, *supra*. note 3, at 190.

¹⁰⁸ Frits Kalshoven, "Applicability of Customary International Law in Non-International Armed Conflicts", in *Current Problems of International Law* 267, 271 (Antonio Cassese ed., 1975).

¹⁰⁹ Akehurst, "Custom as a Source", *supra*. note 57, at 11. As to rebels, see *supra*. 4.5.3. Dissident Groups.

responsible for their crimes committed during civil war,¹¹⁰ but as discussed, the dimension of individual responsibility is different from that of customary international law. Even though Article 18 of Protocol II provides for relief activities by civilians, such activities should be regarded as the result of dissemination or instructions by authorities.¹¹¹

4.5.5. INTERNATIONAL ORGANISATIONS¹¹²

The role of international organisations is becoming more and more important in international law, and this is also true to international humanitarian law on non-international armed conflict. The ICRC's role in civil conflict is prominent, especially in the area of implementation.¹¹³ Besides, there are recent cases in which the UN plays a part in humanitarian activities.¹¹⁴ The view that the practice of international organisations can persuade the formation of custom "in areas of their competence" is widely shared by commentators.¹¹⁵ The present writer considers it necessary to take into account each organisation separately, since each organisation has its own legal basis. Hence, it is worth discussing the ICRC and UN, for they are the two principal organisations which play a significant part in humanitarian activities in civil war. As to the ICRC, the Tribunal for the former Yugoslavia stated:

¹¹⁰ See Judgment of the International Military Tribunal for the Trial of German Major War Crimes (with Dissenting Opinion of the Soviet Members), Nuremberg, 30th September and 1st October, 1946, Miscellaneous No. 12 (1946), Cmd. 6964, at 41-42; the wording of Article 6(1) of the Statute of the International Tribunal for Rwanda [throughout this thesis this Statute is referred to as the Statute for Rwanda], S/RES/955 (1994), reprinted as Doc. 97 in UN *The United Nations and Rwanda 1993-1996*, at 387, Sales No. E. 96.I.20.

¹¹¹ But see Kalshoven, *supra*. note 108, at 271 (emphasising the importance of individuals as actors of international humanitarian law rather than States).

¹¹² See Meron, *Human Rights*, *supra*. note 2, at 54-56 (Meron seems to recognise the subject status of international organisations).

¹¹³ See *infra*. Ch. 9.

¹¹⁴ As to the humanitarian intervention in Somalia, see S/RES/794 (1992), reproduced as Doc. 35 in UN, *The United Nations and Somalia, 1992-1996*, 214, UN Sales No. E. 96.I.8 (1996)

¹¹⁵ Danilenko, *supra*. note 3, at 83; and Shaw, *supra*. note 3, at 65.

The practical results the ICRC has thus achieved in inducing compliance with international humanitarian law ought therefore to be regarded as an element of actual international practice; this is an element that has been conspicuously instrumental in the emergence or crystallization of customary rules.¹¹⁶

This writer is of the opinion that ICRC activities are not equivalent to State practice and *opinio juris* because of its characteristic as a private Swiss body,¹¹⁷ but that its activities can be regarded as highly authoritative evidence to prove the existence of customary international law in international humanitarian law because of the organisation's professional service offered to conflicts of any character. For example, ICRC delegates in civil conflict undertake visits to detainees held by adversaries, which reveals the extent to which parties to a conflict conform with humanitarian instruments.¹¹⁸ Even though the ICRC does not have a right to conduct such visits,¹¹⁹ such outright denial would imply both parties reluctance to apply the law of armed conflict. On rare occasions does this organisation protest against gross violations of international humanitarian law.¹²⁰ Such statements and protests are highly authoritative and valuable because of the organisation's long history of involvement in humanitarian activities, and the ICRC can persuade the belligerent concerned to conform to Protocol II.¹²¹

The UN consists of States,¹²² and the Member States are able to make the UN a subject of practice and *opinio juris* if they so wish.¹²³ The ICJ found in the *Reparation* case

¹¹⁶ *Tadic* case, para. 109.

¹¹⁷ See Articles 1 and 2, the Statute of the International Committee of the Red Cross, *reprinted in IRRC* Mar-Apr 1988, at 1, 1. The Tribunal for the former Yugoslavia did not consider the role of the *opinio juris* of the ICRC. See *Tadic* case, para. 109.

¹¹⁸ See Common Article 3 and Article 18 of Protocol II.

¹¹⁹ *The ICRC's Commentary*, at 58; Hilare McCoubrey and Nigel D. White, *International Organisations and Civil Wars*, at 54 and 134 (1995).

¹²⁰ E.g. see Press Release, "Bosnia-Herzegovina: ICRC strongly condemns shelling of civilians in Tuzla", 26 May 1995, which can be found in the ICRC homepage at <http://www.icrc.org/>.

¹²¹ See Bruderlein, *supra*. note 3, at 587.

¹²² UN Charter, Articles 3 and 4.

that the UN was “an international person” and that “it is a subject of international law”.¹²⁴ Furthermore, UN humanitarian activities are endorsed by Security Council resolutions which are binding on the Member States.¹²⁵ However, one should carefully examine each case instead of jumping to the conclusion that all UN activities in civil war are considered UN practice and *opinio juris*. As far as multi-national forces activities endorsed by Security Council resolutions are concerned, national contingents are under the jurisdiction of national military courts, and therefore their practice should be regarded as that of States, rather than that of the UN.¹²⁶ Hence, Canadian military authorities dealt with Canadian soldiers who committed atrocities during the humanitarian intervention in Somalia by way of court martial.¹²⁷

Concerning Security Council resolutions, they bind the Member States according to Article 25 of the UN Charter. No Security Council resolution has attempted to ascertain the customary status of a certain humanitarian rule, but Article 3 of the Statute of the International Tribunal for the former Yugoslavia refers to “the laws or customs of war” with a list of certain conducts.¹²⁸ Are they customary because the Statute was introduced as an annex to a Security Council resolution? First, this Statute was specifically made to cope with atrocities committed in the former Yugoslavia since 1991.¹²⁹ Second, the Statute does not elaborate what “the laws of war” are and also what “the customs of war” are, and it appears that both of them vaguely mean the

¹²³ As to the principle of consent, see the Law of the Treaties, Preamble. As to international organisations and custom, see Akehurst, “Custom as a Source”, *supra*. note 57, at 11; Danilenko, *supra*. note 3, at 83.

¹²⁴ *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, ICJ Reports 1949, p. 174*, at 179.

¹²⁵ UN Charter, Article 25.

¹²⁶ See cf. Hilare McCoubrey and Nigel D. White, *The Blue Helmets*, at 184 (1996) (arguing that a case in Canada “again affirms the primacy of national court-martial jurisdiction in cases involving charges of unlawful conduct by members of national contingents serving in UN forces).

¹²⁷ See Richard Cleroux, “Canadian troops ‘blindfolded Somali children’”, *The Times*, July 6, 1996, at 16.

¹²⁸ Statute of the International Tribunal, in S/RES/827 (1993), SCOR, 48th year, Res. and Dec., at 29 (1993). Throughout this thesis, this Statute is referred to as “the Statute for the former Yugoslavia”.

¹²⁹ Statute for the former Yugoslavia, Article 1.

Hague law. With such limitation and impreciseness, it would be difficult to consider that Article 3 of the Statute became customary because of the adoption of the Statute in a binding resolution, though it is possible that the resolution declares what has already been a customary rule.

The status of General Assembly resolutions is controversial because of their recommendatory character under article 10 of the UN Charter.¹³⁰ The ICJ maintained:

The Court notes that General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*.¹³¹

The contention of the ICJ that General Assembly resolutions have value as evidence is to be maintained in principle because of their recommendatory nature. However, General Assembly resolutions could be used for political purposes, as often encountered during the Cold War, and the reliability of these resolutions is not always obvious.¹³² Therefore, when one investigates these resolutions, all circumstances which lead to their adoption should be considered,¹³³ such as the voting figures.¹³⁴

The Tribunal for the former Yugoslavia examined General Assembly resolutions 2444 and 2675 which were adopted unanimously, and determined that:

¹³⁰ See generally H.W.A.Thirlway, *International Customary Law and Codification*, at 61-79 (1972).

¹³¹ *Advisory Opinion on Nuclear Weapons*, para. 70.

¹³² Shaw, *supra*. note 3, at 90-92; Thirlway, *supra*. note 130, at 76.

¹³³ See Shaw's cautious approach, Shaw, *supra*. note 3, at 92 ("Nevertheless, one must be alive to the dangers in ascribing legal value to everything that emanates from the [General] Assembly. Resolutions are often the results of political compromises and arrangements and comprehended in that sense, never intended to constitute binding norms").

¹³⁴ Akehurst, "Custom as a Source", *supra*. note 57, at 6.

they were declaratory of the principles of customary international law regarding the protection of civilian populations and property in armed conflicts of any kind...¹³⁵

One salient problem of this finding is that there was little attempt in the decision to ascertain practice and *opinio juris* concerning the protection of civilians before the adoption of the above resolutions. As Akehurst asserted, General Assembly resolutions can become declaratory of existing customary rules,¹³⁶ but they alone cannot become customary international law because they are not accompanied by practice. The Tribunal did examine civilian protection in several civil conflicts shortly before discussing the resolutions,¹³⁷ but it relied upon statements, agreements and military instructions rather than practice.¹³⁸ Thus, it is doubtful if the Tribunal declared what was then the existing customary law, because it did not establish the custom based upon practice and *opinio juris*. In conclusion, it is plausible that a resolution of the Security Council or the General Assembly declare the already existing customary rule, but it alone cannot become custom because of a lack of practice.

4.6. EVIDENCE OF PRACTICE

4.6.1. RATIFICATION

The act of ratifying a convention can be regarded as practice,¹³⁹ though mere ratification means in itself simply that a State which ratifies a treaty shows the State's willingness

¹³⁵ *Tadic* case, para. 112.

¹³⁶ Akehurst, "Custom as a Source", *supra*. note 57, at 4-8.

¹³⁷ *Tadic* case, paras. 100-107.

¹³⁸ Regarding civilian protection, the only exception is an example of the execution of two Nigerian soldiers over the killing of four civilians. *Tadic* case, para. 106.

¹³⁹ See *North Sea Continental Shelf* cases, para. 73, referred to and commented by Christopher Greenwood "Customary Law Status of the 1977 Geneva Protocols" in *Humanitarian Law of Armed Conflict* 93, at 99 and n.18 (Astrid J.M. Delissen and Gerard J. Tanja eds., 1991).

to observe this treaty.¹⁴⁰ Therefore *opinio juris* must be ascertained in order to find the existence of customary international law.¹⁴¹ For instance, a ratifying State may pronounce its conviction that the ratified convention as part or on the whole is customary.¹⁴² In spite of such necessity to obtain *opinio juris*, the ICJ made the following statement:

a very widespread and representative participation in the convention might suffice of itself, provided it included that States whose interests were specially affected.¹⁴³

This assertion is especially true to the Geneva Conventions, and therefore Common Article 3, because the treaties are today ratified by most States. The ICJ and Tribunal for the former Yugoslavia affirmed that Common Article 3 had acquired the customary status, but argument about the process of transformation is lacking.¹⁴⁴ The Iranian delegate contended in the General Assembly that most States had ratified the 1949 Geneva Conventions and that the universal recognition of the principles embodied in the Conventions had been achieved.¹⁴⁵ The present writer contends that Common Article 3, which is not subject to any significant reservation, obtained its customary status by the early 1960s or possibly the late 1950s because of the ratification of the

¹⁴⁰ Schachter, *supra*. note 23, at 724 .

¹⁴¹ Schachter, *id.*, at 725. But see *Abi-Saab*, "The 1977 Additional Protocols", *supra*. note 32, at 123-124 (arguing that if a State ratifies a treaty, she shows its willingness to observe the treaty as a legal obligation, even though her intention may be contrary).

¹⁴² The possibility of such pronouncement with ratification is, however, remote.

¹⁴³ *North Sea Continental Shelf* cases, para. 73. See also *Thirlway*, *supra*. note 130, at 58-59.

¹⁴⁴ The ICJ in the *Nicaragua* case reaffirmed its view that the rules in Common Article 3 are "elementary considerations of humanity". See *Nicaragua* case, para. 218. See also *Tadic* case, para. 98. Meron argues that Common Article 3(1)(a)-(c) embody customary law because of its "elementary, ethical character". See Meron, *Human Rights*, *supra*. note 2, at 34.

¹⁴⁵ See *Iran*, UN GAOR 3rd Comm., 25th Sess., 1786th mtg, 12 Nov. 1970, para. 19, at 286-287, UN Doc. A/C.3/SR. 1786 (1974).

Geneva Conventions by most of the “specially affected States”.¹⁴⁶ Almost all the States belonging to the East and West had ratified the Conventions by 1960 as well as regional powers and other States, and this wide ratification transformed Common Article 3 into customary.¹⁴⁷ - Common Article 3 has been subject to violations even after it acquired the customary status, but this status is intact because of a lack of *opinio juris* of violating States.¹⁴⁸

One issue to discuss in the context of ratification is the “pick and choose” approach. According to this method, a State which decides to stay out of a treaty can “pick and choose” customary rules which suits its interest from the whole treaty and disregard the rest.¹⁴⁹ Abi-Saab, a participant in the Diplomatic Conference, is highly critical of this posture, because the 1977 Protocols were entirely adopted after complicated process and to “pick and choose” customary law from the Protocols would damage their totality.¹⁵⁰ It is true that, once a State ratifies a treaty, she has to obey the treaty on the whole, provided that she does not make any reservation to the treaty. However she is free to feel if a provision of a convention is customary, when she is not a party to the convention. Abi-Saab emphasised the entirety of the Protocols, but as far as Protocol II is concerned, many provisions were either deleted or inserted or reformulated in the last minute by the Pakistani delegate, and it is questionable that the Protocol should be considered on the whole.

¹⁴⁶ See “List of Ratifications”, *supra*. note 1. As to “specially affected States” see *supra*. 4.4.1. Generality.

¹⁴⁷ It should be noted that the process of ratification of the Geneva Conventions is exactly the opposite to that of Protocol II. It was “small” States which ratified the Protocol first, and many of the “specially affected States” are still not parties to the Protocol.

¹⁴⁸ Violating States tend to either deny or justify their conduct, and it is rare to challenge IHL. See *infra* 4.7.2. Denial and Justification by Belligerents for Their Own Conduct.

¹⁴⁹ Abi-Saab, *supra*. note 32, at 125-126 and n.22.

¹⁵⁰ *Id.*, at 124-126.

Another question related to ratification is to what extent universal ratification transforms a treaty into custom: in other words, whether the treaty becomes customary in part or *in toto*. For example, in his publication of 1976 about international legal aspects of prisoners of war, Rosas argued that provisions of Geneva Conventions III which were based upon “well-established” principles had become customary.¹⁵¹ First, the present writer considers a universally ratified convention to be customary *in toto*, granted that significant reservations are not made, simply because all States declare that they obey the whole convention. Second, however, there is difference between provisions which represent the general principles of the laws of war and those which exist out of the scope of those principles. In the context of the treatment of prisoners of war in international war, as Rosas wrote, there are certain provisions which originated from the general principles of the laws of war,¹⁵² e.g. the humane treatment of prisoners of war.¹⁵³ However, provisions of more technical nature, e.g. the election of prisoner of war representatives,¹⁵⁴ may not be as significant as the provisions representing the general principles. Many of the provisions in Protocol II are of general nature, and the possible world-wide ratification of the agreement might not cause this problem.¹⁵⁵

4.6.2. MEASURES OF NATIONAL IMPLEMENTATION

It is desired that a legitimate government takes necessary measures to enforce and implement international humanitarian law.¹⁵⁶ The act of enacting legislation and of

¹⁵¹ Allan Rosas, *The Legal Status of Prisoners of War*, at 100 (1976).

¹⁵² As far as international war is concerned, the general principles of the laws of war have become customary, primarily because of the existence of State practice prior to 1945. Thus, Rosas’ “well-established” principles are almost identical to the general principles of customary law.

¹⁵³ Geneva Convention III, Article 13.

¹⁵⁴ Geneva Convention III, Articles 79-81.

¹⁵⁵ In Ch. 10, however, this author discusses the desirability of technical provisions in international humanitarian law.

¹⁵⁶ Detailed discussion on implementation and enforcement, see *infra*. Ch. 9.

publishing military manuals are hence practice of States,¹⁵⁷ though both instruments also reveal the intention of the State which introduces them. The introduction of national legislations and military manuals varies according to States. Concerning the former, for instance, the UK introduced the Geneva Conventions (Amendments) Act 1995¹⁵⁸ which contains Protocol II as a whole.¹⁵⁹ The Joint Service Regulation for the German armed forces of 1992 was restated and published as *The Handbook of Humanitarian Law in Armed Conflicts*.¹⁶⁰

Regarding military manuals, the inclusion of rules out of treaty law in military manuals would demonstrate the conviction of the State concerned, particularly if the State is not a party to Protocol II, that the rules are customary, but it is true that military manuals “at the very most” allude to Common Article 3.¹⁶¹ In addition, the significance of military manuals is not self-evident. For instance, in the Humanitarian Law Conference held in 1987, there was an intensive discussion on the value of military manuals. On the one hand, Carnahan and Fenrick cast doubt on the significance of military manuals, and for instance Carnahan argued that manuals likely focused on only “clear cut, easy cases”.¹⁶² Gasser, on the other hand, disagreed with them, contending that “such manuals are of great importance in influencing the behaviour of troops and also in indicating to the opposing side in a conflict which rules the armed forces are ready to respect”.¹⁶³

¹⁵⁷ See Bruderlein, *supra*. note 3, at 587; Fleck, *supra*. note 45, at 503; Meron, “The Geneva Conventions” *supra*. note 39, at 361. As to national legislation, see Shaw, *supra*. note 3, at 66; Wolfke, *supra*. note 45, at 77, 149.

¹⁵⁸ Geneva Conventions (Amendments) Act 1995 (c. 27), *reprinted in* 3 (1995) *Current Law Statutes*.

¹⁵⁹ As to this Act, see Peter Rowe and Michael A. Meyer, “The Geneva Conventions (Amendments) Act 1995: A Generally Minimalist Approach”, 45 *ICLQ* 476 (1996).

¹⁶⁰ *The Handbook of Humanitarian Law in Armed Conflicts* (Dieter Fleck ed., 1995).

¹⁶¹ The War Office, *The Law of War on Land being Part III of the Manual of Military Law*, para. 8 (1958); Hans-Peter Gasser in “Determining Customary International Law”, *supra*. note 49, at 478.

¹⁶² Carnahan “Determining Customary International Law”, *id.*, at 488; Fenrick, *id.*, at 493.

¹⁶³ Gasser in *id.*, at 494-495.

Balancing these two opposite views appears to be important. On the other hand, as Bond stresses, military manuals can be useful “indicators of the views of the right behaviour of a particular military institution” if they are available.¹⁶⁴ Availability matters because, should manuals be not available, there is no way of knowing if there is any description of custom in them. Manuals that are readily available are usually those of Great Powers which are not immediately facing civil conflicts, and the possibility that a dissident group produces their own manuals is remote.¹⁶⁵ On the other hand, military manuals are one of many forms of practice and of *opinio juris*, and considering the other elements is also important. Moreover, Kwakwa rightly holds that “there could be as many different customs as there are military manuals” since the content and ambit of military manuals are different from State to State.¹⁶⁶ Lastly, these manuals do not necessarily refer in detail to international humanitarian law on non-international armed conflict.¹⁶⁷ In conclusion, military manuals may be a valuable source of the law if they are obtainable and explicitly state the law of armed conflict on civil war, but in fact such manuals are rather exceptional.

4.6.3. ACTUAL PRACTICE¹⁶⁸

It has already been discussed that considering actual practice is necessary in order to demonstrate to the parties concerned the existence of customary rules. Actual practice can be divided into peacetime and wartime practice. The former primarily means the dissemination of international humanitarian law to professional soldiers as well as

¹⁶⁴ James E. Bond in *id.*, at 490.

¹⁶⁵ See Kwakwa, *supra*. note 2, at 177 (stating that “no existing national liberation movement may make its military manual known to the outside world”).

¹⁶⁶ Kwakwa, *id.*, at 32. (footnote omitted).

¹⁶⁷ Section 211 of the German Military Manual is therefore significant because of its mention of both Common Article 3 and Protocol II. See Section 211 of *Bundeswehr reprinted in The Handbook of Humanitarian Law in Armed Conflicts*, *supra*. note 160, at 47-48.

¹⁶⁸ See Bruderlein, *supra*. note 3, at 587.

civilians. Even if a non-party to Protocol II enacts a legislation including a provision of dissemination, actual dissemination programme must be undertaken in order to claim the customary status of Article 19 of Protocol II since a lack of practice would devalue the domestic legislation.¹⁶⁹ Another form of peacetime practice includes the prosecution of war criminals of other States which are confronting civil war, though it is not widely conducted.¹⁷⁰

Wartime practice in accordance with Protocol II would include; actual military operations by armed forces; actual treatment of the detained soldiers (Article 5); prosecution and punishment (Article 6); search and protection of the wounded, sick and shipwrecked (Articles 7 and 8); performance of medical personnel (Article 9 and 10); activities of humanitarian organisations and civilians (Article 18); use of proper emblems (Article 12); and dissemination (Article 19). This list is not exhaustive, and the following chapters will discuss each practice.

4.6.4. ABSTENTION

The Permanent Court found in the *Lotus* case in 1927 that:

... it would merely show that States had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so; for only if such abstention were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom.¹⁷¹

¹⁶⁹ Dissemination will be discussed in *infra*. Ch. 9.

¹⁷⁰ *Kadic v. Karadic*, reprinted in 34 *ILM* 1592 (1995). Implementation will be discussed in *infra*. Ch. 9.

¹⁷¹ *PCIJ Reports, Series A, No. 10*, at 28. See Brownlie's critical remark on this case. Brownlie, *supra*. note 76, at 6.

Among authorities, Akehurst considers “omissions and silence” State practice,¹⁷² while Danilenko argues that “positive indications” are necessary because of “the dubious nature of abstentions”.¹⁷³ Borrowdale states that an “overwhelming” scale of abstention is necessary for the establishment of a customary rule.¹⁷⁴ This writer maintains that abstention is an indispensable element of practice in the law of armed conflict in general because of the prohibitive nature of the law.¹⁷⁵ For instance, a State and rebels shall abstain from taking hostages, according to Common Article 3 and Article 4(2)(c) of Protocol II which stipulate the prohibition of hostage taking. Subsequently, the less evidence of acts of hostage taking, the more likely States and rebels abstain from practising it.

The examination of abstention needs particular attention, for it is difficult to ascertain why a party to a civil conflict is abstaining from a certain action; and also whether a State is really abstaining. As far as the former problem is concerned, abstention from ratification would be a pertinent example. States may abstain from ratification for various reasons; abstaining States may intend not to ratify the treaty; but they may be merely indifferent.¹⁷⁶ Therefore each situation must be taken into account.¹⁷⁷ For instance, there seem to be two reasons for the intention of the USA not to ratify Protocol II; one is that the US rejection to ratify Protocol I prevents it from ratifying Protocol II; the other is that ratifying Protocol II is not a high priority on the agenda of the US

¹⁷² Akehurst, “Custom as a Source”, *supra*. note 57, at 10. Shaw and Wolfke hold that the validity of abstention depends on situations. Shaw, *supra*. note 3, at 63-64; Wolfke, *supra*. note 45, at 61.

¹⁷³ Danilenko, *supra*. note 3, at 86 n.35.

¹⁷⁴ Borrowdale, *supra*. note 57, at 83.

¹⁷⁵ Kwakwa, *supra*. note 2, at 32 (“Indeed, in the law of war, custom is to be found more in acts of restraint than in positive acts by state and non-state actors”.)

¹⁷⁶ Baxter, *supra*. note 2, at 66-67.

¹⁷⁷ Here, the intention of the State, in other words *opinio juris*, becomes essential.

Senate.¹⁷⁸ The better interpretation of these two reasons would be that the US decision does not amount to abstention from ratifying Protocol II because the intentions are rather passive. Hence, concerning the US non-ratification of Protocol II, it neither favours nor hinders the establishment of custom.

In civil war, another problem is that it is not always possible to determine practice of the fighting parties. To give an example, in Chechnya, Chechen rebels resorted to taking hostages on several occasions, especially in the later period of the conflict.¹⁷⁹ On the Russian side, however, there is virtually no evidence available as to whether the Russian forces abstained from hostage-taking. A better construction of this particular case would be that the Chechens violated the prohibition of hostge-takings, because of the existence of reliable evidence; however, whether the Russians refrained from such conduct is indeterminable, for there is no reliable evidence. In addition, had the Russian forces been renowned for good discipline and high morale, one could make a reasonable assumption that they refrained from hostage-takings. However, ill-trained Russian forces were reputed for their low marale and bad discipline,¹⁸⁰ and therefore the reasonable assumption could not be made.

4.6.5. STATEMENT

The development of communication and international organisations brings the opportunity for States to express their views, and the ICJ confirmed the validity of such

¹⁷⁸ Michael J. Matheson in "A Discussion of Protocol II", *supra*. note 49, at 616. Matheson was Deputy Legal Adviser of the US Department of State.

¹⁷⁹ *Keesing's* June 1995, at 40608-9; Thomas de Wall, "Russian troops surround hostage-takers at border" *The Times*, Jan. 11, 1996, at 11; Michael Evans, "Hostages caught in Russian chief's deadly rivalry", *The Times*, Jan. 16, 1996, at 10

¹⁸⁰ Christopher Bellamy, *Knights in White Armour*, at 2-7 (1996); Thomas de Waal, "Dejected troops tell of chaos in army command", *The Times*, Jan. 20, 1996, at 12

statements as State practice, as well as many authors.¹⁸¹ Statements can be considered practice because they are the result of the act of State's pronouncing their views, but the present author would rather regard such statements as evidence of *opinio juris* since the importance of them is what States think, which is expressed in those statements.

4.7. EVIDENCE OF *OPINIO JURIS*

4.7.1. ACCEPTANCE OF INTERNATIONAL HUMANITARIAN LAW BY BELLIGERENTS¹⁸²

Both parties to a civil conflict tend to deny each other's existence, and therefore their conviction that they adhere to Protocol II and Common Article 3 would be a valuable source to ascertain the customary status of international humanitarian law on non-international armed conflict. There are two ways of expressing *opinio juris*, namely tacit and explicit. Explicit *opinio juris* would not be problematic because of its clearness.¹⁸³ The Tribunal for the former Yugoslavia, for example, referred to an explicit statement of the Prime Minister of Congo in 1964 to obey the Geneva Conventions.¹⁸⁴ Despite such clarity, one should analyse other statements in a conflict, too, because it is questionable whether States and rebels follow their *opinio juris*. In the Algerian War of Independence, the French Prime Minister stated that France would adhere to Common Article 3, and indeed there was improvement in the treatment of captured rebels.¹⁸⁵ However, subsequently, the French Government refused to regard

¹⁸¹ Akehurst, "Custom as a Source", *supra*. note 57, at 1-8; Brownlie, *supra*. note 76, at 698-699; Danilenko, *supra*. note 3, at 87-88; and Shaw, *supra*. note 3, at 71. But cf Kwakwa, *supra*. note 2, at 31 (arguing that belligerents make verbal practice "for public relations purposes" and it is not as reliable in humanitarian law as in other areas of international law, such as the law of treaties).

¹⁸² The use of terms, such as acceptance, acquiescence, recognition, support, etc, should be careful if one discusses the theory of customary international law. See e.g. Wolfke, *supra*. note 45, at 44-51. In this chapter, the terms acceptance, acquiescence, denial, protest and recognition are used in an ordinary sense.

¹⁸³ See Wolfke, *id.* at 62.

¹⁸⁴ *Tadic* case, para. 105.

¹⁸⁵ The statement is *reprinted in* Greenberg, 'Law and the Conduct of the Algerian Revolution', 11 *Harvard ILJ* 37-72, at 50 (1970). As to the conditions of detainees, see ICRC, *The ICRC and the Algerian Conflict*, at 4-8 (1962).

the conflict as a war.¹⁸⁶ Such conduct by the legitimate government indeed reduces the value of explicit *opinio juris*.

Implicit *opinio juris* is more common but also more problematic.¹⁸⁷ President Lincoln's declaration of blockade is a pertinent example. He proclaimed the blockade of ports, but he did not mention the recognition of belligerency of the rebels.¹⁸⁸ Blockading ports in a State's own territory would have implied the existence of war, but explicit recognition of such a situation would have been politically difficult. Therefore, it is necessary to observe the whole conflict, and to discern if there is tacit *opinio juris*.

4.7.2. DENIAL AND JUSTIFICATION BY BELLIGERENTS FOR THEIR OWN CONDUCT

A belligerent party who violates a treaty or customary rule is most likely to justify its position or deny the violation, and it is rare to challenge the established principles of humanitarian law.¹⁸⁹ Moreover, in cases of internal conflicts, States usually regard the situation as simply civil disturbance, and do not consider the application of the laws of war at the outset.¹⁹⁰ The ICJ in the *Nicaragua* case stated that the justification by a violating State "is to confirm rather than to weaken the rule".¹⁹¹ Contrary to this judgment, Meron considers the possibility of weakening custom should States not act in accordance with the Geneva Conventions.¹⁹²

¹⁸⁶ De Gaulle used the term "rebellion" in as late as 1961. See *Keesing's*, May 13-20, 1961, at 18093-18094.

¹⁸⁷ See Wolfke, *supra*. note 45, at 62 (stating that "In most cases the element of acceptance ... is fulfilled tacitly, only by means of a presumption based upon various kinds of active or passive reactions to the practice by the interested states...").

¹⁸⁸ The declaration is *reprinted in* Williams Edward Hall, *A Treatise of International Law*, at 45 (Higgins ed., 8th ed., 1924).

¹⁸⁹ See Meron, "The Geneva Conventions", *supra*. note 39, at 369; Akehurst, "Hierarchy of Sources", *supra*. note 75, at 276, n.5.

¹⁹⁰ See Protocol II, Article 1(2).

¹⁹¹ *Nicaragua* case, para. 186.

¹⁹² Meron, "The Geneva Conventions", *supra*. note 39, at 370.

One can claim that, even if practice is accompanied by contrary *opinio juris*, these opposite elements neither create nor destroy custom because both two elements are necessary for the creation or destruction of customary international law.¹⁹³ However, as Meron contends, the ubiquity of incompatible elements can weaken the custom concerned because such coexistence threatens the basis of custom which is evidence of both practice and *opinio juris* under Article 38(1)(b) of the Statute of the ICJ.

4.7.3. RECOGNITION OF BELLIGERENTS' CONDUCT BY THIRD STATES

The recognition of belligerents' conduct by third States is clear and determinable,¹⁹⁴ and it is easily accessible because of the development of communication. Statements and discussion in diplomatic conferences, the General Assembly and the Security Council would include *opinio juris* stated by delegates. States can also express their conviction whenever they find it necessary. The Russian invasion of Chechnya, for instance, was acknowledged by the USA as "an internal Russian affair" and hoped "that order [could] be restored with a minimum amount of violence and bloodshed".¹⁹⁵

4.7.4. ACQUIESCENCE OF BELLIGERENTS' CONDUCT BY THIRD STATES

States may acquiesce to acts of belligerents who are facing civil conflicts, but determining the existence of acquiescence is not facile since different reasons can be possible;¹⁹⁶ the third States may simply not have the knowledge of the act; or they may not have interest in it; or they may find other priorities. Akehurst disregards the

¹⁹³ Rosalyn Higgins, *Problems and Process*, at 22 (1994).

¹⁹⁴ Cf. Danilenko, *supra*. note 3, at 107-108 (stating that "express recognition of the legally binding quality of observable rules of conduct are most effective"); Wolfke, *supra*. note 45, at 62 (arguing that the most obvious way for a State to accept practice as custom is "by means of express declarations").

¹⁹⁵ *Keesing's*, Dec. 1994, at 40326.

¹⁹⁶ See Baxter, *supra*. note 2, at 66-67; Shaw, *supra*. note 3, at 70-71.

motives of States which refrain from making public statements,¹⁹⁷ and this may be true in certain areas of international law. For instance, in the law of outer space, the number of States which can develop outer space is limited, and available information on the space development has immensely increased.¹⁹⁸ Under such circumstances, a State which does not or cannot participate in the exploration of outer space can use available information and decide if they explicitly support, or protest against, or acquiesce to the practice of States conducting space programmes. However, in internal armed conflict, the number of conflicts since the end of the Second World War has been enormous, while obtainable information is limited. It is, therefore, difficult for States to pay attention to every conflict, and not protesting against violations of international humanitarian law may stem from a lack of information or of interest.

It can be suggested that if investigation into *opinio juris* and practice does not favour acquiescence, the silence should be regarded as the nonexistence of *opinio juris* which neither forms nor destroys customary rules. States may be expected to observe other States' practice,¹⁹⁹ but in practice there are a number of occasions when the international community simply does not pay attention on certain civil conflicts as the present writer will demonstrate in the following chapters. Such indifference should not be interpreted as acquiescence but as nonexistence of *opinio juris* because of a lack of conviction or interest.²⁰⁰

¹⁹⁷ Akehurst, "Custom as a Source", *supra*. note 57, at 39.

¹⁹⁸ Shaw, *supra*. note 3, at 381.

¹⁹⁹ See Danilenko, *supra*. note 3, at 108.

²⁰⁰ Charney, however, considers silence to be acquiescence. Jonathan I. Charney, "Universal International Law", 87 *AJIL* 529, at 538 (1993).

4.7.5. PROTEST AGAINST BELLIGERENTS' CONDUCT BY THIRD STATES

Protest has the effect of preventing the conduct from obtaining legal significance, should third States protest against the conduct of belligerents.²⁰¹ Protest must be explicit because there is no way of detecting “implicit protest”. An appropriate example would be the Indian and Sri Lankan protest against the Taliban announcement of its intention to demolish a Buddhist statue should it fall into the hands of Taliban forces in 1997.²⁰² Both India and Sri Lanka are “specially affected States”; the former as a regional power and the cradle of Buddhism; and the latter as a Buddhist State. More significantly, India and Sri Lanka are not parties to Protocol II,²⁰³ and therefore these protests can be construed as the conviction of these two States that cultural and religious objects should be protected in non-international armed conflict, even though it is not certain if they made this statement in the conviction that the protection is customary.

4.7.6. ACCEPTANCE OF HUMANITARIAN LAW BY STATES IN PEACETIME

In peacetime, States can express their *opinio juris* that they are bound by rules. Peacetime dissemination, and the introduction of legislation and military manuals are pertinent examples of such acceptance.²⁰⁴ It is not possible for a State to implicitly accept, or in other words, acquiesce to rules because of the impossibility to ascertain such *opinio juris*.²⁰⁵ Moreover, “implicit acceptance” of rules by non-belligerent States

²⁰¹ See Akehurst, “Custom as a Source”, *supra*. note 57, at 38-39; Bruderlein, *supra*. note 3, at 592.

²⁰² Christopher Thomas, “Buddhist condemn Taleban over threat to blow up statue”, *The Times*, 25 April 1997, at 18. This statue was, however, destroyed in 2001 by the Taliban. See *infra*. Ch. 8. The protection of cultural objects is provided in Article 16 of Protocol II and Article 19 of Convention for the Protection of Cultural Property in the Event of Armed Conflict, 249 *UNTS* 240 (1956). Throughout this thesis, this Convention is referred to as “the 1954 Hague Convention”.

²⁰³ India is a party to the 1954 Hague Convention, while Sri Lanka is not. See UNESCO, “Convention and Protocol for the Prohibition of Cultural Property in the Event of Armed Conflict (The Hague, 14 May 1954)” at http://www.unesco.org/culture/laws/hague/html_eng/page9.shtml.

²⁰⁴ See *supra*. 4.6.2. Measures of National Implementation.

²⁰⁵ This acceptance by States is different from acquiescence of belligerents' conduct by third States.

would lead to the dangerous conclusion that any convention could become customary because non-ratifying States “implicitly” accept the rules.

4.8. ASCERTAINMENT OF CUSTOMARY RULES

4.8.1. INTRODUCTION

Having discussed the elements of customary international law, the present author now turns to question of which institutions determine the law. Article 38 of the Statute of the ICJ is authority that custom is a source of international law, but it does not specify which institutions ascertain the existence of custom. The ICJ, *ad hoc* international tribunals, domestic courts, including military courts, and publicists are seen as empowered to determine the question of application of the law of armed conflict on civil war at present.

Although the contention exists that international and domestic tribunals are a subject of practice,²⁰⁶ the present writer regards their judgments more as evidence of customary international law, because their primary function is to solve pending issues, as Article 38(1) of the ICJ Statute states that “The Court, whose function is to decide in accordance with international law such disputes”. For instance, if a court of a State pronounces that the prohibition of a certain conduct of hostilities is customary international law, it could be regarded as one form of both practice and *opinio juris* of the State. If other courts of the State as well as the administrative and parliamentary bodies of the State follow the ruling, it would be right to conclude that the State regards the prohibition as customary. In this way the rulings could influence future practice and *opinio juris* of a State, and should courts of other States facing civil wars and of any

²⁰⁶ Danilenko, *supra*. note 3, at 83-84.

international court follow the ruling of the State, it would be possible to maintain that the accumulated judicial decisions developed the prohibition of the conduct of hostilities.²⁰⁷

As far as civil conflicts are concerned, however, domestic and international courts have played only a limited value. Concerning international courts, recent judgments made by the two criminal tribunals could be regarded as views expressed by the international organs, but it is not difficult to predict whether they will be successfully followed by similar tribunals, particularly the International Criminal Court. Regarding domestic courts, available information on them is limited, and moreover it is questionable if there is a cumulation of consistent judgments, according to the above hypothesis.

4.8.2. THE ICJ

Although the ICJ is the most authoritative institution in international law, it is not possible for rebel groups or individuals to take a case to the ICJ, since only States have standing to take cases to it.²⁰⁸ The ICJ examined customary international law and Common Article 3 in the *Nicaragua* case,²⁰⁹ but it was the only occasion when the Court directly investigated international humanitarian law on non-international armed conflict. In addition, this case was marred by the refusal of the USA in the proceedings.²¹⁰ In the *Advisory Opinion on Nuclear Weapons*, the Court avoided the analysis of the use of nuclear weapons in internal conflict,²¹¹ while in the 1996

²⁰⁷ Igor P. Blishchenko, "Judicial Decisions as a Source of International Humanitarian Law", in *The New Humanitarian Law of Armed Conflict* 41, 44-5 (Antonio Cassese ed., 1979).

²⁰⁸ The Statute of the ICJ, Article 34(1).

²⁰⁹ See *Nicaragua* case, para. 218-220.

²¹⁰ See "Statement on the U.S. Withdrawal from the Proceedings Initiated by Nicaragua in the International Court of Justice", reprinted in 24 *ILM* 246 (1985).

²¹¹ The Court avoided the analysis of a use of nuclear weapons in internal conflict. See *Advisory Opinion on Nuclear Weapons*, para. 50.

Genocide case international humanitarian law invoked by Bosnia-Herzegovina²¹² was not discussed because “the Court can find no provision relevant to its jurisdiction in any of the above-mentioned [humanitarian] instruments”.²¹³ The role of the ICJ in finding customary rules in the laws of war on civil war will probably remain limited, considering State sovereignty. However, should the ICJ conduct investigation on that area of law, the finding of the ICJ should be treated as highly authoritative evidence of law.²¹⁴

4.8.3. *AD HOC* INTERNATIONAL TRIBUNALS

The armed conflicts in Rwanda and the former Yugoslavia resulted in the establishment of *ad hoc* international tribunals. In the *Tadic* case, for instance, the Tribunal for the former Yugoslavia undertook a lengthy discussion on the customary status of international humanitarian law on non-international armed conflict.²¹⁵ Judgments by the two Tribunals should be considered highly authoritative because both Tribunals were established by a Security Council resolution under Chapter VII which in virtue of Article 25 of the UN Charter binds all Member States of the UN.²¹⁶

The future of *ad hoc* international tribunals is uncertain, and the fact remains that these two tribunals are the only ones in 50 years. As far as customary international law is

²¹² The invoked rules were “the Customary and Conventional International Law, including *but not limited to* the Four Geneva Conventions of 1949, their First Additional Protocol of 1977, the Hague Regulations on Land Warfare of 1907, and the Nuremberg Charter, Judgment, and Principles”. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgment, I.C.J. Reports 1996, p. 595*, para. 39. (Emphasis added). Although Bosnia-Herzegovina did not list Protocol II or Common Article 3, it left room for these instruments, as the above emphasised wording implies.

²¹³ *Id.*

²¹⁴ Bronwlie, *supra*. note 76, at 19; Shaw, *supra*. note 3, at 86; Wolfke, *supra*. note 45, at 145.

²¹⁵ See *Tadic* case, paras. 96-136.

²¹⁶ As to the former Yugoslavia, see S/RES/827 (1993), *supra*. note 128; as to Rwanda, see S/RES/955 (1994), *supra*. note 110. However, as to enforcement, States are required to “cooperate with” the Tribunals. See Article 29(1) of the Statute for the former Yugoslavia and Article 28(1) of the Statute for Rwanda.

concerned, however, the findings of *ad hoc* tribunals are authoritative, and greatly contribute to ascertaining customary rules of international humanitarian law on internal conflict.

4.8.4. INTERNATIONAL CRIMINAL COURT

The International Criminal Court, established by its Statute in 1998, applies Common Article 3 for “serious violations”,²¹⁷ and “the laws and customs applicable” to civil conflict for “Other serious violations”, when the Court judges crimes committed in non-international armed conflict.²¹⁸ At the time of the writing of this thesis, this Court has not functioned, and it is not possible to declare the value of its judgments. However, when it operates, its findings would be as valuable as the judgments of the ICJ and the two *ad hoc* International Tribunals.

Having said so, the actual adoption of the Rome Statute contributes to the development of customary international law in non-international armed conflicts. First, the Rome Statute was adopted by 120 States in favour, 7 against with 21 abstentions by non-recorded vote.²¹⁹ As this chapter indicates, this author emphasises the careful approach towards ascertaining customary rules, and the actual adoption of a multilateral treaty does not automatically transform the treaty into customary international law; otherwise all the multilateral treaties would become customary upon adoption. The voting was not recorded, which makes one difficult to examine the voting pattern, but according to the press release on the adoption of the Statute, China, India, Israel and the USA

²¹⁷ Rome Statute, Article 8(2)(c).

²¹⁸ *Id.*, Article 8(2)(d).

²¹⁹ Press Release, L/ROM/22, “UN Diplomatic Conference Concludes in Rome with Decision to Establish Permanent International Criminal Court”, (17 July 1998) at [http:// www. un.org/icc/pressrel/ lrom22.htm](http://www.un.org/icc/pressrel/lrom22.htm).

explained that they had voted against the Rome Statute,²²⁰ and their opposition should not be overlooked because they are “specially affected” States. In addition, 21 abstentions should not be overlooked, either.²²¹ Notwithstanding such oppositions or abstentions, the fact that 120 States were in favour of the treaty signifies that a majority of the States acted to adopt the Statute (State practice) and were willing to adopt it (*opinio juris*). Some provisions of the Rome Statute merely repeat what is already customary, e.g. Common Article 3, but the rest may have the effects of either generating or crystallising customary rules, and the 120 States’ votes for the actual adoption of the treaty might accelerate the process of transforming what is merely treaty-based law into custom.

Second, the Statute introduced “serious violations of the laws and customs applicable in armed conflicts not of an international character”, defining what “war crimes” in civil conflict are. This is a useful tool for the establishment of war crimes in customary law as well as treaty law. Moreover, the ICTY and ICTR are *ad hoc* mechanisms, but the Rome Statute is a treaty of permanent character, adopted at a diplomatic conference, so the Statute which introduces “serious violations” would have more influence in the development of customary law than *ad hoc* tools.

4.8.5. DOMESTIC COURTS

The position and function of domestic courts in international law are unclear because there is not any firmly established view on them.²²² Neither UN Charter nor the Statute of the ICJ provides guidance on the role of domestic courts. Nevertheless, domestic

²²⁰ *Id.*

²²¹ Singapore, Sri Lanka and Turkey explained that they had abstained. *Id.*

²²² However, Brownlie argues that “Article 38(1)(d) of the Statute of the [ICJ] is not confined to international decisions...”. Brownlie, *supra*. note 76, at 23.

courts are expected to play a part in implementation of international humanitarian law,²²³ and indeed there are some judgments by domestic courts relating the law of armed conflict applicable to civil war.²²⁴ The reliability of the judgments of domestic courts however depends on each State's justice system. For instance trials in the Rwandan courts are proceeding parallel with the International Tribunal for Rwanda, but there are concerns as to the fairness and adequacy of legal proceedings in Rwanda, particularly given the decimation of the legal community and instruments in the conflict.²²⁵ As Brownlie rightly states that "the value of these decisions varies considerably, and may present a narrow national outlook or rest on a very inadequate use of the source".²²⁶ In addition, as Akehurst correctly pointed out, it is the quality of judgments and publications, the latter to be discussed below, that matters.²²⁷

4.8.6. PUBLICISTS

The opinions of publicists have considerable value even though their role is "subsidiary" under Article 38(1)(d) of the Statute of the ICJ.²²⁸ For international humanitarian law on non-international armed conflict, the role of publicists is of great significance, because the number of judicial decisions which are easily available has still been limited. It is, however, true and deplorable that the works on this issue are almost non-existent,²²⁹ in spite of the frequent occurrence of civil war in the present

²²³ There is no provision regarding implementation in civil conflict apart from Article 19 of Protocol II, but Common Article 1 of the Geneva Conventions require the parties "to respect and to ensure respect for" the conventions "in all circumstances". Detailed discussion on this point will be made in *infra*. Ch. 9.

²²⁴ Recent examples are judgments in Rwandan courts, e.g. see "Hutus sentenced to death", *The Times*, January 4, 1997, at 11. In US courts, see *Echeverria-hernandez case*, *supra*. note 58, at 689-694.

²²⁵ Payam Akhavan, "The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment" 90 *AJIL* 501, 509-510 (1996).

²²⁶ Brownlie, *supra*. note 76, at 23.

²²⁷ Akehurst, "Hierarchy of Sources", *supra*. note 75, at 280.

²²⁸ See Wolfke, *supra*. note 45, at 156. The ICJ itself has not made use of any individual work in its judgment. See also Brownlie, *supra*. note 76, at 24-25; Shaw, *supra*. note 3, at 92.

²²⁹ Kwakwa, *supra*. note 2, at 33.

world. Research into this area of law is inadequate, not to mention research into its customary status, and many civil wars are simply “forgotten”.²³⁰ Therefore, the present writer calls for the development of in-depth research into this field so that the role of publicists will be fulfilled.²³¹

During the task of ascertaining customary rules, publicists should take an objective attitude because what they are seeking now is *lex lata*, not *lex ferenda*. Should they not be able to find customary rules, then, they can propose the future development, but the finding of customary law itself must be undertaken in an objective manner, even if the result of such a method may appear to be “inhumane”.²³² Hence, remarks by two jurists are hereby cited. Brownlie contends:

It is, however, obvious that subjective factors enter into any assessment of juristic opinion, that individual writers reflect national and other prejudices, and further, that some publicists see themselves to be propagating new and better views rather than providing a passive appraisal of the law.²³³

Borrowdale argues:

It is unlikely that an exception in favour of humanitarian law whereby such law enjoys immediate passage into custom will be of any value, for such an exception

²³⁰ To name a few, publications on the application of the laws of war in the civil wars in Sri Lanka and Bougainville, Papua New Guinea are almost non-existent even though they are long-lasting and fiercely fought. As to disparity in coverage of conflict by the media, See Bellamy, *supra*. note 180, at 34.

²³¹ See Christa Meindersma, “Applicability of Humanitarian Law in International and Internal Armed Conflict”, 7 *Hague Yearbook of International Law* 113, 139 (1995).

²³² But see Bruderlein, *supra*. note 3, at 594 (stating that “It is possible to steer the development of customary law in the direction of treaty law, simply by working to strengthen its provision. The legal expert is consequently faced with a choice: he may either leave it to the States of the world community to legislate for the protection of victims of armed conflicts in accordance with their own interests or he may “take the side” of the victims and militate in favour of strengthening humanitarian law through the development of customary law”).

²³³ Brownlie, *supra*. note 76, at 24.

would also ensure the passage of provisions such as article 1(4) which has arisen primarily out of political and not humanitarian motives.²³⁴

4.8.7. DIPLOMATIC CONFERENCES

Abi-Saab contends that customary law may be formed in a course of a diplomatic conference.²³⁵ However, the examination of the *Official Records* of the Diplomatic Conference, which took place between 1974 and 1977 to adopt the two Protocols, in the following five Chapters proves his remark to be Utopian, even considering that he participated in the Conference. Moreover, the attendance of experts in the law of armed conflict to the Conference was limited, and government officials were not always well-informed of the subject which was being discussed.²³⁶ Besides disappointment would follow the expectation that participants should have examined practice in various armed conflicts in the Conference; the *Official Records* reveal that a few delegates mentioned civil wars which their States faced. Last, the present Protocol II resulted from last-minute compromise which was achieved by efforts of the Pakistani representative.²³⁷ It can be held that discussion made by participants in a diplomatic conference may be valuable sources of information about the customary status of certain law, but as far as Protocol II is concerned, there were not thorough debates about the customary status of the law relating to civil conflict.²³⁸

²³⁴ Borrowdale, *supra*. note 57, at 87.

²³⁵ Abi-Saab, *supra*. note 32, at 123; Cassese, "The Geneva Protocols", *supra*. note 23, at 59-66.

²³⁶ See highly critical comments on lack of enthusiasm on the side of participating governments in the Diplomatic Conference. Keith Suter, *An International Law of Guerrilla Warfare*, at 130-131 (1984).

²³⁷ *The ICRC's Commentary*, §4413.

²³⁸ See *infra*. Chs. 5-9.

4.9. EXCEPTION TO THE EFFECT OF CUSTOMARY RULES

4.9.1. INTRODUCTION

The effect of customary international law is, as indicated, to bind all States.²³⁹ However, persistent objectors and new States are problematic. If a State is a persistent objector to a certain practice, the State is not obliged to obey it. On the other hand, it is generally agreed that new States are bound by custom, though how to bind an entity which does not exist when custom is formed is problematic. These two problems are usually argued in the context of *opinio juris*, but it is difficult to distinguish the *opinio juris* of these States from their practice, and therefore these problems are dealt with here.

4.9.2. PERSISTENT OBJECTORS²⁴⁰

In the *Fisheries* case the ICJ has recognised the principle of persistent objection as exempting Norway from customary obligations,²⁴¹ and many writers also confirm the validity of this principle.²⁴² This rule has captured the attention of two prominent scholars of international humanitarian law. In accordance with Cassese, a State which does not wish to be bound by a newly emerging customary rule should express its opposition in a diplomatic conference so that the future application of the rule to the State will be prevented.²⁴³ In his article, Cassese implies that Israel is a persistent

²³⁹ Akehurst, "Custom as a Source", *supra*. note 57, at 24.

²⁴⁰ See the critical analysis of this theory by Jonathan I. Charney, "The Persistent Objector Rule and the Development of Customary International Law", 56 *BYIL* 1 (1985) [hereinafter "The Persistent Objector Rule"].

²⁴¹ *Fisheries case, Judgment of December 18th, 1951, ICJ Reports 1951, p. 116*, at 131.

²⁴² Akehurst, "Custom as a Source", *supra*. note 57, at 24; Borrowdale, *supra*. note 57, at 88-89; Brownlie, *supra*. note 76, at 10; Danilenko, *supra*. note 3, at 113; Kwakwa, *supra*. note 2, at 60-61 n.93; Shaw, *supra*. note 3, at 72; Wolfke, *supra*. note 45, at 66. But see the doubt cast by Charney, "The Persistent Objector Rule", *supra*. note 240, especially at 21-24.

²⁴³ Cassese, "The Geneva Protocols", *supra*. note 23, at 64.

objector to the customary status of Article 1(4) of Protocol I because the State totally opposed to the provision.²⁴⁴ On the contrary, *Abi-Saab* regarded the rule as “a transient phenomenon” since a State’s persistent objection either successfully prevents or succumbs to the formation of custom.²⁴⁵

This rule has not posed a serious problem to Protocol II, for there is no available evidence which shows persistent objection against Protocol II since 1977. Besides, the persistent objector rule does not function where there is no custom, and as will be shown in the subsequent chapters, the number of customary laws applicable to internal conflict established since 1977 is indeed limited. As regards *Cassese’s* argument, Israel is not a persistent objector because the present author contends in Chapter 5 that Article 1(4) of Protocol I has not attained customary status. In conclusion, the persistent objector rule has little part in the present international humanitarian law on non-international armed conflict, though there will be room for the role of this theory should there be a new convention in the future.

4.9.3. NEW STATES

The principles of consent and sovereign equality, which are fundamental in public international law, cannot solve the problem of new States in customary international law since these States are, according to the majority view, bound by custom which has been established before their existence.²⁴⁶ At present, the law of armed conflict applicable to civil war has not faced this problem. Because of the limited existence of customary rules in Protocol II, new States indeed have the opportunity to practice and to reveal

²⁴⁴ *Id.*, at 69-70, 103-4.

²⁴⁵ *Abi-Saab*, *supra*. note 32, at 124-125.

²⁴⁶ See *Danilenko*, *supra*. note 3, at 113-114; *Mendelson*, *supra*. note 83, at 188-189; *Shaw*, *supra*. note 3, at 72.

their *opinio juris* before the future formation of custom in this area of law, though no evidence demonstrates objection of a new State to customary humanitarian law.

CHAPTER 5

CUSTOM AND PROTOCOL II, PART I: MATERIAL FIELD OF APPLICATION¹

5.1. THE LAWS OF WAR BEFORE 1949

De Vattel, who distinguished civil war from popular tumults, seditions, insurrection and rebellion, made the following definition of civil war:

When a party is formed within the State which ceases to obey the sovereign and is strong enough to make a stand against him, or when a Republic is divided into two opposite factions, and both sides take up arms, there exists a *civil war*.²

Other early writers did not attempt to make a definition, but it should have been presumed that there must have been war similar to international war between licit authorities and a rebel group to be regarded as civil war. For instance, Twiss assumed “a State of War *de facto* between parties” as a condition for foreign States to recognise such situation.³ Therefore, intensity should have been also presupposed.

Cassese argues that certain regulations concerning conduct of hostilities in internal conflict became customary during the Spanish Civil War, but he admits that those rules are applicable only to conflicts that have achieved the magnitude of the Spanish Civil

¹ Article 2 of Protocol II is discussed in *infra*. Ch. 6.

² Emer de Vattel, *The Law of Nations or the Principles of Natural Law: Applied to the Conduct and to the Affairs of Nations and of Sovereigns Vol. III, Translation of the Edition of 1758 By Charles G. Fenwick With an Introduction by Albert de Lapradelle*, Book III, §292 (Michel E. Slatkine and Jiri Toman reprint eds., 1983) (James Brown Scott ed., 1916) (1758). Regarding popular tumults, seditions, insurrection and rebellion, see *id.*, §289. Regarding rebellion, see *id.*, §292.

³ Sir Travers Twiss, *The Law of Nations Considered as Independent Political Communities. On the Rights and Duties of Nations in Time of War*, 2nd ed. rev., §38 (1875).

War,⁴ the requirements of which resemble those set in Article 1(1) of Protocol II. His argument appears to be appropriate because, as discussed above, there should have been the state of war to be classified as a civil war. There is indeed one feature common to the American, Japanese and Spanish Civil Wars; that is, both the legitimate Governments and the rebel groups were equipped with naval forces, which in practice fought maritime battles.⁵ No civil war has had serious naval engagements since the end of the Spanish Civil War,⁶ and therefore since 1945 few civil conflicts could have been governed by the regulations which Cassese regards as customary.

5.2. THE REGIME OF THE 1949 GENEVA CONVENTIONS IN THE 1950S AND 1960S

Article 3 common to the 1949 Geneva Conventions was innovative, and it was adopted after lengthy meetings.⁷ The suggestion that the phrase “armed conflict not of an international character” be defined was dropped in the 1949 Diplomatic Conference.⁸ Even though the *Pictet’s Commentaries* mentioned a list of criteria that might constitute such armed conflict,⁹ Pictet, its author, was not in the opinion that Common Article 3 would not cover situation in which any of the listed criteria was not fulfilled.¹⁰ He wrote that these conditions “are not obligatory and are only mentioned as an indication” and that “We think, on the contrary, that the Article should be applied

⁴ Antonio Cassese, “The Spanish Civil War and the Development of Customary Law Concerning Internal Armed Conflict” in *Current Problems of International Law* 287, at 316 (Antonio Cassese ed., 1975).

⁵ Cf. Lindsay Moir, “The Historical Development of the Application of Humanitarian Law in Non-International Armed Conflicts to 1949”, 47 *ICLQ* 337, 342-343 (1998) (arguing that the recognition of the belligerency of insurgents by third States took place “most commonly in maritime situations”).

⁶ There are reports on maritime fightings in the Sri Lankan Civil War, but a rebel group has not had forces amounting to a navy, and available information indicates that their equipment has been limited to boats. See e.g. Vijitha Yapa, “Tamil suicide boat sinks navy ship in siege of lookout base”, *The Times*, Jul. 20, 1996, at 16.

⁷ G.I.A.D. Draper, *The Red Cross Conventions*, at 14 (1958).

⁸ *Pictet’s Commentary*, at 49.

⁹ *Id.*, at 49-50. The Commentary’s criteria directly result from American and Australian proposals. See *Final Record of the Diplomatic Conference*, 1949, Vol. II-B, at 121 [hereinafter *FR*]

¹⁰ *Pictet’s Commentary*, at 50.

as widely as possible” because “certain rules... were already recognized as essential in all civilized countries”.¹¹ It is also suggested by *the ICRC’s Commentary* that when the degree of armed conflict is low and the conditions of Article 1(1) are not satisfied, Common Article 3 will be applicable.¹²

Notwithstanding opinion favouring the broader application of Common Article 3, it was intended to be application to only, as Bond argues, “a limited range of conflicts”.¹³ The *Final Record of the Diplomatic Conference* indicates that many States were not in favour of applying the law of armed conflict to low intensity conflicts.¹⁴ The Australian delegation’s remark reflected such prevailing view, which is as follows:

The Australian Government believes that international law and Conventions should apply when civil war was of such magnitude as to be full-scale war.¹⁵

Until the adoption of the 1977 Protocols, certain observance of Common Article 3 had been observed, even though the application was *de facto* basis, rather than *de jure*.¹⁶ The Congolese declaration to observe the Geneva Conventions has already been mentioned.¹⁷ In the Algerian War of Independence, the French Government agreed to accept a mission of the ICRC “in conformity with Article 3 of the Geneva Conventions” in a communiqué of 1956,¹⁸ while it continued to refuse to admit the

¹¹ *Id.*, at 50.

¹² *The ICRC’s Commentary*, §4457.

¹³ James E. Bond, *The Rules of Riot*, at 56-57 (1974).

¹⁴ *FR*, Vol. II-B, at 121.

¹⁵ *Id.*, at 42. Australia proposed an amendment of draft Article 2 which also appears in *Pictet’s Commentary*. *Id.*, at 121; *Pictet’s Commentary*, at 49-50.

¹⁶ See Bond, *supra*. note 13, at 58.

¹⁷ See *supra*. Ch. 4.

¹⁸ “White Paper on the Application of the Geneva Conventions of 1949 to the French-Algerian Conflict”, at 20, reprinted in Eldon van Cleff Greenberg, “Law and the Conduct of the Algerian Revolution”, 11 *Harvard ILJ* 37, 50 (1970).

existence of armed conflict.¹⁹ In the Biafran War, the Nigerian authorities issued the *Operational Code of Conduct for Nigerian Armed Forces*, in which the compliance with the Geneva Conventions was expressly stated.²⁰

It is therefore appropriate to refer to the conclusion of Bond regarding the necessity of intensity in civil war.²¹ First, States which face internal conflicts are not of the opinion that they are bound by Common Article 3.²² Second, they however begin to accord to certain rules if their conflicts prolong.²³ Third, and as conclusion, “armed conflict not of an international character” in Common Article 3 is no more than traditional civil war which attains certain magnitude.²⁴

5.3. DRAFTING PROTOCOL II IN THE DIPLOMATIC CONFERENCE OF 1974 TO 1977

5.3.1. ARTICLE 1 (DRAFT ARTICLE 1²⁵)

In the Diplomatic Conference, some Eastern and Third World States expressed their favour of restricting the application of Protocol II, fearing the infringement of sovereignty.²⁶ Certain Western States, particularly Norway, were against the idea of restricting the scope of application of Protocol II because such restriction would bring

¹⁹ For instance, in his press conference of 11 April 1961 on French policy on Algeria, President de Gaulle kept referring to the conflict as “rebellion”. *Keatings*, 13-20 May 1961, at 18091-18092. See also Bond, *supra*. note 13, at 60.

²⁰ *The Prosecutor v. Dusko Tadic, a/k/a “Dule”, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, Case No. IT-94-1-AR72, 2 Oct. 1995, para. 73, *reprinted in* 35 *ILM* 32 (1996), [hereinafter *Tadic case* (2 Oct. 1995)]. See Bond, *id.*, at 59. (Bond argues that the Nigerian Government acknowledged no legal obligations).

²¹ Bond, *id.*, at 60, 61.

²² *Id.*, at 60.

²³ *Id.*, at 60-61.

²⁴ *Id.*, at 61.

²⁵ Draft Protocol II, Article 1, 1 *OR*, P 3, at 33.

²⁶ Regarding Communist States, e.g. see the proposed amendments of East Germany, 4 *OR*, CDDH/I/88, at 89; East Germany, 8 *OR*, CDDH/I/SR.22, para. 29, at 207. Concerning developing States, see e.g. India, 8 *OR*, CDDH/I/SR.23, para. 48, at 224. In this thesis, Eastern States refer to States belonging to the Communist bloc during the Cold War, while Western States to those belonging to the Capitalist bloc.

less humanitarian protection,²⁷ while other Western States were in favour of the draft article.²⁸ Fifty-eight States voted in favour, five against and twenty-nine abstained in the voting, and Article 1 of Protocol II was thus adopted.²⁹ This adoption reflected neither the tension between the East and West nor difference between North and South. The Eastern States and most of the Western States were in favour of the article, while the Third World States that were so united in adopting Article 1 of Protocol I which internationalises armed conflict for self-determination were split. One could maintain that the almost unanimous support of the Eastern and Western States for Article 1 of Protocol II cannot be interpreted in the affirmation of the customary status of this article because this article was a product of consensus that was not strongly endorsed by those States. For instance, Canada explained their vote by stating that she voted in favour of the article “in the spirit of compromise and common appreciation of the objectives for Protocol II”.³⁰ Besides, there were five oppositions and twenty-nine abstentions, including influential Third World States, such as Algeria, India, Indonesia and Nigeria, which should have worked against the confirmation of the customary status of Article 1.

5.3.2. ARTICLE 3 (DRAFT ARTICLE 4³¹)

India proposed that Draft Article 4 be amended so that Protocol II would not be inapplicable in case of the existence of “external interference”.³² This proposed amendment, however, did not attract a wide support in the Diplomatic Conference

²⁷ E.g. the proposed amendment of Norway, 4 *OR*, CDDH/I/218, at 9; Norway, 8 *OR*, CDDH/I/SR.23, paras. 12 and 13, at 217; New Zealand, 8 *OR*, CDDH/I/SR.23, para. 21, at 218.

²⁸ E.g. the Netherlands 8, *OR*, CDDH/I/SR.23, para. 39, at 222; Italy, 8 *OR*, CDDH/I/SR.23, para. 45, at 223.

²⁹ 7 *OR*, CDDH/SR.49, para. 65, at 69, 70.

³⁰ Canada, 7 *OR*, CDDH/SR.49, Annex, at 77.

³¹ Draft Protocol II, Article 4, 1 *OR*, P 3, at 34

³² Proposed amendment of India, 4 *OR*, CDDH/I/240, at 16.

because the victims of civil conflict in which interference occurs might not be protected,³³ and India finally “agreed not to press its amendment to the vote but reserved the right to take it up later.”³⁴ Apart from this Indian proposal strengthening the protection of sovereignty, there was no notable opposition to draft Article 4, which was adopted by consensus as Article 3 of Protocol II.³⁵

It is difficult for one to imagine the situation where States are opposed to the protection of sovereignty and the prohibition of non-interference, and indeed there was no active opposition in the Diplomatic Conference to this regard. One participant later wrote: “Though this extreme proposal [of India] was not pushed through, it was symptomatic of the general state of mind and atmosphere which prevailed at the Conference on the subject [of non-intervention]”.³⁶ It could be therefore argued that States implicitly supported Article 3 in the Conference.

5.4. SUBSEQUENT PRACTICE AND *OPINIO JURIS*

5.4.1. AFGHANISTAN (1989-)

After the withdrawal of Soviet troops in 1989, Afghanistan confronted internal war instead of welcoming peace.³⁷ The Soviet-installed Najibullah Government in Kabul was finally ousted by the Mujaheddin in April 1992.³⁸ Fighting among various factions ensued, but the Taliban, which was established in October 1994, took control

³³ E.g. Poland, 8 *OR*, CDDH/I/SR. 30, para. 21, at 304.

³⁴ Report of Committee I, Second Session, 10 *OR*, CDDH/219/Rev. 1, para. 109, at 43.

³⁵ See 7 *OR*, CDDH/SR.50, para. 8, at 86.

³⁶ Abi-Saab, “Non-International Armed Conflicts”, in UNESCO, *International Dimensions of Humanitarian Law* 217, 233.

³⁷ The author concentrates on the civil conflict after the Soviet withdrawal.

³⁸ Patrick Brogan, *World Conflicts*, at 134 (3rd ed., 1998).

of Kabul in September 1996.³⁹ Although the Taliban forces effectively placed the southern part of Afghanistan under control, it could not achieve a total victory.⁴⁰

Several warring groups maintained command structure, which enabled the ICRC to conduct humanitarian assistance.⁴¹ Neither the Government nor any opposition group has united the war-torn State since the Soviet departure, which indicates the existence of military occupation by rebels.⁴² The rebel groups have been able to undertake military operations against the central Government or among each other. For instance, when rebel groups attacked Jalalabad in March 1989, President Najibullah admitted in his appeal to the American and Soviet leaders that “extensive offensive attacks” had been undertaken by the oppositions.⁴³ Later, the Taliban fought fiercely to the extent that it was almost able to conquer whole Afghanistan in May 1997.⁴⁴ There have been a number of reports about atrocities in Afghanistan, but vehement contending parties have at least showed their willingness to obey rules of international humanitarian law. For example, Gulbuddin Hekmatyar, a leader of a main opposition group, ordered the humane treatment of the prisoners of war.⁴⁵ The Taliban, on the other hand, advocated

³⁹ *Id.*, at 135.

⁴⁰ *Id.*, at 135-136.

⁴¹ See Yves Sandoz, “The International Committee of the Red Cross and the Law of Armed Conflict Today”, *International Peacekeeping*, Winter 1997, at 86, 91.

⁴² For example, in 1989 the Special Rapporteur of the UN Commission on Human Rights reported situations of human rights “in government-controlled areas” and “in areas not under government control” as well as “in combat areas”. UN Commission on Human Rights, *Report on the situation of human rights in Afghanistan prepared by the Special Rapporteur, Mr. Felix Ermacora, in accordance with Commission on Human Rights resolution 1988/67*, paras. 29-55, UN Doc. E/CN.4/1989/24 (16 Feb. 1989). He however admitted the difficulty of ascertaining the precise areas occupied by the Government and rebels. See *id.* para. 30.

⁴³ “Najibollah appeals to Gorbachev and Bush”, broadcast by Kabul home service in Dari, 1600 gmt, 10 Mar. 1989, reproduced in BBC Monitoring, *SWB*, Part 3, Far East, 3rd Ser., FE/0408, at C/5 (14 Mar. 1989).

⁴⁴ Christopher Thomas, “Northern Afghan towns fly Taleban’s white flag”, *The Times*, May 22, 1997, at 17; Brogan, *supra*. note 38, at 135.

⁴⁵ UN Commission on Human Rights, *Report on the situation of human rights in Afghanistan submitted by Mr. Felix Ermacora, Special Rapporteur, in accordance with Commission on Human Rights resolution 1991/78* [hereinafter *Report on Afghanistan of 1992*], para. 51, UN Doc. E/CN.4/1992/33 (17 Feb. 1992).

the supremacy of *Sharia* over international law⁴⁶ and the humane treatment of those who were captured according to the Islamic law.⁴⁷ The ICRC has been able to visit combatants detained by various groups since 1989,⁴⁸ even though visits to captives have been subject to military situation.⁴⁹

The Afghan Civil War demonstrates difficulty in determining the legal character of the conflict. First, on the side of the rebels, there are so many actors in the conflict, and each party must be examined to verify the law, i.e. either Common Article 3 or Protocol II, applicable to contentions between the Afghan Government and each group.⁵⁰ However, undertaking such investigation into each warring group would be almost unfeasible because of a proliferation of opposition forces and lack of reliable information. Second, the existence of the legitimate Government of Afghanistan is not always self-evident in Afghanistan, and this is particularly the case with the Taliban, which has been occupying a large part of the country, including Kabul, but has not achieved world-wide recognition.⁵¹ With such difficulty in ascertaining the applicable law to the Civil War, this author is reduced to making only the vague conclusion that many fighting in Afghanistan, including those involved in the Taliban, are situations to be governed by Common Article 3 rather than Protocol II.⁵²

⁴⁶ UN Commission on Human Rights, *Final report on the situation of human rights in Afghanistan submitted by Mr. Choong-Hyun Paik, Special Rapporteur, in accordance with Commission on Human Rights resolution 1996/75*, para. 31, UN Doc. E/CN.4/1997/59 (20 Feb. 1997).

⁴⁷ *Id.*, para. 51.

⁴⁸ See the ICRC, *Annual Report 1989*, at 62-63; *Reference Report 1990*, at 52, 53; *Annual Reports 1991*, at 64; *1992*, at 61; *1993*, at 104; *1994*, at 105; *1995*, at 125; *1996*, at 135; *1997*, at 152; *1998*, at 163; *1999*, at 159.

⁴⁹ See e.g. the ICRC, *Annual Report 1997*, at 152.

⁵⁰ Fightings among the rebelling groups are under Common Article 3.

⁵¹ The Taliban has been recognised by Pakistan, Saudi Arabia and the United Arab Emirates. See "Taleban Demolishes 2 Huge Stone Buddhas", *International Herald Tribune* (The Hague), March 5, 2001, at 6.

⁵² A Special Rapporteur of the UN Commission on Human Rights wrote that 1949 Geneva Convention III and 1977 Protocol I would be applicable to the prisoners of war in Afghanistan, but he should have borne in mind the internal character of the conflict after the withdrawal of the Soviet forces. See *Report on Afghanistan of 1992*, *supra*. note 45, para. 49.

5.4.2. BOUGAINVILLE, PAPUA NEW GUINEA (1990-)

One of the least known secessionist conflicts would be the war in Bougainville, Papua New Guinea (PNG). The Bougainville Revolutionary (Republican) Army (BRA) sought the secession of Bougainville from PNG and proclaimed the independence of Bougainville on May 17, 1990.⁵³ There was unrest in the late 1980s but the situation intensified in May 1990 by the imposition of a naval blockade on Bougainville by PNG and by the declaration of unilateral independence.⁵⁴ In the declaration, “the Interim President of the Republic of Bougainville” claimed that “the people of Bougainville” had been prevented from obtaining an independent State by PNG.⁵⁵ The Government of PNG did not recognise the existence of a secessionist movement, even though it showed ambivalence towards the conflict. In its statement, the Government declared that: “Bougainville is an integral part of the Independent Sovereign State of PNG”; “Secession is non-negotiable”; and “Bougainville Crisis is an internal domestic matter...”.⁵⁶ Regarding the BRA, the PNG Government outlawed the group because “the raising of *unauthorized forces* is contrary to the laws of Papua New Guinea”.⁵⁷ On the other hand, the Government admitted the existence of “armed conflict” and of “human rights violations involving our Forces and the BRA”.⁵⁸

⁵³ *Response by the Government of Papua New Guinea to the United Nations Commission on Human Rights Resolution on Alleged Human Rights Violation on Bougainville Province of Papua New Guinea 23rd September 1994* [hereinafter *Response by the PNG Government*], reprinted in UN Commission on Human Rights, *Human rights violations in Bougainville, Report of the Secretary-General*, at 5, 12, UN Doc. E/CN.4/1995/60, (16 Feb. 1995).

⁵⁴ See UN Commission on Human Rights, *Report by the Special Rapporteur on his mission to Papua New Guinea island of Bougainville from 23 to 28 October 1995* [hereinafter *Special Rapporteur's Report from 23 to 28 October 1995*], para. 32, UN Doc. E/CN.4/1996/4/Add.2 (27 Feb. 1996). As to the declaration, see “Declaration of Independence Republic of Bougainville”, reprinted in *Bougainville: Perspectives on a Crisis*, Apps., at 107 (Peter Polomka ed., 1990).

⁵⁵ “Declaration of Independence Republic of Bougainville”, *id.*

⁵⁶ *Response by the PNG Government*, *supra.* note 53, at 23.

⁵⁷ “Press Statement Hon. Ted Diro, MP, Minister for State: Bougainville Republican Army Outlawed”, reprinted in *Bougainville: Perspectives on a Crisis*, *supra.* note 54, Apps., at 87. Emphasis added.

⁵⁸ *Response by the PNG Government*, *supra.* note 53, at 20.

If one applies the four requirements mentioned in the Article 1(1) of Protocol II, the BRA exercised certain control over its members to some extent, even though the BRA's command structure seemed to be rather unsatisfactory.⁵⁹ Regarding occupation, the landing of the PNG armed forces on the southern part of the island "for the first time ... in two years" in May 1992 would indicate the occupation of whole Bougainville by the rebels for a considerable time.⁶⁰ Even the Government of PNG admitted that there were areas not controlled by its forces or "not safe".⁶¹ Last, available information does not indicate whether or not the BRA showed its willingness to observe international humanitarian law. As the satisfaction of the four prerequisites is not evident, it would be appropriate to conclude that the war was not in the ambit of Protocol II.

5.4.3. CHECHNYA, RUSSIA (1994-1996)

On December 11, 1994 an offensive was officially launched by the Russians against the Chechen rebels, which was followed by massive air raids on the city of Grozny.⁶² The Russian Government consistently regarded the conflict as a domestic problem. Soon after the direct involvement of the Russian forces in Chechnya, Grigoriy Karasin, the official spokesman of the Russian Foreign Ministry, stated that "these events [in Chechnya] lie exclusively within the internal competence of the Russian Federation and are its own internal affair", and he referred to the Chechen rebels as "illegal armed

⁵⁹ *Special Rapporteur's Report from 23 to 28 October 1995, supra.* note 54, para. 31.

⁶⁰ "PNG forces land on rebel-held island", (a) Text of report by Radio Australia external services in English, 0800 gmt, 13 May 1992; (b) Excerpt from report by Radio Australia external services in English, 0900 gmt, 13 May 1992, reproduced in BBC Monitoring, *SWB*, Part 3, Far East, FE/1368, at B/13 (30 Apr. 1992).

⁶¹ *Response by the PNG Government, supra.* note 53, at 26-28.

⁶² See *Keesing's*, Dec. 1994, at 40325.

groups”.⁶³ Besides, criminal proceedings were launched by the Russian Procurator General’s office “against illegal actions of criminal armed formations on Chechnya’s territory” on charges of “banditry and terrorism” under the Russian criminal code.⁶⁴

The Russian Constitutional Court examined the legitimacy of the presidential decrees, including the one of December 9, 1994, and ruled that they were licit.⁶⁵ What is significant with this ruling is that it was stated in the decision as follows:

It is the responsibility of the Federal Assembly of the Russian Federation to bring order to the legislation governing the use of the Russian Armed Forces and the resolution of other matters arising during abnormal situations and conflicts, including matters arising out of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II).⁶⁶

Two different *opinio juris* co-existed: the Court mentioned the applicability of international instruments, while the Government denied it. There is no evidence to suggest that the Russian Government changed its standing concerning the applicability of the law of armed conflict after the ruling of the Court.

⁶³ “Russian Foreign Ministry spokesman warns against internationalizing Chechnya problem”, broadcast by Ostankino Radio Mayak, Moscow, in Russian, 1452 gmt, 20 Dec. 1994, *reproduced in* BBC Monitoring, *SWB*, Part 1, Former USSR, 3rd Ser., SU/2185, at B/8 (22 Dec. 1994).

⁶⁴ “Criminal proceedings instituted against Chechen illegal units operating since 1991”, broadcast by Interfax news agency, Moscow, in English, 1843gmt, 13 Jan. 1995, *reproduced in* BBC Monitoring, *SWB*, Part 1, Former USSR, 3rd Ser., SU/2202, at B/8 (16 Jan. 1995).

⁶⁵ Aleksei Kirpichnikov, “The Decisions on Sending Troops into Chechnya Are Declared Constitutional”, *Sevodnya*, Aug. 1, 1995, at 1, *reprinted in* 47 *The Current Digest of the Post-Soviet Press*, No. 31, at 4, 4 (1995).

⁶⁶ The reply of the Russian Government to the note verbale of the Secretary-General, *reprinted in* UN Commission on Human Rights, *The situation of human rights in the Republic of Chechnya of the Russian Federation*, para. 49, UN Doc. E/CN.4/1996/13 (26 Mar. 1996).

The Chechen rebels were “well-trained” and “well-organized”, as Russian Defence Minister admittedly described them.⁶⁷ In January 1996 it was reported that “The separatists control roughly the southern mountainous third of the republic...”⁶⁸ At almost the same time, it was also reported that about one-tenth of Grozny had been controlled by the Russian forces according to “The staff charts”.⁶⁹ Regarding the willingness to obey the laws of war, Dudayev, the Chechen rebel leader, remarked that “captives will now be dealt with according to the laws of wartime” at the very beginning of the conflict.⁷⁰ However, a more comprehensive statement about the law of armed conflict is not available, and in practice the Chechen side was to be blamed for their brutalities.⁷¹

Was the conflict in Chechnya between 1994 and 1996 under Protocol I, because the Chechens sought for self-determination?⁷² Whether the Chechens are “peoples” in international law or not, in practice even Protocol II was not applied by the Russian Government, not to mention Protocol I. Indeed, the applicability of Protocol I was rarely discussed, and the ICRC *par exemple* stressed that Common Article 3 and

⁶⁷ “Grachev, Yerin and Stephashin hold press conference in Mozdok”, broadcast by Ostankino Channel 1 TV, Moscow, in Russian, 1840gmt, 29 Dec. 1994, reproduced in BBC Monitoring, *SWB*, Part 1, Former USSR, 3d Ser., SU/2190, at B/3 (31 Dec. 1994).

⁶⁸ Thomas de Waal, “Dejected troops tell of chaos in army command”, *The Times*, Jan. 20, 1996, at 12

⁶⁹ “‘Izvestiya’ report claims Russian control one-tenth of Grozny”, Text of article “Moscow has stated: military phase is over. Fighting in Grozny continues” in ‘Izvestiya’, Moscow, in Russian, 21 Jan. 1995, at 1, reprinted in BBC Monitoring, *SWB*, Part 1, Former USSR, 3rd. Ser., SU/2208, at B/7 (23 Jan. 1995).

⁷⁰ “Dudayev: no more playing peacemakers, POWs to be dealt with by war laws”, broadcast by ITAR-TASS news agency (World Service), Moscow, in Russian, 1299 gmt, 14 Dec. 1994, reproduced in BBC Monitoring, *SWB*, Part 1, Former USSR, 3d Ser., SU/2180, 16 Dec. 1994.

⁷¹ See *infra*. Chs. 6-8.

⁷² This author does not ascertain the customary status of Article 1(4) of Protocol I regarding the internationalisation of fighting for self-determination, but he concurs with Kwakwa who denies the customary status of the said article. Edward Kwakwa, *The International Law of Armed Conflict*, at 65 (1992); but cf Georges Abi-Saab, “The 1977 Additional Protocols and General International Law: Some Preliminary Reflections” in, *Humanitarian Law of Armed Conflict Challenges Ahead: Essays in Honour of Frits Kalshoven* 115, 120 (Astrid J.M. Delissen and Gerard J. Tanja eds., 1991) (arguing that Article 1(4) is an interpretation of the 1949 Geneva Conventions).

Protocol II be applied.⁷³ Furthermore, as already examined, the willingness of the rebels to observe Protocol II remained somewhat obscure, and therefore the Protocol might not have been applicable, either.

5.4.4. EL SALVADOR (1981-1992)

In October 1979 a coup succeeded in overthrowing a military regime and a junta was consequently established in El Salvador.⁷⁴ The *Frente Farabundo Martí para la Liberación Nacional* (FMLN), a rebel group, undertook a general assault against the Government forces in January 1981,⁷⁵ and the conflict continued until January 1992 when a peace agreement was reached between the contending parties.⁷⁶

The applicability of Protocol II to the civil conflict in El Salvador is not to be doubted.

The ICRC's *Annual Report 1983* wrote as follows:

In accordance with the provisions of the Geneva Conventions covering such conflicts (Article 3 common to the Conventions, and Additional Protocol II...), the ICRC has for the fourth consecutive year continued its protection and assistance activities...⁷⁷

An almost identical phrase was used in the following Annual Reports.⁷⁸ The four requirements of Article 1(1) of Protocol II were met, and El Salvador should have employed the treaty as its party.⁷⁹ Regarding rebel control of land, the FMLN

⁷³ The ICRC, *Annual Report 1995*, at 203.

⁷⁴ Brogan, *supra*. note 38, at 475.

⁷⁵ *Id.*, at 477.

⁷⁶ *Id.*, at 484.

⁷⁷ The ICRC, *Annual Report 1983*, at 29, referred to by Geoffrey Best, *War and Law Since 1945*, at 366 (1994).

⁷⁸ See the ICRC, *Annual Reports 1984*, at 32; *1985*, at 36; *1986*, at 36; *1987*, at 39; *1988*, at 43; *1989*, at 39; and *Reference Report 1990*, at 40. This point is also raised by Best, *id.*, at 366 n.139.

⁷⁹ See Michael Bothe, "Article 3 and Protocol [sic] II: Case Studies of Nigeria and El Salvador", 31 *AULR*, 899, 906 (1982); Best, *id.*, at 366.

occupied “certain parts of the national territory”,⁸⁰ though particularly in an early stage the extent of rebel occupation might have been limited.⁸¹ For instance, the guerrilla attack by the FMLN in January 1981 failed in the cities but the organisation was able to control “several border provinces”.⁸² With respect to command structure of the dissidents, Bothe contended that certain military and governmental structure existed in the FMLN.⁸³ Concerning scale of military operations by the rebel group, its military offensive of January 1981 could be regarded as the beginning of a series of hostilities.⁸⁴ Violence was exacerbated during 1980,⁸⁵ and the assassination of Archbishop Romero, as the Commission on the Truth for El Salvador put it, “symboliz[ed] the point at which human rights violations reached their peak and presag[ed] the all-out war between the Government and the guerrillas that was to come”.⁸⁶ However, it was at the end of 1980 when the FMLN was formed by five different groups and the unified organisation undertook the first major operations against the Government in January 1981.⁸⁷ With reference to the rebels’ willingness to observe Protocol II, the FMLN together with another rebel organisation showed its “determin[ation] to respect the humanitarian norms contained in the Geneva Conventions and Protocol II Additional”.⁸⁸ In practice, for instance, it was reported

⁸⁰ Letter dated 29 March 1993 from the Secretary-General to the President of the Security Council transmitting the report presented on 15 March 1993 by the Commission on the Truth [hereinafter *Report by the Commission on the Truth*], S/25500 (1 Apr. 1993), at 297 & 392 n.5, reproduced in UN, *The United Nations and El Salvador, 1990-1995*, Doc. 67, 290, UN Sales No. E. 95.I.12 (1995).

⁸¹ Compare Bothe, *supra*, note 79, at 906 (“Very few villages or towns, if any, seem to be in the hands of the FNLN, which controls mainly uninhabited areas”) with Waldemar A. Solf, (No title), 31 *AULR* 927-933, at 932 (1982) (“They do have control over a sufficient part of the remote rural areas of the country to conduct such [concerted military] operations.”)

⁸² Brogan, *supra*, note 38, at 477.

⁸³ Bothe, *supra*, note 79, at 906.

⁸⁴ Compare Bothe, *id.* (“this control over scattered areas has enabled the leftists to engage in military operations for a certain time, arguably “sustained,” and they apparently have done so in a systematic, coordinated way, arguably “concerted.” [footnote omitted]) with Solf, *supra*, note 81.

⁸⁵ *Report by the Commission on the Truth*, *supra*, note 80, at 302, 303.

⁸⁶ *Id.*, at 302.

⁸⁷ *Id.*, at 302, 303. However, the rebels regarded the operation as ‘the “final offensive”’. See *id.*, at 303.

⁸⁸ Frente Farabundo Marti Para la Liberacion Nacional & Frente Democratico Revolucionario, *The Situation of Human Rights in the Salvadoran Armed Conflict January-September 1985*, at 76 (1985).

that activities to disseminate international humanitarian law had been conducted for FMLN fighters for the first time in 1982.⁸⁹

This Salvadoran Civil War did reflect the Cold War as the Americans supported the Government, while the Cubans, Nicaraguans and Russians the opposition group.⁹⁰ However, the degree of foreign interference in El Salvador was low, and the applicability of Protocol II to the struggle was not hampered by the involvement of third Powers. The USA sent assistance to El Salvador, most of which turned to be of military use,⁹¹ and American military advisers trained Salvadoran soldiers.⁹² On one occasion when the FMLN launched an offensive in November 1989, American Green Berets were besieged in part of the Hotel El Salvador by the guerrillas, but the existence of the Green Berets were not sufficiently explained by the American authorities.⁹³ However, the US Congress allowed neither the despatch of troops to El Salvador⁹⁴ nor the direct involvement of American advisers in military operations.⁹⁵ Concerning support from Communist States, there was smuggling of arms from Cuba, Nicaragua and indirectly the USSR,⁹⁶ but it seems that their active participation in the civil conflict did not take place.

Notwithstanding such situation favourable to the invocation of Protocol II, it is questionable whether the treaty was *de jure* applied by the legitimate authorities. In 1982 the Government of El Salvador made critical comments on the interim report of

Compare Bothe, *supra*. note 79 (he is silent on this requirement) with Solf, *supra*. note 81, at 932 ("To the best of my knowledge, the FNLM has never claimed that Protocol II is applicable") and Best, *supra*. note 77, at 367 n.142 ("It is also matter for debate, when and how the El Salvador insurgents' humanitarian commitment was registered".)

⁸⁹ The ICRC, *Annual Report 1982*, at 32.

⁹⁰ Brogan, *supra*. note 38, at 473 & 479.

⁹¹ *Id.*, at 478.

⁹² *Id.*

⁹³ *Id.*, at 482.

⁹⁴ *Id.*, at 473.

⁹⁵ *Id.*, at 477.

the Special Representative of the UN Commission on Human Rights.⁹⁷ In this document, the Salvadoran Government praised activities conducted by the ICRC,⁹⁸ and stated that it “understands and is aware of its legal and moral responsibility in this matter [as improving the human rights situation in El Salvador]” and that “[the ICRC’s] humanitarian endeavours are fully supported by the Government”.⁹⁹ On the other hand it declared that “El Salvador is suffering from an acute outbreak of *terrorism* which is being used by *extremist organizations*... .”¹⁰⁰ The term “terrorism” was repeatedly used in the same document, which demonstrates that for the Salvadoran Government, acts committed by the rebels were not of warfare but of mere terrorism. It seems to the present writer that the Government of El Salvador considered, or tried to consider, that the situation should have been governed by human rights law because a situation of terrorism is excluded from application of the laws of war.¹⁰¹ It should be added that, in the Salvadoran comments, there was no mentioning of humanitarian treaties.

Another point that would cast doubt on the *de jure* application of humanitarian instruments is massive violations of the law of armed conflict.¹⁰² The above statement of El Salvador that its Government supported ICRC activities was neither self-flattering nor temporary. For example, according to the ICRC’s *Annual Report 1985*, regular visits to detainees held by the Salvadoran authorities were conducted by ICRC delegates, while visits to Government soldiers captured by the FMLN were not always

⁹⁶ *Id.*, at 479.

⁹⁷ UN Commission on Human Rights, *Comments of the Government of El Salvador on the interim report of the Sepcial Representative on the situation of human rights in El Salvador (A/36/608)*, in *Note by the Secretary General [hereinafter Comments of the Salvadoran Government]*, at 2, UN Doc. E/CN.4/1982/4 (21 Jan. 1982). See Bothe, *supra*. note 79, at 905 n.17.

⁹⁸ UN Commission on Human Rights, *id.*, at 5-7. This point is also noted in Bothe, *id.*, at 907 n.25.

⁹⁹ UN Commission on Human Rights, *id.*, at 5.

¹⁰⁰ *Id.*, at 7. Emphases added.

¹⁰¹ Protocol II, Article 1(2).

¹⁰² See Bothe, *supra*. note 79, at 907

possible.¹⁰³ Nonetheless, the Government forces and agents were notorious for massacring and “disappearing” civilians.¹⁰⁴ The existence of “death squads” that killed, according to Brogan, eight hundred people per month between 1980-82 and twenty thousand in total¹⁰⁵ contradicts the authorities’ willingness to implement the laws of war that is materialised as a form of acceptance of the ICRC mission from an early phase.¹⁰⁶ The rebel side could not escape from criticism against their conducts contrary to the law, either. To give a few examples, in 1985 the FMLN was reminded by the ICRC several times to respect the Red Cross emblem and its activities.¹⁰⁷ The indiscriminate use of mines by the opposition group that resulted in deaths of civilians was reported.¹⁰⁸

In conclusion, the application of Protocol II and Common Article 3 to the civil conflict in El Salvador was short of *de jure*,¹⁰⁹ because of the Salvadoran Government’s position not to acknowledge the existence of war with the rebel group and also because of flagrant violations of the law of armed conflict attributed to both sides.

5.4.5. LIBERIA (1989-1997)

In December 1989 Charles Taylor began campaigns against the Government headed by Samuel Doe, and in September 1990 another rebel leader Prince Johnson captured and killed Doe, which left Liberia without government.¹¹⁰ Despite the intervention of forces of a regional organisation, civil war continued until 1997, when Charles Taylor

¹⁰³ The ICRC, *Annual Report 1985*, at 36-37.

¹⁰⁴ See *Report by the Commission on the Truth*, *supra*. note 80, at 312-365.

¹⁰⁵ Brogan, *supra*. note 38, at 476.

¹⁰⁶ See Bothe, *supra*. note 79, at 907-908.

¹⁰⁷ The ICRC, *Annual Report 1985*, at 36.

¹⁰⁸ *Report by the Commission on the Truth*, *supra*. note 80, at 307.

¹⁰⁹ See Best, *supra*. note 77, at 365-6.

¹¹⁰ Brogan, *supra*. note 38, at 67-68.

was elected as the President of Liberia in election.¹¹¹ What was noticeable with the Liberian Civil War was, first, there were many armed groups fighting with each other. The National Patriotic Front of Liberia (NPFL), led by Charles Taylor, was probably the largest rebel group, but there were others, such as the Liberia Peace Council (LPC), the Revolutionary United Front (RUF), and the United Liberation Movement for Democracy (ULIMO).¹¹² Second, this conflict was notorious for its savagery. One could rightly argue that what occurred in Liberia would be the most tragic and inhumane through the 1990s. Even the ICRC which usually refrains from making a public statement on atrocity committed in a conflict released the following account about the war in Liberia:

The ICRC once more deplores and condemns the serious and systematic violations of the elementary rules of international humanitarian law and of the minimum principles of humanity that have been committed since the start of the conflict in December 1989.¹¹³

Sandoz questioned if the situation could be regarded as “armed conflict” when the Government collapsed.¹¹⁴ According to *the ICRC’s Commentary*, such a situation is not governed by Article 1(1) but Common Article 3,¹¹⁵ and the clear wording of the

¹¹¹ *Id.*, 68-70.

¹¹² As to rebel groups in Liberia, see generally, Stephen Ellis, “Liberia’s Warlord Insurgency”, in *African Guerrillas* 155 (Christopher Clapham ed., 1998).

¹¹³ Jean-Daniel Tauxe (ICRC Delegate General for Africa), “Liberia: humanitarian logistics in question”, No. 312 *IRRC*, May-Jun. 1996, at 352, 352.

¹¹⁴ Yves Sandoz, “The International Committee of the Red Cross and the Law of Armed Conflict Today”, Vol. 4, No. 4, *International Peacekeeping*, Winter 1997, at 86, 91. He also refers to Somalia as one of such situations.

¹¹⁵ *The ICRC’s Commentary*, para. 4461 (stating that Protocol II does not apply to a situation where “several factions confronting each other without involvement of the government’s armed forces”, but Common Article 3 applies to such situation). See also Hilare McCoubrey and Nigel White, *International Organizations and Civil Wars*, at 67 (1995); Christa Meindersma, “Applicability of Humanitarian Law in International and Internal Armed Conflict”, 7 *Hague Yearbook of International Law* 113, 126 (1995).

former Article confirms this view.¹¹⁶ Theoretically, therefore, Liberia ought to have been covered by Common Article 3, but the record of the application of the law was extremely poor, as the following Chapters demonstrate. The Security Council passed Resolution 788 (1992), in which “all parties to the conflict and all others concerned” were called upon “to respect strictly the provisions of international humanitarian law”.¹¹⁷ No available information shows that the Resolution was taken seriously by the warring factions.

5.4.6. RWANDA (1994)¹¹⁸

The conflict in Rwanda that has attracted much media attention, as well as response by the international community in a form of creating an international tribunal, started when a plane crash killed the Presidents of Rwanda and Burundi in Kigali.¹¹⁹ Acts of genocide by majority Hutu against minority Tutsi and moderate Hutu immediately commenced, but at almost the same time the Rwandan Patriotic Front (RPF), mainly the Tutsi organisation, began fighting with the Rwandan Government forces which resulted in the RPF victory in August 1994.¹²⁰ Hutu culprits of the genocide and others fled to neighbouring countries, and hostilities resumed in 1996 when exiled Hutu rebels invaded Rwanda.¹²¹

Concerning the applicability of Protocol II, the Commission of Experts established by the Security Council to investigate genocidal acts and war crimes in Rwanda found

¹¹⁶ See Georges Abi-Saab, *supra*. note 36, at 228-9.

¹¹⁷ Article 5, S/RES/788 (1992), SCOR, 47th year, Res. and Dec., at 99 (1992).

¹¹⁸ Civil conflict in Rwanda has been prolonging, but in this thesis focus is placed on a short period between April and August 1994.

¹¹⁹ Brogan, *supra*. note 38, at 32-33.

¹²⁰ *Id.*, at 33-34. The purpose of this thesis is to discuss the customary status of the laws of war, including war crimes, and thus the problems of genocide and crimes against humanity are not within its scope. As to the aspects of genocide and crimes against humanity in the Rwandan conflict, see e.g. Alain Destexhe, *Rwanda and Genocide in the Twentieth Century*, Translated into English from French by Alison Marschner (1995).

that the situation in the State had been a non-international armed conflict to be covered by Common Article 3 and Protocol II.¹²² The Commission also argued that those who had conducted operations in Rwanda had been ‘individuals under a responsible command that conducted “sustained and concerted military operations” involving strategic planning and tactical sophistication’.¹²³ The Commission did not refer to the occupation of a territory by the RPF, but it is clearly shown by a map attached to the Secretary-General’s report on Rwanda.¹²⁴ Finally, the RPF showed its willingness to the ICRC to abide by the Geneva Conventions and Protocols.¹²⁵ Information on the actual military practice on the side of the RPF is limited, and the ICTR in the *Akayesu* case did not refer to this point.¹²⁶ However, it could be presumed that the rebel group was at least able to implement Protocol II with its intention to observe humanitarian rules as well as with its military strength and command structure. The International Criminal Tribunal for Rwanda considers that both Common Article 3 and Protocol II were applicable to this civil war,¹²⁷ and the above information on the rebel group conform with this judgment.

¹²¹ Brogan, *supra*. note 38, at 34.

¹²² Security Council, *Letter from the Secretary-General to the President of the Security Council transmitting the final report of the Commission of Experts, Annex, Final report of the Commission of Experts established pursuant to Security Council resolution 835 (1994)* [hereinafter *Final report of the Commission*], paras. 106, 108, 110, UN Doc. S/1994/1405 (9 Dec. 1994), reproduced as Doc. 107 in UN, *The United Nations and Rwanda, 1993-1996*, 415, UN Sales No. E. 96.I.20 (1996).

¹²³ *Id.*, para. 111. Footnotes omitted.

¹²⁴ See Security Council, *Report of the Secretary-General on the situation in Rwanda, reporting on the political mission he sent to Rwanda to move the warring parties towards a cease-fire and recommending that the expanded mandate for UNAMIR be authorized for an initial period of six months*, at 298, UN Doc. S/1994/640 (31 May 1994), reproduced as Doc. 64 in UN, *The United Nations and Rwanda, 1993-1996*, 290, UN Sales No. E. 96.I.20 (1996).

¹²⁵ UN Human Rights Commission, *Report on the situation of human rights in Rwanda submitted by Mr. R. Degni-Ségui, Special Rapporteur of the Commission on Human Rights, under paragraph 20 of Commission resolution E/CN.4/S-3/1 of 25 May 1994*, para. 54, UN Doc. E/CN.4/1995/7 (28 Jun. 1994).

¹²⁶ *The Prosecutor v. Jean-Paul Akayesu, Judgement*, Case No. ICTR-96-4-T, 2 Sept., 1998, at <http://www.ictor.org/ENGLISH/cases/Akayesu/judgement/akay001.htm>.

¹²⁷ *Id.*, paras. 618-627.

5.4.7. SOMALIA (1988-)

Ethiopia and Somalia were in rivalry which resulted in war,¹²⁸ and the former organised a Somali National Movement (SNM) that represented one of the Somali clans.¹²⁹ In May 1988 a civil war started with the SNM's attacks against the government forces in the northern part of Somalia.¹³⁰ In the late 1990 Mogadishu was besieged by the rebels and President Siad fled from the capital, leaving Somalia totally anarchic.¹³¹ Somalia was divided by warlords who could exercise their power only on their respective clans.¹³²

Somalia has posed the same problems as Liberia. First, the Government of Somalia collapsed, and fighting were made among various factions based upon clans, among which were the SNM, the Somali National Alliance (SNA), the Somali Salvation Democratic Front (SSDF), United Somali Congress (USC), and the self-claimed Republic of Somaliland.¹³³ Second, warring parties to the civil war paid little respect to the law of armed conflict, and barbarity was rife. For instance, the ICRC was compelled to rely on armed guards to protect its activities because of worsening security.¹³⁴ Looting, killing and raping were not uncommon in the capital city of Mogadishu, and the situation was worse in the northern part of Somalia.¹³⁵ Third, international intervention did not change the situation to a better direction, and atrocities continued between clans. For instance, it was reported that southern Mogadishu had been inflicted with heavy fighting between factional forces, which

¹²⁸ Brogan, *supra*. note 38, at 97-99.

¹²⁹ *Id.*, at 99.

¹³⁰ *Id.*, at 100.

¹³¹ *Id.*, at 100.

¹³² *Id.*, at 101.

¹³³ As to factions, see generally Daniel Compagnon, "Somali Armed Movements", in *African Guerrillas* 73 (Christopher Clapham ed., 1998).

¹³⁴ The ICRC, *Annual Report* 1992, at 46.

¹³⁵ See Compagnon, *supra*. note 133, at 79.

resulted in more than 300 deaths and 1,400 wounded, among whom many were civilians, between December 13 and 21, 1996.¹³⁶

In short, Somalia, as Liberia, is a pertinent case to be governed by Common Article 3, primarily because there has been no central government.¹³⁷ Somalia has been abandoned by the international community since the withdrawal of the UN forces, even though the sufferings of victims in the Somalia has been continuing.¹³⁸

5.4.8. SRI LANKA (1983-)

There was inter-communal unrest in the 1970s in Sri Lanka, but it was in July 1983 that the Liberation Tigers of Tamil Eelam (LTTE or the Tamil Tigers), an organisation advocating the creation of a Tamil state,¹³⁹ began military operations against the Sri Lankan Government, which have continued until today.¹⁴⁰ Fighters of the LTTE are well trained and disciplined who have caused heavy losses of the Government forces.¹⁴¹ The LTTE has held control of part of the territory of Sri Lanka, particularly the northern area, and in 1985 the Sri Lankan delegate at least admitted the existence of “a prohibited zone” and “a security zone”.¹⁴² Particularly in the former area where

¹³⁶ UN Commission on Human Rights, *Report on the situation of human rights in Somalia, prepared by the Independent Expert of the Commission on Human Rights, Ms. Mona Rishmawi, pursuant to Commission resolution 1996/57 of 19 April 1996*, para. 38, UN Doc. E/CN.4/1997/88, (3 Mar. 1997), revised by E/CN.4/1997/88/Corr.1 (1 Apr. 1997).

¹³⁷ McCoubrey and White, *supra*. note 115, at 67. As to the latest political situation, see Abdi Ismail Samatar, *BBC Focus on Africa*, Jan.-Mar. 1999, at 26.

¹³⁸ See the ICRC, *Annual Report 1999*, at 125-130.

¹³⁹ S.S. Misra, *Ethnic Conflict and Security Crisis in Sri Lanka*, at 63-67 (1995). This thesis focuses on the LTTE, the strongest group among various organisations. As to other parties, see *id*, at 65-67.

¹⁴⁰ See generally Brogan, *supra*. note 38, at 252-260. According to the Sri Lankan Government, “The events of July 1985 were caused by a minority of lawless elements in particular circumstances”. UN Commission on Human Rights, *Note verbale dated 30 January 1984 from the Permanent Mission of the Democratic Socialist Republic of Sri Lanka to the Secretary-General*, para. 44, UN Doc. E/CN.4/1984/10 (1 Feb. 1984).

¹⁴¹ Misra, *supra*. note 139, at 65.

¹⁴² Sri Lanka, UN Commission on Human Rights, 41st Sess., Summary Record of the 52nd mtg., para. 36, UN Doc. E/CN.4/1985/SR.52 (20 Mar. 1985). Since 1990, the LTTE seems to have established a highly-organised administrative structure. See Hellmann-Rajanayagam, *The Tamil Tigers: armed struggle for identity*, at 63-4 (1994).

rebels were undertaking operations, action could be taken by the army against them.¹⁴³ However, available information does not show the eagerness of the Tamil Tigers to conform with international humanitarian law. For instance, since 1989 the Government of Sri Lanka has accepted ICRC activities, especially its visits to detainees and dissemination,¹⁴⁴ while the LTTE has received them to a much lesser extent,¹⁴⁵ and moreover the LTTE guerrillas were famous for their brutalities.¹⁴⁶

The Sri Lankan Government neither granted the prisoner of war status to the dissidents nor admitted the applicability of the law of armed conflict. According to a representative of Sri Lanka in a meeting of the Commission on Human Rights, "Sri Lanka had no prisoners of war: all those in prison had violated the laws of the country and were treated in accordance with the United Nations Standard Minimum Rules for the Treatment of Prisoners".¹⁴⁷ On the other hand, he pronounced that "The dissident groups in Sri Lanka could not be considered as "organized armed group"; rather, they were gangs which were exterminating each other. Nor could those gangs be said to control any territory at all. The conditions set forth in the [Second] Protocol ..., therefore, did not exist in Sri Lanka ...".¹⁴⁸ According to an official report of 1992, the Government noted that the LTTE was controlling northern areas, but it did not refer to humanitarian instruments but to human rights law.¹⁴⁹

¹⁴³ Statement by Sri Lanka, *id.*, para. 36. See also Misra, *supra*. note 139, at 72-73.

¹⁴⁴ The ICRC, *Annual Report 1989*, at 64.

¹⁴⁵ As to dissemination, see the ICRC, *Reference Report 1990*, at 64. As to ICRC visits to those detained by the LTTE, see the ICRC, *Annual Report 1991*, at 75.

¹⁴⁶ See e.g. "Terror in Sri Lanka", *The Economist*, Feb. 10, 1996, at 18. The LTTE interprets military targets broadly. See Hellmann-Rajanayagam, *supra*. note 142, at 54, 96; Misra, *supra*. note 139, at 74.

¹⁴⁷ Sri Lanka, UN Commission on Human Rights, 43rd Sess., Summary Record of the 34th mtg., 2nd pt., para. 50, UN Doc. E/CN.4/1987/SR.34/Add.1 (11 Mar. 1987).

¹⁴⁸ Sri Lanka, UN Commission on Human Rights, 43rd Sess., Summary Record of the 47th mtg., para. 53, UN Doc. E/CN.4/1987/SR.47 (11 Mar. 1987). He also denied the applicability of the Geneva Conventions. See Sri Lanka, UN Commission on Human Rights, 43rd Sess., Summary Record of the 46th mtg., 2nd pt., para. 37, UN Doc. E/CN.4/1987/SR.46 (9 Apr. 1987).

¹⁴⁹ Overseas Publicity Division, Government Information Department, Sri Lanka, *Human Rights in Sri Lanka: Status Report*, at 5-7 (1992).

Even though the LTTE has been fighting for self-determination, this conflict has not been internationalised according to Protocol I. Should the State be a party to Protocol II, the application of the treaty would still be questionable, because of the reluctance of the separatist group to obey the laws of war. In conclusion, similar to the conflict in Chechnya, Common Article 3 appears to be the only international applicable rule.

5.4.9. THE FORMER YUGOSLAVIA (1991-1995)

The Socialist Federal Republic of Yugoslavia was split up in the early 1990s, and the conflicts resulting from the disintegration brought a countless number of atrocities which Europe had not seen for fifty years.¹⁵⁰ The conflict in the former Yugoslavia had both international and non-international aspects,¹⁵¹ but it can be regarded as “internationalised”.¹⁵² Regarding war between the Serbs and Croats that started with the proclamation of independence by Croatia, the representatives of the both sides agreed that they would abide by the 1949 Geneva Conventions and 1977 Protocol I.¹⁵³ Considering conflict in Bosnia-Herzegovina that broke out with the approval of her independence in the referendum of February 1992, the parties to the conflict agreed to comply with most of the 1949 Geneva Conventions and their first Protocol.¹⁵⁴ Hence, it appears inappropriate to discuss the conflict in the former Yugoslavia in this thesis that focuses on non-international armed conflicts, but this author uses the war for the following reasons.

¹⁵⁰ See Brogan, *supra*. note 38, at 437-453.

¹⁵¹ *Tadic* case (2 Oct. 1995), para. 77.

¹⁵² McCoubrey and White, *supra*. note 115, at 94.

¹⁵³ *Tadic* case (2 Oct. 1995), para. 73; the ICRC, *Annual Report 1991*, at 89; McCoubrey and White, *supra*. note 115, at 94.

¹⁵⁴ *Tadic* case (2 Oct. 1995), *id.*, at 55-56; the ICRC, *Annual Report 1992*, at 93; and McCoubrey and White, *id.*

First, while the conflict was “internationalised”, its non-international nature cannot be disregarded. The conflict in Bosnia-Herzegovina was more non-international,¹⁵⁵ in which Croats, Muslims and Serbs not belonging to regular armed forces played an important role. The war in Croatia might have been more international than the one in Bosnia-Herzegovina, but irregular militias participated in the conflict.¹⁵⁶ Müllerson gives a persuasive example:

In Bosnia-Herzegovina where a village fought against a village and a neighbour against a neighbour, where Muslims in Bihac revolted against the mainly Muslim Government in Sarajevo, one can hardly deal with the conflict as a single international armed conflict.¹⁵⁷

The ICTY has carefully examined the nature of the conflict in its jurisprudence. To take two examples, in the *Rajic* case, focus was placed on a link between a Croatian armed group in Bosnia-Herzegovina and the Croatian armed forces, and the Trial Chamber found, after examining the link, that the former had been supported by the latter and therefore that the conflict between the Croatian armed group and the Bosnian Government’s armed forces had assumed international character.¹⁵⁸ In the *Tadic* case, the Appeals Chamber overturned the Trial Chamber’s finding that had regarded the conflict in Bosnia-Herzegovina until May 19, 1992 as international without specifying the type of conflict after the date.¹⁵⁹ The Appeals Chamber relied on Article 4(A)(2) of Geneva Convention III regarding the requirements to be

¹⁵⁵ McCoubrey and White, *supra*. note 115, at 94.

¹⁵⁶ Brogan, *supra*. note 38, at 446.

¹⁵⁷ Rein Müllerson, “International Humanitarian Law in Internal Conflicts”, 2 *Journal of Armed Conflict Law* 109, at 112 (1997).

¹⁵⁸ *Prosecutor v. Ivica Rajic, a/k/a Viktor Andric, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence*, Case No. IT-95-12-R61, 13 Sept. 1996, paras. 9-21, at [http:// www.un.org/icty/rajic/trialc2/decision-e/60913612htm](http://www.un.org/icty/rajic/trialc2/decision-e/60913612htm).

¹⁵⁹ *Prosecutor v. Dusko Tadic, Judgement*, Case No. IT-94-1-A, 15 Jul. 1999, paras. 83-162, *reprinted in* 38 *ILM* 1518 (1999).

militias and found, after examining the nature of the relationship between the Bosnian Serb Army and Army of the Federal Republic of Yugoslavia, that the latter had had control over the former and therefore that the conflict in Bosnia-Herzegovina had been international in character even after May 19, 1992.¹⁶⁰

Both cases show that the ICTY examined in detail the nature of the conflict. In the *Tadic* case in particular, the Trial Chamber's finding was overturned by the Appeals Chamber, and this fact alone reveals the difficulty in determining the character of the conflict. In the view of international humanitarian law, as the ICTY found in its judgment, the conflict in Bosnia-Herzegovina was "internationalised", but in reality there were non-international elements, and the examination of the conflict would therefore become a useful comparison with other civil wars which are analysed in this thesis.

Second, the parties to the conflict flagrantly violated the law of armed conflict applicable to international conflicts, and the effect of the internationalisation should be doubted. In the following Chapters such atrocities will be referred to, but it is worth mentioning here that the ICRC passed a number of public statements and appeals, part of which denounced the cruel acts committed by the parties to the conflict.¹⁶¹ Thus, the conflict in the former Yugoslavia should be discussed and compared with civil conflicts which took place during the 1990s in which violations of international humanitarian law were rife.

¹⁶⁰ *Id.*, particularly paras. 88-97 (regarding Geneva Convention III) and paras. 146-162 (regarding the relationship between the two armies). It is worth mentioning that the Court in this case examined in length to what extent control over a rebel group by a foreign State was necessary to transform an internal conflict into an international one. The Trial Chamber relied on the "effective control" test adopted in the *Nicaragua* case, but the Appeals Chamber found the text not persuasive. Instead, it employed the "overall control" test, which had been adopted in various international, regional and domestic courts, in order to determine whether the Federal Republic of Yugoslavia had control over the *Republika Srpska*. See *id.*, paras. 98-145.

¹⁶¹ The ICRC, *Annual Reports 1991*, at 88; *1992*, at 92, 93; *1993*, at 147-148.

5.5. EXAMINATION OF CUSTOMARY STATUS

5.5.1. ARTICLE 1(1)

The civil war in El Salvador seems to be the only example examined in this thesis in which the applicability of Protocol II was unquestionable, and with such lack of practice, it would not be plausible to regard the requirements set in Article 1(1) of Protocol II as customary. Thus Common Article 3 should play a role, since it is considered to be “the last resort” in a non-international armed conflict when Protocol II is not applicable.¹⁶² As Article 1 of Protocol II states, the treaty “develops and supplements [Common] Article 3 ... without modifying its existing conditions of application”, and this clear wording indicates that the scope of Common Article 3 exists, independent of that of Protocol II.¹⁶³ Moreover, Draper wrote:

It is not easy to imagine that a State will claim the legal right before the forum of world opinion to murder, torture and mutilate, and leave the wounded untended, because the victims are, or were, only bandits.¹⁶⁴

The reality is, however, that even this very concise provision has been often violated and has not been formally applied. The experiences of the above conflicts demonstrate the following paradox. On the one hand, as just stated, Common Article 3 should be the last resort in an internal conflict where Protocol II cannot prevent cruelties, but on the other such civil war which needs the most basic protection incorporated in this terse article is in practice the least likely to be governed by it. Liberia appears to be the

¹⁶² See Rodney G. Allen et al, “Refining War: Civil Wars and Humanitarian Controls”, 18 *Human Rights Quarterly* 747, 766 (1996); Meindersma, *supra*. note 115, at 126; Michael Veuthey, “Implementation and Enforcement of Humanitarian Law and Human Rights Law in Non-International Armed Conflicts: The Role of the International Committee of the Red Cross”, 33 *AULR* 83, 89 (1983).

¹⁶³ See Abi-Saab, *supra*. note 36, at 229.

¹⁶⁴ Draper, *supra*. note 7, at 17.

most pertinent example of such paradox, analysed in this chapter, and so are Chechnya, Rwanda and Somalia.

5.5.2. ARTICLE 1(2)

Although this thesis confines itself to armed conflicts,¹⁶⁵ there are situations which do not amount to armed conflicts. For instance, the United Kingdom has been confronting violence in Northern Ireland. The Irish Republican Army (IRA) is a military organ pursuing the unification of Ireland by force, and the organisation has been “under responsible command”.¹⁶⁶ However, the IRA has not controlled any part of Northern Ireland with an exception of “no-go” areas in Belfast and Londonderry for a brief period.¹⁶⁷ In addition the IRA neither “carr[ies] out sustained and concerted military operations” nor “implement[s] ... Protocol [II]” because of its terrorist nature.¹⁶⁸ In Bahrain, unrest started in December 1994, led by opposition groups mostly of Shia for parliamentary democracy that existed for a short period after independence.¹⁶⁹ It has not been the armed forces but the security forces (police) that have dealt with the riotings,¹⁷⁰ and the dissidents have not resorted to the use of armed weapons. For instance, it was “stones and Molotov cocktails” that were used by

¹⁶⁵ This thesis confines itself to the contention that international humanitarian law is not customarily applicable to riot situation. Therefore which law should be applied to such occasion should be found elsewhere. See e.g. Asbjörn Eide, “Internal Disturbances and Tensions”, in UNESCO, *International Dimensions of Humanitarian Law* 241 (1988). It is, however, worth noting that the ICRC is usually allowed to visit those who are detained in relation to internal disturbances, which contributes to ameliorating the situation. See e.g. Abi-Saab, *supra*. note 36, at 238.

¹⁶⁶ See C. P. Walker, “Irish Republican Prisoners - Political Detainees, Prisoners of War or Common Criminals?”, 19 *The Irish Jurist* 189-225, at 224 (1984).

¹⁶⁷ See *Report of the Commission to consider legal procedures to deal with terrorist activities in Northern Ireland. Chairman: Lord Diplock*, Cmnd. 5185, at 9; Walker, *id.*, at 213; Tim Pat Cogan, *The IRA*, at 374 (rev. new ed., 1995).

¹⁶⁸ See Walker, *id.*, at 219.

¹⁶⁹ See “Bahraini fireworks”, *The Economist*, Apr. 6, 1996, at 17; Michael Binyon, “Bahrain rounds up 1,500 protesters”, *The Times*, 22 Dec. 1994, at 8; Anthony H. Cordesman, *Bahrain, Oman, Qatar, and the UAE*, at 81 (1997).

¹⁷⁰ See Cordesman, *id.*, at 83 and 386 n.80, 107-111.

demonstrators against the security forces in December 1994.¹⁷¹ The Bahraini Government has not regarded the situation as armed conflict, and at the beginning of the unrest, the Ambassador of Bahrain to the UK used terms such as “international terrorist organisations” and “terrorist acts”.¹⁷²

The above two examples are only a handful of the recent situations not amounting to civil wars, and neither Protocol II nor other humanitarian rules has been formally invoked by a State facing such situation. Therefore this non-applicability of the treaty confirms the well-established principle that international humanitarian law, one instrument of which is Protocol II, does not regulate the conducts undertaken in situations short of armed conflict, as provided by Article 1(2) of Protocol II.¹⁷³ Accordingly, one could contend that this provision is customary.

5.5.3. ARTICLE 3

This Article contains two principles of international law, the principle of inviolable sovereignty and the principle of non-intervention.¹⁷⁴ These principles are as old as international law itself,¹⁷⁵ and are incorporated in paragraphs 1 and 7 of Article 2 of the UN Charter, respectively. They are firmly established principles in international law whose customary status was confirmed by the ICJ,¹⁷⁶ and it can be argued that Article 3 merely reiterates them.¹⁷⁷ Involvement of foreign States and/or international

¹⁷¹ *Id.*, at 81.

¹⁷² “Letter from Karim Ebrahim Al Shakar to the Editor of 16 Jan. 1995, Unrest in Bahrain”, *The Times*, Jan. 18, 1995, at 19.

¹⁷³ Regarding the non-applicability of international humanitarian law to violent situation, see e.g. McCoubrey and White, *supra*. note 115, at 20-21, 68-71.

¹⁷⁴ See *the ICRC's Commentary*, para. 4499.

¹⁷⁵ See Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, at 17-20 (7th rev. ed., 1997).

¹⁷⁶ *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Merits, Judgment*, *ICJ Reports 1986*, p. 14, paras. 202-213, particularly 202 and 212.

¹⁷⁷ See *the ICRC's Commentary*, paras. 4500, 4502.

organisations in an internal conflict is almost inevitable, as the above analysis indicates, and there is fear that the sovereignty of State which is facing internal conflict is infringed by Protocol II.¹⁷⁸ However, as far as Article 3(1) is concerned, no State or organisation has ever “invoked” Protocol II “as a justification for intervening, directly or indirectly ... in the armed conflict ... of the High Contracting Party...”. Therefore, the customary status of this paragraph has not been damaged.

¹⁷⁸ See Kwakwa, *supra*. note 72, at 22, 23.

CHAPTER 6

CUSTOM AND PROTOCOL II, PART II: HUMANE TREATMENT

6.1. THE LAWS OF WAR BEFORE 1949

De Vattel, on the one hand, upheld the humane treatment of the *hors de combat*,¹ women, children, old people,² other civilians,³ and prisoners of war.⁴ He, on the other hand, acknowledged that the sovereign could punish the leaders of a rebel group.⁵ Wheaton and Woolsey also asserted the protection of civilians⁶ and prisoners of war,⁷ even though the protection they sustained is quite different from today's more detailed protection. "Treating captured rebels as prisoners of war", Lieber's Code provided, "neither proves nor establishes an acknowledgment of the rebellious people, or of the government which they may have erected, as a public or sovereign power".⁸ The Code also stipulated that "the leaders of the rebellion or chief rebels" might be tried "for high treason" if amnesty had not been granted.⁹

Both sides of the Spanish Civil War expressed their willingness to treat prisoners of war humanely.¹⁰ In practice, the ICRC was permitted to visit only a few prisons and

¹ Emer de Vattel, *The Law of Nations or the Principles of Natural Law: Applied to the Conduct and to the Affairs of Nations and of Sovereigns, Vol. III, Translation of the Edition of 1758 By Charles G. Fenwick With an Introduction by Albert de Lapradelle*, Book III, §140 (Michel E. Slatkine and Jiri Toman reprint eds., 1983) (James Brown Scott ed., 1916) (1758). De Vattel argued that quarter should be given, but with exception. See *id.*, §140-141.

² *Id.*, §145.

³ *Id.*, §§146-7.

⁴ *Id.*, §§148-153. De Vattel, however, did not deny the possibility of certain deviation from the humane treatment of prisoners of war, e.g. enslavement. See e.g. §152.

⁵ *Id.*, §294.

⁶ Henry Wheaton, *Elements of International Law*, §345 (James Brown Scott ed., 1936) (Edition of Richard Henry Dana, Jr., ed. by George Grafton Wilson, 1866); Theodore D. Woolsey, *Introduction to the Study of International Law, Designed as an Aid in Teaching, and in Historical Studies*, §129 (1860).

⁷ Wheaton, *id.*, §344; Woolsey, *id.*, §128.

⁸ Lieber's Code, Article 153.

⁹ Lieber's Code, Article 154.

¹⁰ See *supra*. Ch. 2.

general exchange of prisoners did not take place, even though improvements of the conditions of prisoners were seen after visits and the small number of exchange was achieved.¹¹ Besides, the rebel group denied its resort to hostage-taking and “deplore[d]” the killing of persons who were famous domestically and internationally.¹² As to the protection of women and children, the legitimate Government indicated its willingness to exchange women and children whom it had captured, while the rebels who, they claimed, were “inspired by the loftiest sentiments of humanity” declared that women and children would be let out of its occupying zone, if they wished to do so.¹³

6.2. THE REGIME OF THE 1949 GENEVA CONVENTIONS IN THE 1950S AND 1960S

Common Article 3 introduced the humane treatment of non-combatants to “armed conflict not of an international character”. A list of prohibited acts include “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture”;¹⁴ “taking of hostages”;¹⁵ “outrages upon personal dignity, in particular humiliating and degrading treatment;”¹⁶ and “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples”.¹⁷

There was practice of both the observance and violation of these provisions in civil conflicts in the 1950s and 1960s. During the Algerian War of Independence, the ICRC

¹¹ *General Report of the International Red Cross Committee on its activities from August, 1934 to March, 1938*, at 113-122, Doc. No. 12a (1938).

¹² *Id.*, at 128.

¹³ The rebels set conditions that the Government would undertake the same action to women and children in the Government’s zone. *Id.*, at 128.

¹⁴ Common Article 3(1)(a).

¹⁵ Common Article 3(1)(b).

¹⁶ Common Article 3(1)(c).

criticised the French use of torture in its confidential report, which was unprecedentedly published in a French newspaper.¹⁸ The FLN, an Algerian rebel group, sought to demonstrate its willingness to treat French soldiers in their hands as prisoners of war,¹⁹ while the French came to grant the *de facto* prisoners of war status to some of the captured Algerians, especially if they held guns on capture.²⁰ “Considerable improvements” in treatment of detainees were reported by the ICRC after its visits to Algerian prisoners in Algeria.²¹ However, ICRC visit to French prisoners held by the Algerian rebel group was made only once.²² At the beginning of the civil conflict in Yemen, the Royalists slaughtered all those who were captured, but later they treated prisoners humanely in camps.²³ However Boals argued that it was primarily the presence of ICRC delegates, not necessarily international humanitarian law, that helped to ameliorate the conditions of detainees.²⁴ During the conflict in Nigeria, despite allegations about atrocities committed by the Nigerian armed forces, the Government in general seemed to have been willing to treat captured enemy soldiers as prisoners of war and to punish those who conducted cruelties.²⁵ On the other hand, the treatment of Nigerian soldiers captured by the Biafran rebels was more problematic, and they might have been maltreated, and faced starvation.²⁶

¹⁷ Common Article 3(1)(d).

¹⁸ A summary of the ICRC report in *Le Monde* is found in *Keesings*, 12-19 March 1960, at 17309-10.

¹⁹ See Eldon van Cleff Greenberg, “Law and the Conduct of the Algerian Revolution”, 11 *Harvard ILJ* 37, 59-60 (1970).

²⁰ *Id.*, at 58-9.

²¹ The ICRC, *The ICRC and the Algerian Conflict*, at 6 (1962).

²² *Id.*, at 9-10.

²³ Kathryn Boals, “The Relevance of International Law to the Internal War in Yemen”, in *The International Law of Civil War* 303, 315 (Richard Falk ed., 1971).

²⁴ *Id.*, at 315-6.

²⁵ As to the Nigerian Government and the laws of war, see Allan Rosas, *The Legal Status of Prisoners of War*, at 196-201 (1976).

²⁶ As to the Biafran secessionists and the laws of war, see Rosas, *id.*, at 201-2.

General Assembly Resolution 2676 (XXV)²⁷ regarding prisoners of war would have been significant had it been adopted universally, since according to the Resolution the protection of prisoners of war was not limited in international armed conflict. In paragraph 1, “*all parties to any armed conflict*” were called upon “to comply with the terms and provisions of the [Third] Geneva Convention”.²⁸ In addition, paragraph 5 suggested that “combatants in *all armed conflicts not covered by article 4 of the [Third] Geneva Convention of 1949* be accorded the same humane treatment defined by the principles of international law applied to prisoners of war”.²⁹ The wording of paragraph 1 is more inclusive than that of paragraph 5 because the former only referred to “any armed conflict” while the latter designated “all armed conflicts not covered by article 4 of the Geneva Convention”. Even though there is a difference between the two paragraphs, paragraph 5 could have covered internal conflict since Article 4 of the Geneva Convention III sets the categories for prisoners of war in international armed conflict.

Resolution 2676 (XXV) was, however, fiercely opposed by both Eastern and Third World States that claimed that the Resolution was introduced by the Americans to justify their position in the Vietnam war. In the adoption of the Resolution at the General Assembly, the Eastern European States and many Third World States voted against, and there were twenty abstentions which included not only many Third World States but also France and Portugal.³⁰ Before the voting took place in the General Assembly, the USSR strongly condemned the USA because the captured American

²⁷ G.A. Res. 2676 (XXV), UN GAOR, 25th Sess., Supp. No. 28, at 76, UN Doc. A/8028 (1970).

²⁸ G.A. Res. 2676 (XXV), para. 1. Emphasis added.

²⁹ G.A. Res. 2676 (XXV), para. 5. Emphasis added. The British delegate pronounced their reservations in the Third Committee on this paragraph because the protection of prisoners of war might be extended to “even those who used arms in pursuit of criminal ends”. See UK, UN GAOR 3rd Comm., 25th Sess., 1804th mtg. para. 30, UN Doc. A/C.3/SR. 1804 (1 Dec. 1970).

³⁰ UN GAOR, 25th Sess., 1922nd pln. mtg. para. 130, UN Doc. A/PV. 1922 (9 Dec. 1970). (67/30/20).

soldiers in Vietnam were “not prisoners of war but interventionists”, while the USA attempted to have the same footing as the aggressed Vietnamese by introducing the Resolution.³¹ With such strong opposition especially from the Communist bloc, it is difficult to sustain that this Resolution has declared the customary status of the humane treatment of prisoners of war in internal conflict.

6.3. DRAFTING PROTOCOL II IN THE DIPLOMATIC CONFERENCE OF 1974 TO 1977

6.3.1. ARTICLE 2 (DRAFT ARTICLE 2³²)

In the Diplomatic Conference, Article 2 on the whole was adopted by consensus.³³ It appears from the documents of the Diplomatic Conference on this Article that there were not extensive arguments on this Article. Besides, it was adopted by consensus and it is not possible to observe the *opinio juris* of the voting States from the record.

6.3.2. ARTICLE 4 (DRAFT ARTICLES 6 AND 32³⁴)

Some States were not in favour of draft Article 6 *in toto* since the Article would take place of national laws that have already prohibited the acts provided by the Article.³⁵ Others, on the other hand, supported the whole draft Article.³⁶ The drafting of the present Article was a very complicated procedure,³⁷ some provisions survived through

³¹ See USSR, UN GAOR, 25th Sess., 1922nd pln. mtg. paras. 65-81, especially 66, 73, UN Doc. A/PV. 1922 (9 Dec. 1970).

³² Draft Protocol II, Article 2, 1 *OR*, Part 3, at 33-34.

³³ 7 *OR*, CDDH/SR.50, at 85.

³⁴ Draft Protocol II, Articles 6 and 32, 1 *OR*, Part 3, at 35, 41-42, respectively.

³⁵ E.g. Nigeria, 8 *OR*, CDDH/I/SR.32, para. 21, at 327; India, 8 *OR*, CDDH/I/SR.32, para. 22, at 327.

³⁶ E.g. Switzerland, 8 *OR*, CDDH/I/SR.32, para. 29, at 328; Ukrainian SSR, 8 *OR*, CDDH/I/SR.32, para. 31, at 327.

³⁷ See Michael Bothe et al, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, at 640-641 (1982).

the Diplomatic Conference, but the Article on the whole was the product of last-minute compromise and also of merger between draft Articles 6 and 32.³⁸

The area overlapping between the present Article 4 and Common Article 3 was the least controversial in the Diplomatic Conference; i.e. the first and second sentences of paragraph (1);³⁹ paragraph (2)(a) except for corporal punishment;⁴⁰ and paragraph (2)(c) and (e).⁴¹ It is true that there are differences in terms between the above-mentioned two Articles, and for instance paragraph 1 of Article 4 is not identical with paragraph 1 of Common Article 3. However, such differences did not become a matter of controversy in the Diplomatic Conference.

There was no noticeable discussion regarding the last sentence of paragraph 1, paragraph 2(f), (g) and (h), and hence, it is difficult to determine the customary status of these provisions. With respect to paragraph 3, significantly, throughout the discussion about this paragraph, no State openly opposed it.⁴² On the other hand there were disagreements as to details of the paragraph and, therefore, various amendments were proposed.⁴³ The better interpretation of the discussion about paragraph 3 in the Diplomatic Conference would be that this paragraph might have had a generating effect upon the formation of customary rule about the general protection of children because of the nonexistence of opposition against it. However, as examined later there have been violations of the protection of children in recent civil wars, and such positive effect was probably negated.

³⁸ Pakistan, 8 *OR*, CDDH/427 and CDDH/430, at 20.

³⁹ Adopted by consensus. See 7 *OR*, CDDH/SR.50, para. 16, at 87.

⁴⁰ Adopted by consensus. See 7 *OR*, CDDH/SR.50, para. 35, at 89.

⁴¹ No voting for these sub-paragraphs is recorded.

⁴² The work compiled by Levie is useful when one needs to overview the discussion on each article and paragraph. See *The Law of Non-International Armed Conflict*, at 186-199 (Howard S. Levie ed., 1987).

⁴³ See the above note and Levie, *id.*, at 187-189.

There was disagreement among the participants in the Diplomatic Conference on corporal punishment, collective punishment and terrorism, and therefore it is difficult to consider them to be in accordance with custom existing at that time. As to corporal punishment, Canada stated that the prohibition of such punishment would be contrary to many national laws, which provide the kind of punishment.⁴⁴ With reference to collective punishment, the original term “collective penalties” was replaced by the present wording,⁴⁵ because the original term may refer to penal law in domestic law.⁴⁶ Apart from this linguistic problem, Pakistan proposed to delete the prohibition of collective punishment, which was supported by Canada and Iraq.⁴⁷ However, the subsection was saved at the last minute by consensus.⁴⁸ Concerning terrorism,⁴⁹ when Committee I adopted the draft Article, a clause about the prohibition of terrorism was adopted in the present form.⁵⁰

6.3.3. ARTICLE 5 (DRAFT ARTICLE 8⁵¹)

Certain part of draft Article 8 was subject to debate and a number of amendments, while the *Official Records* do not document thorough discussion about the rest of the draft Article.⁵² The humane treatment provided by the present Article 5(1)(b) was considered to be unrealistic for implementation. The Canadian representative suggested that the treatment be less obligatory, since rebel groups in particular would

⁴⁴ Canada, 8 *OR*, CDDH/I/SR.40, para. 12, at 423.

⁴⁵ 7 *OR*, CDDH/SR.50, para. 29, at 88.

⁴⁶ E.g. France, 7 *OR*, CDDH/SR.50, para. 20, at 83; Spain, 7 *OR*, CDDH/SR.50, para. 21, at 88; Finland, 7 *OR*, CDDH/SR.50, para. 24, at 88.

⁴⁷ Pakistan, 7 *OR*, CDDH/SR.50, para. 18, at 87; Iraq, 7 *OR*, CDDH/SR.50, para. 19, at 87; Canada, 7 *OR*, CDDH/SR.50, para. 26, at 88. In addition, the delegate of India earlier opposed this prohibition, which, he argued, was out of date in many States. India, 9 *OR*, CDDH/I/SR.73, para. 3, at 427.

⁴⁸ See 7 *OR*, CDDH/SR.50, para. 29, at 88.

⁴⁹ The prohibition of terrorism is dealt with, together with Article 13, in *infra*. Ch. 8.

⁵⁰ See 8 *OR*, CDDH/I/SR.39, para. 7, at 410 (26/17/19).

⁵¹ Draft Protocol II, Article 8, 1 *OR*, Part 3, at 35-36.

⁵² See Bothe, *supra*. note 37, at 643-648; Levie, *supra*. note 42, at 205-241.

not be able to fulfil such obligation,⁵³ and other delegates supported his view or expressed similar opinions.⁵⁴ However Committee I adopted a provision which is identical to the present Article 5(1)(b) by consensus,⁵⁵ and there was no further significant remark on this subparagraph.

Reception of relief and religious practice were originally not mandatory requirements, but they became compulsory in draft Article 8(1)(c) and (d) respectively adopted by Committee I.⁵⁶ The former subparagraph was adopted by 28 votes to 23, with 7 abstentions,⁵⁷ which demonstrate many delegates' dissatisfaction. The Canadian and Indonesian representatives explained their discontent with the obligatory nature of the subparagraph.⁵⁸ As regards the latter on religious practice, it was adopted by consensus.⁵⁹ The Canadian delegate "welcomed the compromise reached on paragraph 1 (d)".⁶⁰

The similar wording of Article 5(4) regarding the release of detainees was adopted in Committee I, but many States voted against it or abstained.⁶¹ Italy, for instance, explained after the voting that, even if a party to a civil war releases captives, taking necessary measures for the safety of those who are released would be impossible in

⁵³ 8 *OR*, Canada, CDDH/I/SR.32, para. 71, at 337.

⁵⁴ See e.g. Federal Republic of Germany, 8 *OR*, CDDH/I/SR.32, para. 72, at 337; India, CDDH/I/SR.32, 8 *OR*, para. 87, at 340; Iran, 8 *OR*, CDDH/I/SR.32, para. 82, at 339-340; Nigeria, 8 *OR*, CDDH/I/SR.32, para. 84, at 340.

⁵⁵ 8 *OR*, CDDH/I/SR.39, para. 18, at 413-414. The reason why this controversial provision was adopted by consensus is not clear, but it might be that compromise was reached.

⁵⁶ See 10 *OR*, CDDH/219/Rev.1, at 53. This adopted draft Article 8(1)(c) and (d) are identical to Article 5(1)(c) and (d) respectively.

⁵⁷ 8 *OR*, CDDH/I/SR.39, para. 20, at 414.

⁵⁸ Canada, 8 *OR*, CDDH/I/SR.40, para. 13, at 423; Indonesia, 8 *OR*, CDDH/I/SR.40, para. 9, at 423.

⁵⁹ 8 *OR*, CDDH/I/SR.39, para. 50, at 416.

⁶⁰ Canada, 8 *OR*, CDDH/I/SR. 40, para. 13, at 416.

⁶¹ 8 *OR*, CDDH/I/SR.39, para. 63, at 418 (42/11/6)

practice.⁶² An Indonesian delegate concisely regarded the adopted paragraph as “irrelevant and unacceptable to his delegation”.⁶³

Discussion about other provisions of Article 5 was either nonexistent or fragmentary. The least problematic provision was the protection of the wounded and sick,⁶⁴ which was virtually not discussed.⁶⁵ Except for a statement made by Indonesia, there is no remark by other delegates on working conditions for the detainees as provided by Article 5(1)(c).⁶⁶ As to the special treatment of captured women, very little is recorded apart from Canada’s statement and proposal to make such treatment less mandatory.⁶⁷ There was little discussion that would indicate the legal nature of paragraph 2, subparagraphs (b) to (e) and paragraph 3. Overall the *Official Records* do not reveal the customary nature of any provision of Article 5, even though it could be argued that Article 5(1)(b) to (d) and Article 5(4) were not customary because of disagreements about the provisions in the Diplomatic Conference.

6.3.4. ARTICLE 6⁶⁸ (DRAFT ARTICLES 9 AND 10⁶⁹)

Article 6 resulted from the merger of draft Article 9 about principles of penal law and draft Article 10 about penal prosecution. Regarding the former draft Article, some States⁷⁰ supported the opinion of the ICRC that the principles described in the draft

⁶² Italy, 8 *OR*, CDDH/I/SR.40, paras. 2-3, at 421.

⁶³ Indonesia, 8 *OR*, CDDH/I/SR.40, para. 9, at 423.

⁶⁴ Protocol II, Article 5(1)(a).

⁶⁵ The only notable remark on this provision was made by the Canadian delegate, who stated that “There was no difficulty over paragraph 2 (a) [of draft Article 8], which referred to the wounded and sick...”. Canada, 8 *OR*, CDDH/I/SR.32, para. 71, at 337.

⁶⁶ The Indonesian delegate stated that the obligation of draft Article 8(1)(e) should not be compulsory. See Indonesia, 8 *OR*, CDDH/I/SR.40, para. 9, at 423.

⁶⁷ Canada’s proposal, 4 *OR*, CDDH/I/37, at 23-24; Canada, 8 *OR*, CDDH/I/SR.32, para. 71, at 337.

⁶⁸ Article 6(5) will be discussed in *infra*, Ch. 8.

⁶⁹ Draft Protocol II, Articles 9 and 10, 1 *OR*, at Part 3, at 36.

⁷⁰ See e.g. Iran, 8 *OR*, CDDH/I/SR.33, para. 27, at 347; Argentine, 8 *OR*, CDDH/I/SR.33, para. 29, at 347; GDR, 8 *OR*, CDDH/I/SR.33, para. 38, at 349.

Article were already part of all legal systems of the world.⁷¹ The Belgian representative even stated that the principles of both draft Articles embodied customary rules.⁷² Other States were concerned with the fact that draft Article 9 was worded in a general manner, instead of limiting its application to internal conflict. Iraq raised this concern, which was shared by India and the USA.⁷³ The American representative, therefore, proposed to make this draft Article applicable only “With respect to offences related to the conflict”.⁷⁴ Concerning draft Article 10, which set detailed rules on the procedure of prosecution, it was difficult to satisfy all participating States, each of which had its own domestic law, and this difficulty was revealed by a number of proposals for amendments.⁷⁵

Now, focus is placed upon each paragraph of Article 6. Regarding the death penalty, draft Article 10(3) provided the postponement of execution of the death sentence for those who are “found guilty of an offence in relation to the armed conflict” until the end of hostilities, but such provision was rejected in the final vote.⁷⁶ On the other hand, the prohibition of imposing the death sentence upon minors and pregnant women did not attract criticism, even though the additional phrase “and mothers of young children”⁷⁷ was put to vote in Committee I,⁷⁸ and was adopted by consensus in the final vote.⁷⁹

With reference to the principle of non-retroactivity set in Article 6(2)(c), its relevance was not questioned, even though the term “under the law” resulted from compromise

⁷¹ The ICRC, 8 *OR*, CDDH/I/SR.33, para. 26, at 347.

⁷² Belgium, 8 *OR*, CDDH/I/SR.33, para. 41, at 350.

⁷³ See Iraq, 8 *OR*, CDDH/I/SR.33, para. 51, at 351; USA, 8 *OR*, CDDH/I/SR.33, para. 55, at 352; India, 8 *OR*, CDDH/I/SR.33, para. 60, at 353.

⁷⁴ USA, 4 *OR*, CDDH/I/258, at 31.

⁷⁵ 4 *OR*, at 32-37.

⁷⁶ 7 *OR*, CDDH/SR.50, para. 86, at 95.

⁷⁷ Article 6(4) uses the phrase “or mothers of young children”.

⁷⁸ Adopted by 37/2/9. 10 *OR*, CDDH/234/Rev.1, para. 90, at 131.

after discussion.⁸⁰ Committee I adopted the wording “under national or international law”,⁸¹ but as the Argentinian representative stated to make his reservation about this sub-paragraph, a legitimate government’s recognition of a law of rebels as “national law” would be “unlikely”.⁸² Pakistan proposed paragraph 2(c) of draft Article 10 whose wording is the same as the present one of Article 6(2)(c),⁸³ and this proposed second paragraph was adopted by consensus.⁸⁴

Apart from the above two provisions of Article 6 of Protocol II, intensive discussion did not take place about other paragraphs and sub-paragraphs. Thus, the present writer considers that the customary status of Article 6 was not confirmed in the Diplomatic Conference. It is true, as already discussed, that sub-paragraphs (b), (c) and (d) of Article 6(2) originated from draft Article 9, which was considered by some representatives to be principles embodied in major legal systems. On the other hand, there were delegates who felt that penal prosecutions in internal conflict should be dealt with by domestic law rather than an international treaty.⁸⁵ Also, there was contention that principles of human rights law were not automatically applicable to civil war and therefore that they should be made applicable specifically to such conflict.⁸⁶ The latter view would imply that human rights provisions, which were inserted in Protocol II, were innovative at its adoption in the context of non-international armed conflict. In conclusion, the existence of conflicting views about Article 6 would signify the innovative nature of the Article.

⁷⁹ 7 OR, CDDH/SR.50, para. 78, at 94.

⁸⁰ *The ICRC's Commentary*, para. 4604.

⁸¹ Adopted by 35/3/4. 9 OR, CDDH/I/SR.63, para. 64, at 301.

⁸² Argentina, 9 OR, CDDH/I/SR.64, para.54, at 314. See also *the ICRC's Commentary*, para. 4605.

⁸³ Pakistan, 4 OR, CDDH/427, at 292.

⁸⁴ 7 OR, CDDH/SR.50, para. 78, at 94.

⁸⁵ See especially explanations of vote by Kenya and Nigeria after the final adoption. Kenya and Nigeria, 9 OR, CDDH/SR.50, Annex, at 101, 102 respectively.

⁸⁶ See Iraq, India and USA, *supra*. notes 73.

6.4. SUBSEQUENT PRACTICE AND *OPINIO JURIS*

6.4.1. AFGHANISTAN

The Taliban has been introducing measures which appear to be in violation of various humanitarian provisions. For instance, it has imposed harsh corporal punishment upon those who commit crimes against strict Islamic law and penalties include amputation and stoning.⁸⁷ The Taliban treatment of women challenges the principle of equal humane treatment. To give a few examples,⁸⁸ female patients cannot be examined by male physicians unless it is necessary, and female patients are “accompanied by her close relatives (mahram)”.⁸⁹ Furthermore, the Taliban prohibited female medical staff from working, and ordered female patients to use only one medical institution.⁹⁰ Negotiations took place among the Taliban and international organisations, such as the UN and ICRC, and the warring group allowed women to use main hospitals in Kabul and also to work as medical staff.⁹¹

Even if the internal war in Afghanistan has been atrocious, there were signs of willingness to treat captured combatants humanely. The report of the UN Commission on Human Rights refers to an order Concerning all the prisoners of war given by the

⁸⁷ UN Commission on Human Rights, *Final report on the situation of human rights in Afghanistan submitted by Mr. Choong-Hyun Paik, Special Rapporteur, in accordance with Commission on Human Rights resolution 1996/75* [hereinafter *Final report on Afghanistan of 1997*], paras. 44-6, UN Doc. E/CN.4/1997/59 (20 Feb. 1997); Anthony Loyd, “Taleban’s rough justice wins approval from crime-plagued Kabul citizens”, *The Times*, Nov. 13, 1996, at 14.

⁸⁸ As to other prohibitions, see Christopher Thomas, “Taleban outlaws women and white socks”, *The Times*, Apr. 4, 1997, at 16; Christopher Thomas, “Women must walk quietly”, *The Times*, Jul. 22, 1997, at 11.

⁸⁹ “Taliban Islamic Movement of Afghanistan Rules of work for the State hospitals and private clinics based on Sharia principles”, Article 1, reproduced in *Final Report on Afghanistan of 1997*, Appendix II, *supra*, note 87.

⁹⁰ The ICRC, *Annual Report 1997*, at 151.

⁹¹ *Id.*

leader of one of the dissident parties.⁹² According to the order, first, “No person is allowed to insult, threaten, harass or murder a prisoner of war”,⁹³ which corresponds to the fundamental guarantees set by Article 4. Second, prisoners of war would receive the same clothes and food as the Mujahedin.⁹⁴ Third, the prisoners of war would not have more working days than the Mujahed should they be required to work.⁹⁵ Fourth, “the same medical care as the Mujahedin” would be received by the prisoners of war.⁹⁶ Fifth, family visits to prisoners of war would be permitted.⁹⁷ Last, the prisoners of war would receive “[a]dequate attention” on their “intellectual development”.⁹⁸ This order would be one of the few available documents that show at least the willingness of the rebels to treat captured soldiers humanely.

Despite the above order, which on the whole is according to Article 5 of protocol II, the treatment of detainees has differed from time to time, and also from party to party. Considering visits to detainees held by the Government, the ICRC was granted unlimited access to them in November 1991.⁹⁹ In 1992 the newly established Government of Afghanistan granted amnesty to the political prisoners who were captured by the former Government, and the ICRC therefore found its visits to detainees “for a while no longer necessary”.¹⁰⁰ Accordingly, the number of those who were visited by ICRC delegates was not significant in the following year,¹⁰¹ though it

⁹² UN Commission on Human Rights, *Report on the situation of human rights in Afghanistan submitted by Mr. Felix Ermacora, Special Rapporteur, in accordance with Commission on Human Rights resolution 1991/78*, para. 51, UN Doc. E/CN.4/1992/33 (17 Feb. 1992).

⁹³ *Id.* This corresponds to the fundamental guarantees set by Article 4 of Protocol II.

⁹⁴ *Id.* The distribution of food is stipulated by Article 5(1)(b) of Protocol II.

⁹⁵ *Id.* This corresponds to Article 5(1)(e) of Protocol II.

⁹⁶ *Id.* This corresponds to Article 5(2)(d) of Protocol II.

⁹⁷ *Id.* Protocol II does not have a corresponding provision.

⁹⁸ *Id.* What exactly “intellectual development” is not clear, but it might include religious development, which can be read in Article 5(1)(d) of Protocol II.

⁹⁹ The ICRC, *Annual Report 1991*, at 64.

¹⁰⁰ The ICRC, *Annual Report 1992*, at 59, 61.

¹⁰¹ See the ICRC, *Annual Report 1993*, at 104.

increased¹⁰² until 1996 when prisons were opened and detainees released by the newly installed authorities.¹⁰³ The year 1997, however, saw a rapid increase in the number of detainees, and the ICRC was not able to visit those captives in the hands of “one of the main parties”, among whom many were feared to have been executed.¹⁰⁴ Places of detention visited by the ICRC were overcrowded and unhygienic, and the ICRC improved sanitation facilities and provided detainees with clothes for cold winter.¹⁰⁵ Messages were exchanged between internees and their families through the organisation.¹⁰⁶

6.4.2. BOUGAINVILLE

There is only piecemeal information on the protection of civilians in this conflict, but some documents of the UN Commission on Human Rights on this conflict are available. For example, in reply to information of the Amnesty International on “extrajudicial executions, torture, rape, beatings and harassment of civilians” attributed to the PNG Government forces,¹⁰⁷ the Government admitted that both sides conducted atrocities, and emphasised the existence of measures to protect human rights.¹⁰⁸ Before this statement, the PNG Government wrote a statement, according to which “Members of the security forces who have been found guilty [of human rights violations] have been severely disciplined and dismissed from the forces”.¹⁰⁹

¹⁰² In 1994 about seven hundred fifty detainees in total were visited by the organisation; in 1995 four thousand. See the ICRC, *Annual Reports 1994*, at 102; *1995*, at 123.

¹⁰³ The ICRC, *Annual Report 1996*, at 135.

¹⁰⁴ The ICRC, *Annual Report 1997*, at 152.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ UN Commission on Human Rights, *Human rights violations in Bougainville, Report of the Secretary-General*, at 4, UN Doc. E/CN.4/1994/60 (26 Jan. 1994). The report also refers to atrocities committed by the BRA. See *id.*

¹⁰⁸ *Id.*, at 20.

¹⁰⁹ UN Commission on Human Rights, *Letter dated 10 February 1992 from the Ambassador of Papua New Guinea to Belgium and the European Community addressed to the Chairman of the Commission on*

However, allegations of cruelties committed by both warring parties in the conflict continued. Thus, according to a UN document issued in 1996, the PNG forces resorted to extrajudicial killing of no less than sixty-four individuals in about five years, and dumped some bodies at sea or burned the others.¹¹⁰ Prisoners of war are, the report alleged, non-existent.¹¹¹ In spite of “a well-established system of courts which gives full protection of law”, the report also claimed, “in practice recourse to justice is very limited”.¹¹²

6.4.3. CHECHNYA

Serious cases of hostage taking were seen in Chechnya. In January 1996 Chechen soldiers occupied a hospital in Kizlyar, outside the Chechen republic and took more than 3,000 patients as hostages in the hospital.¹¹³ As a result of overnight negotiations, most of the hostages were released and 160 hostages, including thirty women and fifteen children, were carried with Chechen rebels in buses towards Chechnya.¹¹⁴ The buses were stopped in Pervomaiskoye by the Russians and the rebels took hostages again in that town.¹¹⁵ On the early morning of January 15, the Russian forces gave warning to the rebels that the village would be attacked unless the hostages were released and three hours later the Russians bombed the village school and houses in

Human Rights, Bougainville issue - Statement by the Government of Papua New Guinea, para. 2(e), UN Doc. E/CN.4/1992/76 (20 Feb. 1992).

¹¹⁰ UN Commission on Human Rights, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Mr. Bacre Waly N'diaye, submitted pursuant to Commission resolution 1995/66, Addendum, Report by the Special Rapporteur on his mission to Papua New Guinea island of Bougainville from 23 to 28 October 1995*, para. 50, UN Doc. E/CN.4/1996/4/Add.2 (27 Feb. 1996). As to the treatment of bodies, see *infra*. Ch. 7.

¹¹¹ *Id.*, para. 54.

¹¹² *Id.*, para. 58.

¹¹³ Thomas de Waal, “Russian troops surround hostage-takers at border”, *The Times*, Jan. 11, 1996, at 11; Philippa Fletcher, “Patients tell of 24-hour terror”, *id.* The problem of protection of medical facilities will be discussed in *infra*. Ch. 7.

¹¹⁴ De Waal, *id.*

¹¹⁵ “The Chechen nightmare continues”, *The Economist*, Jan. 13-19, 1996, at 40; Thomas de Waal, *id.*

which the hostages were still kept.¹¹⁶ President Yeltsin announced the killing of 153 rebels and capture of 30, with escape of 82 hostages.¹¹⁷

The Russian authorities were extremely cautious about using the term “prisoner of war”. According to the press service of the Russian Justice Ministry, the ICRC and Russian authorities agreed that “the term prisoners of war [was] not applicable in this situation...” and that “Under the existing legislation it cannot be applied to persons detained” even though they accorded that meetings of ICRC delegates with detainees could be arranged by Russian officials.¹¹⁸

There were allegations that “filtration camps” existed in which captured Chechen fighters were subjected to torture.¹¹⁹ A Major-General of the Interior Ministry denied that there were “concentration camps” for captured fighters, while he acknowledged the existence of “detention centres” in which the detainees were identified.¹²⁰ According to one of the delegates of the Parliamentary Assembly of the Council of Europe, the delegates had observed the violation of human rights in “places of detention”, while they were not shown “screening camps” by the Russians, who insisted the non-existence of such facilities.¹²¹ Sergei Kovalev, “a human rights defender” who visited “screening camps”, claimed that Russian authorities resorted to

¹¹⁶ Carlotta Gall, “Villagers see tanks blast their homes into rubble”, *The Times*, Jan. 16, 1996, at 10; Michael Evans, “Hostages caught in Russian chiefs’ deadly rivalry”, *id.*

¹¹⁷ Thomas de Waal, “Dejected troops tell of chaos in army command”, *The Times*, Jan. 20, 1996, at 20.

¹¹⁸ “Justice minister receives Red Cross delegation”, broadcast by Interfax news agency, Moscow, in English, 1729 gmt, 7 Feb. 1995, reproduced in BBC Monitoring, *SWB*, Part 1, Former USSR, 3rd Ser., SU/2223, at B/8 (9 Feb. 1995).

¹¹⁹ Thomas de Waal, “Chechen fury at ‘torture camps’”, *The Times*, 30 Sept. 1995, at 14.

¹²⁰ “General denies existence of “concentration camps” for Chechens”, broadcast by Interfax news agency, Moscow, in English, 1205gmt, 24 Feb. 1995, reproduced in BBC Monitoring, *SWB*, Part 1, Former USSR, 3rd Ser., SU/2238, at B/5 (27 Feb. 1995).

¹²¹ “Council of Europe delegation saw human rights violations in Chechnya”, broadcast by Estonian Radio, Tallin, in Estonian, 1700gmt, 11 Jan. 1995, reproduced in BBC Monitoring, *SWB*, Part 1, Former USSR, 3rd Ser., SU/2328, at B/6 (13 Jun. 1995).

torture in those camps.¹²² The ICRC's Annual Report 1995 did not mention such facilities, but the total number of internees visited by ICRC delegates was not large,¹²³ and it would be reasonable to assume that more detainees were held in non-favourable conditions by both parties in the conflict.

Among other violations which have been reported is widespread looting; for instance, Deputy Director of the Russian Federal Counterintelligence Service admitted the existence of pillage among Russian soldiers, even though he claimed that there were more among Chechen fighters.¹²⁴ Child soldiers were allegedly fighting in Chechnya, which was acknowledged by the Chechen authorities.¹²⁵

6.4.4. EL SALVADOR

A well-known massacre befell El Mozote, a village in El Salvador, in which more than two hundred civilians, including women and children, were allegedly executed.¹²⁶ According to the Truth Commission, men were tortured before execution, while women and children were machine-gunned separately.¹²⁷ The massacre was denied by the authorities of El Salvador, but the examination of exhumed bodies revealed that a mass killing had taken place.¹²⁸ Accordingly, the Commission found that "The El

¹²² "Sergey Kovalev presents report on conditions for Chechen detainees", broadcast by Russia TV channel, Moscow, in Russian, 1600gmt, 30 May 1995, reproduced in BBC Monitoring, *SWB*, Part 1, Former USSR, 3rd Ser., SU/2318, at B/7 (1 Jun. 1995).

¹²³ The delegates visited 530 detainees held by the Russian authorities and 170 internees held by the Chechen side. See the ICRC, *Annual Report 1995*, at 206.

¹²⁴ "Deputy head of counterintelligence admits Russian troops engaged in pillaging", broadcast by ITAE-TASS news agency (World Service), Moscow, in English, 1825gmt, 28 Feb. 1995, reproduced in BBC Monitoring, *SWB*, Part 1, Former USSR, 3rd Ser., SU/2241, at B/7 (2 Mar. 1995).

¹²⁵ UN Commission on Human Rights, *The situation of human rights in the Republic of Chechnya of the Russian Federation, Report of the Secretary-General*, para. 74, UN Doc. E/CN.4/1996/13 (26 Mar. 1996).

¹²⁶ See *Letter dated 29 March 1993 from the Secretary-General to the President of the Security Council transmitting the report presented on 15 March 1993 by the Commission on the Truth*, S/25500 (1 Apr. 1993), at 347-351, reproduced in UN, *The United Nations and El Salvador, 1990-1995*, Doc. 67, 290, UN Sales No. E. 95.I.12 (1995).

¹²⁷ *Id.*, at 348.

¹²⁸ *Id.*, at 349-350.

Mozote massacre was a serious violation of international humanitarian law and international human rights law".¹²⁹ On another occasion, six Jesuit priests and other two civilians were murdered at the Pastoral Centre of José Simeón Caña Central American University by personnel of the Salvadoran armed forces.¹³⁰

According to the study of Cohn and Goodwin-Gill, both sides of the Salvadoran Civil War forcibly recruited the underage.¹³¹ There was even "a school" organised by one of the factions of the FMLN, but the curriculum of the school was based upon more ideology and military training.¹³²

The ICRC having received the original permission of general visits to detainees in 1979, even before an armed conflict took place, delegates of the institution regularly visited detainees held by the Salvadoran Government.¹³³ Thus the ICRC mission in El Salvador seems to have been successful, compared with other conflicts that this thesis examines,¹³⁴ but one should pay attention to Best's comments. According to him, the delegates had not been able to meet with "disappeared' and assassinated" civilians, and in addition the ICRC was not informed of "thousands of detainees" whom the organisation was able to visit only after they underwent "torture and other maltreatment".¹³⁵

¹²⁹ *Id.*, at 351.

¹³⁰ As to this case, see *id.*, at 312-317.

¹³¹ Ilene Cohn and Guy S. Goodwin-Gill, *Child Soldiers*, at 24-25 (1994).

¹³² *Id.*, at 94-5.

¹³³ The ICRC, *Annual Reports 1979*, at 36; *1980*, at 29; *1981*, at 25-6; *1982*, at 31; *1983*, at 29-30; *1984*, at 32; *1985*, at 36; *1986*, at 38; *1988*, at 43-4; *1989*, at 40. However, at the beginning of the civil conflict in El Salvador it was difficult for the delegates to visit internees held by the security forces. See the ICRC, *Annual Report 1981*, at 26.

¹³⁴ The exception is Sri Lanka.

¹³⁵ Geoffrey Best, *War and Law Since 1945*, at 368 (1994).

The record of ICRC visits to detainees held by the FMLN is not always satisfactory.¹³⁶ The International Committee began to undertake visits to those held by the dissident organisation in 1982,¹³⁷ but the FMLN was not always cooperative. According to the ICRC's *Annual Report 1983*, it was the policy of the opposition group to release armed personnel of the Government forces soon after their capture.¹³⁸ On the other hand, in 1984, the ICRC was not permitted to visit personnel of the Salvadoran armed forces "who had been detained for a considerable time by the Front",¹³⁹ and situations did not improve in the subsequent years.¹⁴⁰

6.4.5. LIBERIA

The ICRC Delegate General for Africa summed up atrocities committed in the Liberian Civil War:

For six and a half years the civilian population, the wounded, persons placed *hors de combat* and prisoners have been regularly subjected to killings, torture, mutilation, hostage-taking, forced labour, looting, destruction of property and forced displacements. Children have been enlisted to fight and even dead bodies have been desecrated".¹⁴¹

Liberia was, therefore, in a distressing predicament throughout its conflict, but particularly on April 6, 1996 the situation deteriorated to the extent that "there was a

¹³⁶ See *id.*, at 368.

¹³⁷ The ICRC, *Annual Report 1982*, at 31.

¹³⁸ The ICRC, *Annual Reports 1983*, at 30; also *1984*, at 32.

¹³⁹ The ICRC, *Annual Report 1984*, at 32.

¹⁴⁰ The ICRC, *Annual Reports 1985*, at 36-7; *1986*, at 38; *1988*, at 44; *1989*, at 41. *Annual Reports 1988* and *1989* use the identical paragraph as follows: "The ICRC also endeavoured to afford protection to military personnel and civilians captured by the FMLN. Approaches to FMLN leaders were stepped up with a view to having the ICRC regularly notified of the capture of civilians or armed forces personnel and ensuring that the persons detained are treated in accordance with the rules of international humanitarian law and are visited by delegates". Though implicit, this paragraph reveals that visits to FMLN-held detainees were unsatisfactory.

¹⁴¹ Jean-Daniel Tauxe, "Liberia: humanitarian logistics in question", *IRRC*, May-Jun. 1996, at 352, 353.

complete breakdown of law and order in Monrovia”.¹⁴² Five days later, soldiers of all factions occupied and looted the headquarters of UNOMIL and other UN related facilities, even though the leaders of the two major factions promised to stop such conduct.¹⁴³ The looting of and failure to return vehicles and other properties to the United Nations and other organisations seriously undermined humanitarian operations.¹⁴⁴ On another occasion, combined forces of a few factions placed hundreds of civilians including foreigners and ECOMOG soldiers into barracks where conditions were regarded as “desperate” and used them as human shields against attacks from their opponents.¹⁴⁵ Furthermore, on September 28, 1996, a massacre took place in Sinje, resulting in the death of at least twenty-one civilians who “suffered decapitation, castration and blunt object trauma, in addition to gunshot wounds”.¹⁴⁶

President Doe was captured and then tortured by a rebel leader and his subordinates in September 1990.¹⁴⁷ Torture itself being hideous, what is abominable with this torture in particular is that the scene of torturing the former President was videotaped and became available across West Africa.¹⁴⁸

Contending factions might have punished looters, but it is questionable if pillagers were given fair trials and appropriate punishments. For example, according to an eyewitness account given by Huband, a group of soldiers belonging to one of the factions

¹⁴² Security Council, *Seventeenth progress report of the Secretary-General on the United Nations Observer Mission in Liberia* [hereinafter *Seventeenth progress report*], para. 14, UN Doc. S/1996/362, (21 May 1996). See also Tauxe, *id.*, at 352.

¹⁴³ *Seventeenth progress report*, paras. 15, 28 and 29, *id.* As to looting of ICRC properties, see Tauxe, *id.*, at 353.

¹⁴⁴ Security Council, *Eighteenth progress report of the Secretary-General on the United Nations Observer Mission in Liberia*, para. 34, UN Doc. S/1996/684 (22 Aug. 1996).

¹⁴⁵ *Seventeenth progress report*, *supra* note 142, Annex I, para. 1.

¹⁴⁶ Security Council, *Nineteenth progress report of the Secretary-General on the United Nations Observer Mission in Liberia* [hereinafter *Nineteenth progress report*], para. 31, UN Doc. S/1996/858 (17 Oct. 1996).

¹⁴⁷ Mark Huband, *The Liberian Civil War*, at 192-193 (1998).

¹⁴⁸ See *id.*, at 192-193.

captured two persons “in civilian clothes”, whom the soldiers condemned for being looters; the accused had been kicked and beaten before they were shot.¹⁴⁹ There appears to have been no trial for the captured.

The UN Secretary-General’s eighth report of 1994 states that “The use of 6,000 children in combat is a flagrant example of disregard for the rights of the child”.¹⁵⁰ Later when fighting intensified in Monrovia in April 1996, many combatants were under eighteen years of age who “seemed to operate with little organizational structure or control from their commanders”.¹⁵¹ Moreover, the number of child soldiers in Liberia was raised from 6,000, to 15,000, to 20,000 in the nineteenth report of 1996.¹⁵² It is neither possible nor necessary to count the exact number of child soldiers,¹⁵³ and importance lies in the fact that child soldiers were widely used in Liberia. In Liberia,¹⁵⁴ there were special sites to demobilise child soldiers, and for instance the Third Progress Report of the Secretary-General claimed that three sites had accommodated 136 children and that fifteen children had had reunion with their families.¹⁵⁵

There is little reliable information as to those who were deprived of liberty in Liberia. Even though the ICRC’s *Annual Reports* contain such information, it seems that the

¹⁴⁹ *Id.*, at 177-179.

¹⁵⁰ Security Council, *Eighth Progress Report of the Secretary-General on the United Nations Observer Mission in Liberia*, para. 35, UN Doc. S/1004/769 (24 Jun. 1994). Cohn and Goodwin-Gill mention the recruitment of children particularly by the NPFL. Cohn and Goodwin-Gill, *supra*. note 131, at 29, 40, 42.

¹⁵¹ *Seventeenth progress report*, para. 16, *supra*. note 142.

¹⁵² *Nineteenth progress report*, para. 16, *supra*. note 146.

¹⁵³ See US Department of State, *Country Reports on Human Rights Practice for 1994*, at 140 (1995). This Reports referred to the estimate of “some sources” that “10 percent of the 40,000 to 60,000 combatants are under 15 years of age”.

¹⁵⁴ Sierra Leone, a neighbouring State of Liberia, also has a large number of child soldiers. See “Under-Age Killers”, *The Economist*, Dec. 12-18, 1998, at 70.

¹⁵⁵ Security Council, *Third Progress Report of the Secretary-General on the United Nations Observer Mission in Liberia*, para. 27, UN Doc. S/1994/463 (18 Apr. 1994); cf. Cohn and Goodwin-Gill, *supra*. note 131, at 135-6, 140.

ICRC's visits to detainees were subject to a situation, which was not always favourable to the organisation. The institution, for instance, was able to visit over one thousand detainees held by various factions in different places throughout 1993,¹⁵⁶ and was also able to see several hundred internees at the beginning of 1994.¹⁵⁷ However, the situation worsened by the end of 1995, and the ICRC was capable of visiting only a small number of detainees from then onwards.¹⁵⁸

After forty-three UNOMIL and six NGO personnel were detained and mistreated in Liberia, the detention was "strongly condemn[ed]" and regarded as "a flagrant violation of international humanitarian law" by the Security Council.¹⁵⁹ The Secretary-General reported the mistreatment and beating of some of the detained before their release by 18 September 1994.¹⁶⁰ The Security Council adopted a resolution unanimously in which the Council "*Condemns ... the detention and maltreatment of Mission observers, [ECOMOG] soldiers, humanitarian relief workers and other international personnel, and demands that all factions strictly abide by applicable rules of international humanitarian law*".¹⁶¹

6.4.6. RWANDA

Among the victims in Rwanda, it is unclear how many were the victims of armed conflict, but a "report on violations of international humanitarian law in Rwanda" was

¹⁵⁶ The ICRC, *Annual Report 1993*, at 37.

¹⁵⁷ The ICRC, *Annual Report 1994*, at 38.

¹⁵⁸ The ICRC, *Annual Reports 1994*, at 38; *1995*, at 39-41; *1996*, at 40, 42.

¹⁵⁹ Security Council, *Detention of UN military observers and non-governmental staff in Liberia*, UN Doc. S/PRST/1994/53 (13 Sept. 1994), Press Release Security Council, Resolutions and Statements of the Security Council, SC/5974, at 180 (12 Jan. 1995).

¹⁶⁰ See Security Council, *Seventh progress report of the Secretary-General on the United Nations Observer Mission in Liberia*, para. 32, UN Doc. S/1994/1167 (14 Oct. 1994).

¹⁶¹ Article 7, S/RES/950 (1994), SCOR, 49th year., Res. and Dec. 1994, at 77.

produced by the UN High Commissioner for Human Rights to Rwanda.¹⁶² According to the report, there have been allegations about “summary or arbitrary executions carried out by RPF forces”,¹⁶³ torture, mutilation, rapes, disappearances and lootings.¹⁶⁴ The report raised “concerns ... about the low numbers of prisoners and fears ... that most of those captured may have been killed”.¹⁶⁵

Since the end of the internal conflict in Rwanda, a number of people have been detained for their alleged involvement in genocide or alleged offences concerning State security, many of whom have been waiting for trial in overcrowded detention centres.¹⁶⁶ The ICRC has visited detainees; provided them with food and medical treatment; transmitted messages between detainees and their families; and endeavoured to improve the hygiene of places where they are detained.¹⁶⁷ However, the number of the detainees who have been registered by the ICRC have increased from 16,000 in 1994 to 120,000 in 1997, and the situation has not improved.¹⁶⁸ One crucial reason for this inhumane treatment is that arbitrary arrests are not uncommon due to inefficient justice system in Rwanda, which in effect result in more detainees.¹⁶⁹

As regards family reunion, the ICRC and other governmental and non-governmental organisations have registered children who left Rwanda unattended, and helped them reunite with their families.¹⁷⁰

¹⁶² Security Council, *Letter dated 21 July 1994 from the Secretary-General to the President of the Security Council transmitting the report on violations of international humanitarian law in Rwanda during the conflict, prepared on the basis of the visit of the United Nations High Commissioner for Human Rights to Rwanda (11-12 May 1994)*, UN Doc. S/1994/867 (25 Jul. 1994), reproduced in UN, *The United Nations and Rwanda 1993-1996*, Doc. 77, at 313, UN Sales No. E.96.I.20 (1996).

¹⁶³ *Id.*, para. 9.

¹⁶⁴ *Id.*, para. 16.

¹⁶⁵ *Id.*, para. 10.

¹⁶⁶ The ICRC, *Annual Reports 1994*, at 61; *1995*, at 59-60; *1996*, at 56-59; *1997*, at 72-74.

¹⁶⁷ The ICRC, *Annual Reports 1994*, at 61; *1995*, at 59-60; *1996*, at 56-59; *1997*, at 72-74.

¹⁶⁸ The ICRC, *Annual Reports 1994*, at 61; *1997*, at 72-74.

¹⁶⁹ The ICRC, *Annual Reports 1996*, at 57; *1997*, at 72.

¹⁷⁰ The ICRC, *Annual Reports 1994*, at 58; *1995*, at 61; *1996*, at 60; *1997*, at 75.

Some articles of the Statute of the International Tribunal for Rwanda correspond with detailed provisions in Article 6 of Protocol II. Thus the rights to information and defence¹⁷¹ can be found in subparagraphs of (a), (b) and (d) of Article 20(4) of the Statute.¹⁷² Individual criminal responsibility¹⁷³ is provided by Article 6.¹⁷⁴ The competence-of the Tribunal is limited to crimes committed “between 1 January 1994 and 31 December 1994” by Article 1,¹⁷⁵ which accords with the principle of non-retroactivity.¹⁷⁶ Presumed innocence¹⁷⁷ is guaranteed by Article 20(3),¹⁷⁸ while right to trial in one’s own presence¹⁷⁹ by Article 20(4)(d).¹⁸⁰ In accordance with Article 20(4)(g),¹⁸¹ the accused are “Not to be compelled to testify against himself or herself or to confess guilt”.¹⁸² Last, imprisonment is the only form of penalty, according to Article 23.¹⁸³

6.4.7. SOMALIA

The international community paid close attention to the Somali Civil War as long as United Nations forces were staying in Somalia, but before and after the UN intervention information on the conflict is minimal. Besides, during the intervention only incidents related to the UN forces were focused, and reports on fightings among the warring factions were not sufficient.

¹⁷¹ Protocol II, Article 6(2)(a),.

¹⁷² See also the Statute for the former Yugoslavia, Article 21(a), (b) and (d).

¹⁷³ Protocol II, Article 6(2)(b).

¹⁷⁴ See also the Statute for the former Yugoslavia, Article 7.

¹⁷⁵ See also the Statute for the former Yugoslavia, Article 1.

¹⁷⁶ Protocol II, Article 6(2)(c).

¹⁷⁷ Protocol II, Article 6(2)(d).

¹⁷⁸ See also the Statute for the former Yugoslavia, Article 21(3).

¹⁷⁹ Protocol II, Article 6(2)(e).

¹⁸⁰ See also the Statute for the former Yugoslavia, Article 21(4)(d).

¹⁸¹ See also the Statute for the former Yugoslavia, Article 21(4)(g).

¹⁸² Protocol II, Article 6(2)(f).

¹⁸³ See Protocol II, Article 6(4).

It is not well-known that the northern part of Somalia was devastated well before the arrival of the UN forces. According to extensive reports by the Human Rights Watch, when the city of Burao was captured by the SNM in May 1989, the rebel forces killed “a number of military officers and officials”.¹⁸⁴ Looting was rife among Government soldiers when they advanced into the city centre.¹⁸⁵ The Government forces, moreover, attacked the Issak clan after they had prompted the non-Issaks to leave Burao.¹⁸⁶ At almost the same time an armed struggle occurred in Hargeisa, the largest city of northern Somalia, in which looting, mass arrests, killing and maltreatment of detainees, indiscriminate killing of civilians, and rape were allegedly prevailing.¹⁸⁷ Even though the port city of Berbera did not become a theatre of war between the Government and SNM forces, the Somali authorities arrested those whom they suspected of possible collaboration if the SNM had attacked the city.¹⁸⁸ For the same reason, the Somali army reportedly killed civilians “in an extremely brutal fashion”.¹⁸⁹

From 1988 to 1991 the ICRC was not able to conduct adequate protection services for detainees.¹⁹⁰ In 1992 delegates of the Committee visited internees held by various contending groups in certain cities and distributed “medical and non-food assistance, and occasionally food”.¹⁹¹ In the subsequent years the ICRC was capable of visiting prisoners,¹⁹² but the number of visited detainees is extremely limited,¹⁹³ and one could

¹⁸⁴ *Somalia: A Government at War With Its Own People*, at 128 (1990). As to report on Burao, see *id.*, at 128-132.

¹⁸⁵ *Id.*, at 129.

¹⁸⁶ *Id.*, at 131.

¹⁸⁷ As to report on Hargeisa, see *id.*, at 132-150.

¹⁸⁸ *Id.*, at 150-154. As to report on Berbera, see *id.*, at 150-158.

¹⁸⁹ *Id.*, at 155. According to the Human Rights Watch, no less than five hundred people became victims with their throats cut. See *id.* As to the killings in Berbera, see *id.*, at 155-158.

¹⁹⁰ The ICRC, *Annual Reports 1988*, at 29; *1989*, at 25; *1991*, at 36; *Reference Report 1990*, at 28.

¹⁹¹ The ICRC, *Annual Report 1992*, at 48.

¹⁹² The ICRC, *Annual Reports 1993*, at 83-4; *1994*, at 88-9; *1995*, at 88.

¹⁹³ For instance, according to *Annual Report 1995*, “delegates visited detainees held by the warring parties in Somalia and particularly in Somaliland (over 400)”. The ICRC, *Annual Report 1995*, at 88.

rightly presume that there were more prisoners who were not protected. In 1997 no activity of the ICRC for detained Somalis was reported.¹⁹⁴

As to education for children, the UNESCO played a major part in providing education to Somali children and training teachers.¹⁹⁵ Between January 1993 and October 1995, the organisation satisfied the educational needs of 250,000 children “through the introduction of a standardized curriculum”; distributed “more than 1 million textbooks and teacher guides”; and offered “teacher training for 267 schools”.¹⁹⁶

6.4.8. SRI LANKA

Indiscriminate bombing of civilians is rife. To refer to one example, in February 1996 bombs placed by the LTTE exploded in Colombo, killing and injuring a number of civilians. The European Union issued a statement which “strongly condemns” the killing, because “there is no justification for targeting areas that are so heavily populated by civilians”.¹⁹⁷

Cohn and Goodwin-Gill describe how children have been recruited by the Tamil Tigers.¹⁹⁸ Recruitment is believed to be unforced, but there were allegations of an aspect of compulsion in enlistment.¹⁹⁹ Those child soldiers are detached from their

¹⁹⁴ See the ICRC, *Annual Report 1997*, at 99-103.

¹⁹⁵ See Security Council, *Report of the Secretary-General on the situation in Somalia submitted in pursuance of paragraph 13 of Security Council resolution 954 (1994)*, para. 33, UN Doc. S/1995/231 (28 Mar. 1995), reproduced in UN, *The United Nations and Somalia 1992-1996*, Doc. 110, at 480, UN Sales No. E. 96.I.8 (1996).

¹⁹⁶ *Id.*

¹⁹⁷ Security Council, *Letter dated 6 February from the Permanent Representative of Italy to the United Nations Addressed to the Secretary General, Annex, Statement on the recent bombing in Colombo, issued on 6 February 1996 by the Presidency on behalf of the European Union*, at 2, UN Doc. S/1996/89 (7 Feb. 1996).

¹⁹⁸ Cohn and Goodwin-Gill, *supra*. note 131, at 29, 31, 35, 39-42.

¹⁹⁹ *Id.*, at 29.

families, and some claim that they are only offered military training without school education.²⁰⁰

In spite of its continuous offer of services since 1983,²⁰¹ it was in 1989 that the ICRC was allowed by the Sri Lankan authorities to embark upon its activities,²⁰² but since then, the number of detainees visited by the organisation has been considerable.²⁰³ It appears that the Sri Lankan authorities has notified the families of detainees of their detention, and the ICRC has assumed the responsibility when there is no communication from the authorities to the families of internees.²⁰⁴ Notwithstanding such cooperation, the ICRC expressed its concern about the fate of those who disappeared.²⁰⁵ On the side of the LTTE, the ICRC has been permitted to visit only a small number of detainees held by the group.²⁰⁶

6.4.9. THE FORMER YUGOSLAVIA²⁰⁷

Flagrant violations of humanitarian rules, e.g. murder, cruel treatment, torture, rape and malnutrition, are reported in internment camps established by the parties to the conflict.²⁰⁸ The ICRC openly condemned the situation of detainees held by the warring factions and also the use of methods, such as “harassment, murder, confiscation of property, deportation and the taking of hostages”.²⁰⁹ “Ethnic

²⁰⁰ *Id.*, at 96.

²⁰¹ The ICRC, *Annual Report 1983*, at 41.

²⁰² The ICRC, *Annual Report 1989*, at 63-64.

²⁰³ The ICRC, *Annual Reports 1989*, at 64; *1990*, at 17; *1991*, at 75; *1992*, at 66-67; *1993*, at 110-112; *1994*, at 112-113; *1995*, 134-135; *1996*, at 143-144; *1997*, at 158; *1998*, at 174-175; *1999*, at 169-170, 172; *Reference Report 1990*, at 62.

²⁰⁴ See e.g. the ICRC, *Annual Report 1994*, at 113.

²⁰⁵ The ICRC, *Reference Report 1990*, at 62; *Annual Reports 1992*, at 66; *1993*, at 111.

²⁰⁶ *Supra*. note 203.

²⁰⁷ Rights of the accused guaranteed by the Statute for the former Yugoslavia have been already mentioned above.

²⁰⁸ See Hilare McCoubrey and Nigel D. White, *International Organizations and Civil Wars*, at 130-1 (1995).

²⁰⁹ “Bosnia-Herzegovina: ICRC’s solemn appeal to all parties to the conflict”, *IRRC*, Sept.-Oct. 1992, at 492, 492.

cleansings”²¹⁰ were often undertaken in a brutal fashion.²¹¹ Among those who were forced to move, some were singled out and put into places of detention, where they were subject to “[h]umiliation, terror and mental cruelty” and also “they were forced, on pain of death, to perform atrocities against each other - mutilation, physical and sexual, and, often, mutual killing”.²¹²

ICRC delegates visited a large number of prisoners held by the fighting parties from the start of the conflict in the former Yugoslavia.²¹³ According to the ICRC’s *Annual Report 1993*, those delegates visited about seventeen thousand prisoners, delivered food and other basic goods “[w]herever necessary”, and forwarded their messages to their families.²¹⁴ Exchange and release of prisoners were undertaken by the warring groups, and in total thirteen thousand captives had been freed in 1993.²¹⁵ In spite of such encouraging signs, the ICRC made an appeal to the parties in the war not to make use of prisoners “as human shields” and compel them “to work on front lines”.²¹⁶

6.5. EXAMINATION OF CUSTOMARY STATUS

6.5.1. ARTICLE 2

Paragraph 1 provides the equal treatment of those who are affected and this is embodiment of the non-discrimination principle that has gained universal recognition.²¹⁷ This paragraph is almost identical to Common Article 3(1), and thus it could be rightly argued that Article 2(1) of Protocol II is customary in the context of

²¹⁰ As to the aspect of forcible movement of civilians, see *infra*. Ch. 8.

²¹¹ See generally Laura Silber and Allan Little, *The Death of Yugoslavia*, at 269-284 (1995).

²¹² *Id.*, at 270.

²¹³ According to the ICRC’s *Annual Report 1991*, delegates visited more than five thousand prisoners. The ICRC, *Annual Report 1991*, at 90.

²¹⁴ The ICRC, *Annual Report 1993*, at 148.

²¹⁵ *Id.*, at 149.

²¹⁶ *Id.*, at 148.

²¹⁷ See *the ICRC’s Commentary*, para. 4482.

Common Article 3(1). This paragraph is so general that it could cover vast areas of violations of laws of war. For instance, a State or a rebel group is liable for massive transfer of civilians or so-called ethnic cleansing because this comprehensive provision prohibits discriminate treatment of non-combatants,²¹⁸ even though the State concerned is not a party to Protocol II and therefore is not bound by Article 17 of the treaty.

The only occasion where this paragraph was openly violated would be the treatment of the women by the Taliban, who invoked Islamic law for justification. In Rwanda, Somalia and the former Yugoslavia, there was practice of discriminatory nature, but *opinio juris* has not been ascertained. Therefore the customary status of Article 2(1) remains intact.

Reliable information is scarce concerning paragraph 2, even though the maltreatment of detainees in Rwanda after the civil war on a massive scale is a gross violation of this paragraph. Besides, even though this paragraph provides “fundamental guarantees” incorporated into Articles 5 and 6 for continually detained prisoners,²¹⁹ the following investigation demonstrates that most of these Articles are not customary. For these reasons, it would be difficult to sustain that Article 2(2) has obtained customary status.

6.5.2. ARTICLE 4

Customary rules found in Article 4 deriving from Common Article 3²²⁰ are as follows: the first two sentences of paragraph 1; paragraph 2(a) except for “health and physical or mental well-being of persons” and “corporal punishment”; paragraph 2(c); and paragraph 2(e) except for the last part of sentence “rape, enforced prostitution and any

²¹⁸ See “The ICRC and internally displaced persons”, *IRRC*, Mar.-Apr. 1995, at 181, 183.

²¹⁹ *The ICRC's Commentary*, paras. 4494-4495.

²²⁰ Cf. the Rome Statute, Art. 8(2)(c) (providing “serious violations” of Common Article 3). See Antonio Cassese, “The Geneva Protocols of 1977 on the Humanitarian Law of Armed Conflict and Customary International Law”, 3 *UCLA Pacific Basin Law Journal* 55, 107-8 (1984).

form of indecent assault”. All the conflicts examined above saw violations of some or all of the provisions, but these violations were not accompanied by *opinio juris* that ignored the legitimacy of these provisions. Therefore, these stipulations continue to be customary, even though they are subject to breaches.

Other provisions need analysis. Giving quarter to those who lay their arms is a fundamental rule of the Hague law,²²¹ but no practice or *opinio juris* is available to this author about quarter. Therefore, it would be reasonable to find that the last sentence of Article 4(1) is not customary.²²²

The prohibition of “violence to ... health and physical or mental well-being of persons” may expand protection,²²³ but it is not clear what constitutes “health and physical or mental well-being of persons”. It may be that all forms of atrocity violate those elements, and accordingly there may be ample practice breaching this prohibition. On the other hand, no available information indicates the existence of *opinio juris* about this particular phrase. Therefore, it might be reasonable to consider that this wording is not customary because of the possible existence of violations as well as a lack of *opinio juris*.

Corporal punishment has been a particular problem in Afghanistan under Taliban, which justifies such punishment by resorting to *sharia*. Although this thesis does not mention the Civil War in Sierra Leone, in this conflict there have been an overwhelming number of victims of corporal punishment.²²⁴ Apart from these

²²¹ *The ICRC's Commentary*, para. 4525; cf. Rome Statute, Art. 8(2)(e)(x) (listing “Declaring that no quarter will be given” as one of “Other serious violations of the laws and customs applicable in armed conflicts not of an international character).

²²² But see Cassese, *supra*. note 220, at 111.

²²³ *The ICRC's Commentary*, para. 4532.

²²⁴ See Barbara Crossette, “A Ghastly Campaign of Terror in Sierra Leone”, *International Herald Tribune* (The Hague), 30 Jul. 1998, at 1.

conflicts, such form of punishment is not frequently imposed in other civil conflicts, and States as well as rebels may be refraining from resorting to the punishment. However, there is a scarcity of *opinio juris* concerning this punishment. In conclusion, however gruesome it may be, the prohibition of corporal punishment has not yet attained customary status. It may, however, be noted that the 1949 Geneva Conventions prohibit the imposition of such punishment in international armed conflict.

Collective punishment has been observed in conflicts related to difference of ethnicity or similar nature. Many were killed by different ethnic groups for acts they had not committed²²⁵ in the former Yugoslavia and Somalia. The genocide in Rwanda, which took place along with its Civil War, may be regarded as massive collective punishment. On the other hand, evidence which shows practice and *opinio juris* supporting the prohibition of collective punishment is not sufficiently acquired by this writer. In consequence, collective punishment is not customarily banned.²²⁶

The prohibition of “rape, enforced prostitution and any form of indecent assault”, particularly rape, has been violated in many civil wars, such as those in Liberia, Rwanda, Somalia and the former Yugoslavia. The ICTY sentenced a Bosnian Croat to imprisonment in its “first judgment to deal exclusively with rape as a war crime”.²²⁷ Yet a number of practices existed, and besides it is questionable if many “specially affected States” have expressed their belief that such conduct in internal strife is contrary to customary law. Therefore, similar to corporal punishment, even though

²²⁵ As to the interpretation of collective punishment, see Geneva Convention IV, Article 33; *the ICRC's Commentary*, paras. 4535-6.

²²⁶ But see Cassese, *supra*. note 220, at 111.

²²⁷ “War criminal jailed”, *The Times*, 11 Dec. 1998, at 17.

“rape, enforced prostitution and any form of indecent assault” are horrific by nature, the customary status of the prohibition of these acts has not been firmly established.²²⁸

The banning of slave trade dates back to the nineteenth century, but the prohibition of slavery was achieved in 1926 when the Slavery Convention was introduced.²²⁹ This Convention has been widely ratified,²³⁰ and slavery has been domestically banned by almost all States.²³¹ Today, the prohibition of slavery is part of the human rights law,²³² but it indeed predates the development of that branch of law. Article 2 of the 1926 Slavery Convention does provide the material scope of application, and therefore it is possible to contend that the customary proscription extends to civil conflict. Thus, slavery is customarily banned,²³³ which results from the customary interdiction of slavery.

Massive pillage has been observed in Chechnya, Liberia, Somalia, and the former Yugoslavia, and this alone prevents customary prohibition of looting from being formed.²³⁴ Even though the Russian authorities and certain warring groups in Liberia seem to have punished some looters, this willingness to observe the interdiction of pillage is not a major phenomenon.

²²⁸ But see the Rome Statute, Art. 8(2)(e)(vi).

²²⁹ See International Convention with the object of Securing the Abolition of Slavery and the Slave Trade, UKTS 16 (1927), Cmd. 2910; Antonio Cassese, *International Law in a Divided World*, §§33, 168 (1986).

²³⁰ *United Nations, Multilateral Treaties Deposited with the Secretary General: Status as at 31 December 1997*, at 699-700, UN Doc. ST/LEG/SER.E/16, UN Sales No. E.98.V.2 (1998).

²³¹ 2 Restatement of the Law: Third Restatement of U.S. Foreign Relations Law, Reporters' Note 4 to §702, reprinted in D.J. Harris, *Cases and Materials on International Law*, at 728 (5th ed., 1998); *the ICRC's Commentary*, para. 4541.

²³² E.g. Universal Declaration of Human Rights, Article 4, G.A. Res. 217 (III), UN GAOR, 3d Sess., Part I, Resolutions, at 71.

²³³ Cf. Cassese, *supra*. note 220, at 111 (arguing that the prohibition of slavery is one of the new rules which are “mere extensions and expansions of existing customary rules”).

²³⁴ But see the Rome Statute, Art. 8(2)(e)(v); Cassese, *id*.

The prohibition of “threats to commit any of the foregoing acts” extends the scope of application of paragraph 2(a) to (h).²³⁵ Such threats might be frequently made, but the problem is that it is actual violation, not mere threats, that is usually reported. To what extent threats are made is, therefore, not determinate, and this subparagraph has not obtained customary status yet.²³⁶

As to child soldiers,²³⁷ Article 4(3)(a), (b) and (e) remain to be treaty provisions because of fragmentary information on practice and *opinio juris*. Practice contrary to Article 4(3)(c) and (d) has prevailed, but the present writer contends that the prohibition of the governmental recruitment of children under fifteen years old became customary because of almost universal ratification of the Convention on the Rights of the Child.²³⁸ First, Article 38(1) of the Convention obliges parties to this treaty “to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child”, but one should not jump to the conclusion that all five subparagraphs of Article 4(3) of Protocol II have become customary in connection with Article 38(1). Many States, including many “specially affected States”, are not parties to Protocol II, and for them the Protocol is not “international humanitarian law applicable to them”. The same is true of Article 38(4) which requires States to protect children “In accordance with their obligations under international humanitarian law”. Protocol II is not “international humanitarian law” in *stricto sensu* for non-parties to it.

²³⁵ *The ICRC’s Commentary*, para. 4543.

²³⁶ But see Cassese, *supra*. note 220, at 111.

²³⁷ See *id.*, at 110.

²³⁸ Convention on the Rights of the Child, *reprinted in 28 ILM* 1448 (1989). Regarding a list of ratifying States, see UNESCO, “Status by Treaty: Convention on the Rights of the Child” which can be found in the UNICEF homepage at <http://www.unhcr.ch/>. See the Rome Statute, Article 8(2)(e)(vii).

Second, Article 38(2) and (3) prohibits the recruitment of children under fifteen years of age and provides a rule of recruitment of children between fifteen and eighteen years old, and they have themselves become customary with near universal ratification of the Child-Convention. This Convention is part of human rights law, and this author briefly mentions in Chapter 1 that customary humanitarian law exists separate from the custom of human rights law. However, the almost universal ratification of this agreement signifies that almost all States solemnly agree to abide by the treaty, including Article 38 which deals with the problem of humanitarian law.

The only States that have not ratified the Child Convention are Somalia and the USA.²³⁹ All the other States have ratified the treaty and the nature of customary law as binding non-parties to a treaty is not of significance. The former's non-ratification derives from the fact that there is no established Government of Somalia which is competent to ratify a treaty.²⁴⁰ As customary law prohibits the recruitment of children by armed forces of a State, today's Somalia is not within the purview of the Child Convention because of the non-existence of a lawful government. As regards the USA, the only remaining superpower, its non-ratification does not undermine the customary status of the prohibition of child soldiers, as all the other States except Somalia are bound by the Convention anyway. Moreover those under eighteen years of age in the USA need their parents' consent to volunteer and they are not assigned to combat.²⁴¹ Therefore recruitment of children is not plausible in the US domestic law, and the non-ratification does not pose a serious problem.

²³⁹ See UNICEF, "Frequently asked questions: Q: Who has not ratified and why not?" at <http://www.unicef.org/crc/faq.htm>.

²⁴⁰ See *id.*

²⁴¹ Cohn and Goodwin-Gill, *supra*. note 131, at 69 n.37.

One salient problem is that Article 38 of the Convention cannot be applied to a rebel group because “State Parties” to the Convention are the subject of the Convention.²⁴² Therefore the customary prohibition of recruitment of children under fifteen years of age is applicable only to States, not rebel groups. Another problem is that even with the achievement of universal character it is necessary to observe whether Article 38 of the Child Convention will be observed. If child soldiers continue to be used in internal conflicts, the Convention would become futile.

Lastly, the ICTR stated in its judgment that all the guarantees provided by Article 4 of Protocol II are customary because they “reaffirm and supplement Common Article 3” which the Court found customary.²⁴³ While the ICTR’s judgments are highly authoritative, the present writer differs from the above finding for the following reasons. First, it is not clear from the judgment which provisions of Protocol II “reaffirm and supplement Common Article 3” and which do not. As Article 1 of Protocol II states, the Protocol “develops and supplements [Common] Article 3”, and should one follow the logic of the ICTR, the whole Protocol could be regarded as customary. Therefore, it is necessary to examine which provisions develop and supplement Common Article 3 before jumping to the conclusion. Second, it is true that many of the provisions in Article 4 are identical to Common Article 3 and therefore customary, but other provisions do not appear in Common Article 3 and therefore examination of State practice and *opinio juris* needs to be undertaken. As long as the ICTR states that a certain article of Protocol II, which is not included in Common Article 3, is customary in its highly authoritative judgment, the Court should undertake examination of the two essential elements of custom. For instance, the

²⁴² *Id.*, at 69.

²⁴³ *The Prosecutor v. Jean-Paul Akayesu, Judgement*, Case No. ICTR-96-4-T, 2 Sept., 1998, para. 610, at [http:// www. ictor.org/ENGLISH/cases/Akayesu/judgement/akay001.htm](http://www.ictor.org/ENGLISH/cases/Akayesu/judgement/akay001.htm) [hereinafter *Akayesu* case].

ICTY analysed State practice and *opinio juris* in its judgment in the *Kupreskic* case for reasoning the customary prohibition of reprisal.²⁴⁴ Even though this author's opinion on reprisal differs from the ICTY's finding in the case,²⁴⁵ the ICTY's method of examining the process of formation of custom is more appropriate than the ICTR's approach to ascertain customary status of Article 4 in the *Akayesu* case.

6.5.3. ARTICLE 5

The status of detainees in civil war is probably the most difficult problem, as governments are extremely reluctant to treat rebels as "prisoners of war".²⁴⁶ Article 5, therefore, does not give "special treatment" to the detainees, since it is applicable to all "persons whose liberty has been restricted" and it does not single out a particular group of people, as Geneva Convention III does, to confer those who cease to fight the status of prisoners of war.²⁴⁷ On the other hand, it is true that as a conflict intensifies, legitimate authorities tend to treat captured enemies as prisoners of war *de facto*, if not *de jure*.²⁴⁸ One commentator argues that captured rebels belonging to national liberation movements tend to be treated as prisoners of war should they obey international humanitarian law,²⁴⁹ while another even wrote, just before the conclusion of the Diplomatic Conference in 1977, that there were customary rules which obliged parties to a large-scale civil war to treat captives and civilians humanely, in accordance with draft Articles 6 to 10.²⁵⁰

²⁴⁴ *Prosecutor v. Zoran Kupreskic et al, Judgement, Case No. IT-95-16-T, 14 Jan. 2000, paras. 532-533, at <http://www.un.org/icty/kupreskic/trialc2/judgement/kup-tj000114e.pdf>.*

²⁴⁵ See *infra*. 9.4.1. Reciprocity and Belligerent Reprisal.

²⁴⁶ See *supra*. 6.4.3. Chechnya.

²⁴⁷ Georges Abi-Saab, "Non-International Armed Conflicts", in UNESCO, *International Dimensions of Humanitarian Law* 217, 234 (1988).

²⁴⁸ See *supra*. 5.4.4. and 6.4.4. El Salvador.

²⁴⁹ Edward Kwakwa, *International Law of Armed Conflict*, at 83 (1992).

²⁵⁰ Allan Rosas, *supra*. note 25, at 291 (1976). Articles 4 to 6 of Protocol II originate from draft Articles 6 to 10. See *supra*.

Despite certain observance of certain humane treatment of captured soldiers in civil conflicts, it would be difficult to consider that any provision of Article 5 has become customary²⁵¹ with the exception of Article 5(1)(a), which is customary in the context of Common Article 3. In Afghanistan there was a document in favour of humane treatment of prisoners, and in El Salvador and Sri Lanka the ICRC was enabled to conduct its protective activities quite freely for detainees held by the respective authorities. However, in other conflicts the treatment of captured fighters was either inadequate or desperate. Among the internal conflicts examined in this thesis, no State acknowledged that captured rebels would be treated humanely according to Protocol II. The Rome Statute avoids referring to detainees, not to mention prisoners of war, and moreover it emphasises the principle of sovereignty, similar to Article 3 of Protocol II.²⁵²

6.5.4. ARTICLE 6(1) TO (4)

The introductory sentence of Article 6(2), read together with Article 6(1), is customary, since the introductory sentence “reaffirmed” Common Article 3(1)(d).²⁵³ The rest of Article 6 has not obtained customary status, because practice is lacking.²⁵⁴ Very little information is available concerning how in practice individuals are prosecuted or punished for “criminal offences related to the armed conflict”. There must be trials in all civil wars, judging those who are charged for crimes connected to those conflicts, but difficulty in obtaining such information may imply that the justice system does not function in a proper fashion. The Statutes of the International Tribunals for Rwanda and the former Yugoslavia may be encouraging signs of implementing the standards of

²⁵¹ But see Cassese, *supra*. note 220, at 111.

²⁵² The Rome Statute, Article 8(3)

²⁵³ ICRC, 8 *OR*, CDDH/I/SR.34, para. 3, at 357.

²⁵⁴ But see Cassese, *supra*. note 220, at 111.

penal prosecution similar to Article 6, but in practice it would be much doubted whether governments facing internal conflicts are willing to follow such procedures.

CHAPTER 7

CUSTOM AND PROTOCOL II, PART III: WOUNDED, SICK AND SHIPWRECKED

7.1. THE LAWS OF WAR BEFORE 1949

Before the adoption of the 1864 Geneva Convention, medical protection had been scarcely discussed. De Vattel tersely mentioned the protection of the sick;¹ while Woolsey concisely stated that “Even military hospitals are spared, if not misused for a hostile purpose”.² Lieber’s Code provided the protection of the wounded and hospitals in a rudimentary way.³ The 1864 Geneva Convention and the following conventions of humanitarian nature, therefore, augmented medical protection, but the same protection did not extend to civil wars until 1949 when the four Geneva Conventions included Common Article 3.⁴

In spite of non-existence of treaty provisions before 1949, there were examples in which certain medical treatment was provided for victims of civil wars. The protection of wounded and sick samurai in the Japanese Civil War have been already discussed in Chapter 3. When a rebellion took place on the Japanese Kyushu island in 1877, *Hakuaisha*, which became the Japanese Red Cross Society in 1887 with Japanese ratification of the Geneva Convention, was established⁵ and its own emblem was

¹ Emer de Vattel, *The Law of Nations or the Principles of Natural Law: Applied to the Conduct and to the Affairs of Nations and of Sovereigns, Vol. III, Translation of the Edition of 1758 By Charles G. Fenwick With an Introduction by Albert de Lapradelle*, Book III, §145 (Michel E. Slatkine and Jiri Toman reprint eds., 1983) (James Brown Scott ed., 1916) (1758).

² Theodore D. Woolsey, *Introduction to the Study of International Law, Designed as an Aid in Teaching, and in Historical Studies*, §131 (1860).

³ Lieber’s Code, Articles 34-5, 71, 79, 115-116.

⁴ See *supra*. Ch. 2.

⁵ Olive Checkland, *Humanitarianism and the Emperor’s Japan, 1877-1977*, at 6 (1994).

authorised for use by the Japanese Government.⁶ Even though no evidence suggests the actual use of the emblem,⁷ the organisation helped wounded soldiers of both sides.⁸ During the Spanish Civil War, the Spanish Government explicitly stated the protection of the Red Cross emblem while the junta of Burgos made a formal declaration to obey the 1929 Geneva Convention in which the protection of the emblem was provided.⁹ In practice, hospitals and army medical units used the emblem and the former escaped from bombardment, even though violations of the protection of the emblem were reported.¹⁰

7.2. THE REGIME OF THE 1949 GENEVA CONVENTIONS IN THE 1950S AND 1960S

Common Article 3 provides the humane treatment of non-combatants in general¹¹ as well as the collection of, and care for the wounded and sick in particular.¹² Between 1949 and 1977 there were attempts particularly by the ICRC and other relevant organisations to expand medical protection in non-international war,¹³ but the realisation of codification of such rules had to wait for the adoption of 1977 Protocol II. Apart from Resolution 2675(XXV) of the General Assembly which prohibits attacks against “hospital zones”,¹⁴ no reference was made to other measures for medical protection in the Resolutions 2673 to 2677. As to medical practice between this period, little information is available, which neither favours nor disapproves the customary status of medical provisions in Common Article 3. For example, authors of

⁶ Information provided by the Library of the Japanese Red Cross Society. Sent on Nov. 25, 1998. The Red Cross emblem was adopted by the Japanese Red Cross Society after the 1864 Geneva Convention was ratified by Japanese.

⁷ *Id.*

⁸ John F. Hutchinson, *Champions of Charity: War and the Rise of the Red Cross*, 204 (1996).

⁹ *General Report of the International Red Cross Committee on its activities from August, 1934 to March, 1938*, Doc. No. 12a, at 127, 128 (1938).

¹⁰ *Id.*, at 105-108.

¹¹ Common Article 3(1).

¹² Common Article 3(2).

¹³ See *the ICRC's Commentary*, §§4620-7.

publications concerning the Algerian War of Independence placed little focus upon this issue.¹⁵ Hence, customary regulations apropos of medical protection had been limited to Common Article 3 before 1977.

7.3. DRAFTING PROTOCOL II IN THE DIPLOMATIC CONFERENCE OF 1974 TO 1977

7.3.1. ARTICLE 7 (DRAFT ARTICLE 12¹⁶)

During debate about draft Article 12, there was no significant statement that would support its customary status.¹⁷ However there was no notable disagreement about the draft Article either, and the difference between the East and West was non-existent. The first and second paragraphs of draft Article 12 were amended and adopted by consensus in the plenary meeting.¹⁸ Throughout discussion on draft Article 12, attention centred on who should be protected by this draft Article. Thus, the Soviet Union, Byelorussia and Ukraine proposed an amendment that clarified the definition of the wounded and sick.¹⁹ Significantly, the USA was supportive of the Soviet amendment,²⁰ but such elucidation was not accepted, and adopted Article 7 of Protocol II is almost identical to Article 10 of Protocol I.²¹ The Australian amendment that the

¹⁴ G.A. Res. 2675(XXV), U.N. GAOR, 25th Sess., Supp. No. 28, at 76, U.N. Doc. A/8028 (1971).

¹⁵ See e.g. Arnold Fraleigh, "The Algerian Revolution as a Case Study in International Law" in *The International Law of Civil War* (Richard Falk ed., 1971); Eldon van Cleff Greenberg, "Law and the Conduct of the Algerian Revolution. Law and the Conduct of the Algerian Revolution", 11 *Harvard ILJ* 37 (1970).

¹⁶ Draft Protocol II, Article 12, 1 *OR*, Part. 3, at 37.

¹⁷ See *The Law of Non-International Armed Conflict*, at 307-323 (Howard S. Levie ed., 1987).

¹⁸ 7 *OR*, CDDH/SR.51, para. 16, at 109. The third and fourth paragraphs were separated as Article 12 *bis*. 13 *OR*, CDDH/221/Rev.1, at 192.

¹⁹ Amendment by the Byelorussian SSR, Ukrainian SSR and USSR, 4 *OR*, CDDH/II/238, at 45. In this proposed amendment, the wounded and sick are defined as being "belonging to any Party to the conflict or to the neutral part of the population...".

²⁰ USA, 11 *OR*, CDDH/II/SR.25, para. 63, at 256.

²¹ It is not clear why the amendment was not adopted but Chairman's suggestion ought to be noted that "The wording used in draft Protocol II should not differ from the text in draft Protocol I unless there was a good reason for using different wording in relation to non-international conflicts from that used in relation to international conflicts". 11 *OR*, CDDH/II/SR.26, para. 62, at 266-267.

shipwrecked should be protected as well as the wounded and sick was adopted and successfully included in Article 7.²²

7.3.2. ARTICLE 8 (DRAFT ARTICLE 13²³)

The *Official Records* reveal that there were some discussions about the shipwrecked and dead, while the rescue of the wounded and sick did not become an issue. Draft Article 13 mentioned neither the shipwrecked nor the dead, and Australia proposed an amendment that included the shipwrecked in the scope of the draft Article.²⁴ As to the collection of the wounded and sick, an ICRC representative stated that draft Article 13 “supplemented the rule in [Common] Article 3”,²⁵ and another representative of the organisation later accepted the Australian proposal to include the shipwrecked.²⁶ The American and Dutch delegates favoured the ICRC text, contending the difficulty in practice to search for those who were shipwrecked.²⁷

As to the treatment of the dead, however, the ICRC delegate referred to the feeling of the institution that “article 13 could be *supplemented* by a provision” concerning the corpses.²⁸ The British representative suggested the addition of collection of the bodies,²⁹ to which the ICRC delegate did not raise objection.³⁰ Pakistan proposed an amendment that provided search for the wounded, sick, shipwrecked and dead “Whenever circumstances permit” and that was adopted in the plenary meeting.³¹ In

²² Australia, 4 *OR*, CDDH/II/225, at 44-45.

²³ Draft Protocol II, Article 13, 1 *OR*, Part 3, at 38.

²⁴ Australia, 4 *OR*, CDDH/II/226, at 49.

²⁵ The ICRC, 11 *OR*, CDDH/II/SR.26, para. 66, at 266.

²⁶ The ICRC, 11 *OR*, CDDH/II/SR.27, para. 10, at 270.

²⁷ USA and the Netherlands, 11 *OR*, CDDH/II/SR.27, paras. 6 and 7, respectively, at 269, 270.

²⁸ The ICRC, 11 *OR*, CDDH/II/SR.26, para. 67, at 267. (Emphasis added).

²⁹ UK, 11 *OR*, CDDH/II/SR.27, para. 12, at 270. See also Canada, 11 *OR*, CDDH/II/SR.27, para. 11, at 270.

³⁰ The ICRC, 11 *OR*, CDDH/II/SR.27, para. 13, at 270.

³¹ 7 *OR*, CDDH/SR.51, para. 21, at 110. Whether the proposal was adopted by consensus is not indicated.

conclusion the *Official Records* on the whole do not show the declaratory nature of this Article.

7.3.3. ARTICLE 9 (DRAFT ARTICLE 15³²)

States, such as the UK, the USA, and Yugoslavia emphasised the importance of defining the term “medical personnel” because this problem is related with qualification for wearing the Red Cross emblem.³³ On the other hand, Pictet as a representative of the ICRC asserted the use of the general expression because of the difficulty in distinguishing military personnel from civilians in internal conflict.³⁴ The amended draft Article proposed by Pakistan did not clarify the term “medical personnel”, and this provision was adopted in the plenary meeting.³⁵ Therefore, it was the definition of the term, not the protection of the medical and religious personnel *per se*, that caused debate. Whether the protection was customary at that time was not indicated by any representative in the Conference.

7.3.4. ARTICLE 10 (DRAFT ARTICLE 16³⁶)

Draft Article 16(1) and (2), which corresponds to Article 10(1) and(2) of Protocol II, was rarely discussed, while draft Article 10(3), origin of Article 10(3) of Protocol II, caused disagreement among delegates. The Canadian representative proposed the deletion of paragraph 3 because it would infringe on the sovereignty of States and this proposal was supported by Indonesia and the USA.³⁷ The delegate of the UK also

³² Draft Protocol II, Article 15, 1 *OR*, Part 3, at 38.

³³ UK, 11 *OR*, CDDH/II/SR.27, para. 46, at 275; USA, 11 *OR*, CDDH/II/SR.27, para. 40, at 275, at 340; Yugoslavia, 11 *OR*, CDDH/II/SR.28, para. 6, at 282.

³⁴ The ICRC, 11 *OR*, CDDH/II/SR.28, para. 4, at 281.

³⁵ Pakistan, 4 *OR*, CDDH/427, at 54. As to the adoption of Article 9, see 7 *OR*, CDDH/SR.51, at 112. Whether it was adopted by consensus or not is not clear from the text.

³⁶ Draft Protocol II, Article 16, 1 *OR*, Part 3, at 38.

³⁷ Canada, 11 *OR*, CDDH/II/SR.28, para. 14, at 283; Indonesia, 11 *OR*, CDDH/II/SR.28, para. 19, at 283; USA, 11 *OR*, CDDH/II/SR.28, para. 15, at 283.

favoured the effacement of the paragraph because it might not be applicable to non-international armed conflict in practice.³⁸ On the other hand, States such as Denmark, Sweden and the USSR supported the paragraph.³⁹ An intermediate view that the application of the paragraph would depend on the situation, was taken by Cuba and West Germany.⁴⁰ In the final stage, a Pakistani amendment was proposed and adopted by consensus in the plenary meeting.⁴¹

Through discussion, several delegates referred to the humanitarian nature of the draft Article. For instance, the Soviet delegate supported the admissibility of interference in order to humanise conflicts.⁴² The West German representative doubted the supremacy of the sovereignty of States over protection of the victims in armed conflict and his American counterpart shared his views.⁴³ However, considering that Article 10 is a product of compromise that can be read in the *Official Records*, it would be difficult to sustain that Article 10 reflected customary rule existing at that time. Paragraphs 1 and 2 of draft Article 16 did not become an issue in the Diplomatic Conference, and one might be tempted to support the customary status of the first two paragraphs of Article 10 of Protocol II. However, a lack of opinion about the paragraphs would not support the contention that they were customary. Considering paragraph 3 and 4 of the said Article, the existence of disagreement among the delegates over paragraph 3 of draft Article 16 clearly tells their non-customary nature.

³⁸ UK, 11 *OR*, CDDH/II/SR.28, para. 24, at 284.

³⁹ Denmark, 11 *OR*, CDDH/II/SR.28, para. 20, at 284; Sweden, 11 *OR*, CDDH/II/SR.28, para. 27, at 285; USSR, 11 *OR*, CDDH/II/SR.28, para. 25, at 284.

⁴⁰ Cuba, 11 *OR*, CDDH/II/SR.28, para. 30, at 285-286; FRG, 11 *OR*, CDDH/II/SR.28, para. 31, at 286.

⁴¹ Pakistan, 4 *OR*, CDDH/427, at 56; 7 *OR*, CDDH/SR.51, para. 42, at 112.

⁴² USSR, 11 *OR*, CDDH/II/SR.41, para. 37, at 453.

⁴³ West Germany, 11 *OR*, CDDH/II/SR.21, para. 38, at 207; USA, 11 *OR*, CDDH/II/SR.21, para. 43, at 209-210.

7.3.5. ARTICLE 11 (DRAFT ARTICLE 17⁴⁴)

Discussion about this article was probably one of the shortest in the Diplomatic Conference. The United States redrafted brief ICRC draft Article 17 according to the corresponding provisions of draft Protocol I.⁴⁵ This amended draft Article was adopted provisionally by voting,⁴⁶ but Pakistan further amended the draft Article, deleting paragraph 3 in compliance with the “gentleman’s agreement”.⁴⁷ The Pakistani amendment was adopted by consensus.⁴⁸ Debate about draft Article 17 did not touch on its substance and why the draft Article that was once adopted by voting had to be reduced to two paragraphs in the last stage is not revealed by the *Official Records*. In short, it is uncertain, judging from lack of information, whether Article 11 was customary at the adoption of Protocol II.

7.3.6. ARTICLE 12 (DRAFT ARTICLE 18⁴⁹)

The protection of the Red Cross emblem itself did not become a matter of debate, but “who is entitled to wearing the emblem” caused controversy. Among several problems in the Diplomatic Conference raised about the emblem, three major questions are worth mentioning here. One was the insertion of religious personnel in the Article, as Iraq stated that this was contrary to the tradition of certain States.⁵⁰ Another point was whether those who belonged to local Red Cross branches should also be entitled to

⁴⁴ Draft Protocol II, Article 17, 1 *OR*, Part 3, at 38.

⁴⁵ USA, 4 *OR*, CDDH/II/235, at 57-58; USA, 11 *OR*, CDDH/II/SR.28, para. 47, at 288.

⁴⁶ 11 *OR*, CDDH/II/SR.28, para. 46, at 288 (34/1/15). How the participating States voted is not clear from the *Official Records*.

⁴⁷ Pakistan, 7 *OR*, CDDH/SR.51, paras. 43, 46, at 113.

⁴⁸ 7 *OR*, CDDH/SR.51, para. 47, at 113.

⁴⁹ Draft Protocol, Article 18, 1 *OR*, Part 3, at 38.

⁵⁰ Iraq, 11 *OR*, CDDH/II/SR.40, para. 37, at 435. See also Indonesia, 11 *OR*, CDH/II/SR.31, para. 46, at 324. It should be noted that available information does not record statements made by other States disagreeing the inclusion of the religious personnel in the Article and also that the Indonesian and Iraqi representatives did not explicitly refer to their own religion.

the emblem, because there were such cases in civil conflict at that time.⁵¹ The other is whether it was obligatory to wear the emblem because some delegates were in favour of the “optional” use of the emblem.⁵² Notwithstanding such variety of contentions, the Diplomatic Conference adopted by consensus Article 12 of Protocol II in the plenary meeting.⁵³ Judging from the *Official Records*, there is no indication that would suggest the customary status of Article 12 of Protocol II. Before proceeding to subsequent practice and *opinio juris*, it is worth pointing out that, in spite of the problem of the proliferation of emblems, namely Red Cross, Red Crescent, and Red Lion and Sun, this issue was not raised in the Diplomatic Conference except by Israel that used the Red Shield of David *de facto*.⁵⁴

7.4. SUBSEQUENT PRACTICE AND *OPINIO JURIS*

7.4.1. AFGHANISTAN

Hospitals and medical personnel have been no more immune from bombardment than civilians in Afghanistan. Medical facilities organised by the ICRC have been playing an important part in treating the wounded and sick, but at times they have been overwhelmed by the number of victims. In October 1989 an office of the Afghan Red Crescent in Kabul suffered a rocket attack, resulting in two deaths and thirteen injuries, and the ICRC has appealed to the parties to the civil war to respect the civilians as well as the emblems.⁵⁵ In 1993 two hospitals in Kabul assisted by the International Committee were assaulted “On several occasions”, which caused civilian casualties.⁵⁶

⁵¹ See Denmark, 11 *OR*, CDDH/II/SR.40, paras. 5, 6, at 429, 430, respectively.

⁵² E.g. USSR, 11 *OR*, CDDH/II/SR.40, para. 61, at 438.

⁵³ Pakistan amended its own amendment that was finally adopted. See Pakistan, 4 *OR*, CDDH/427, CDDH/429, at 59. As to adoption, see 11 *OR*, CDDH/SR.51, para. 48, at 113, 114.

⁵⁴ Israel, 11 *OR*, CDDH/II/SR.28, para. 49, CDDH/II/SR.40, para. 39, at 289, 435 respectively.

⁵⁵ The ICRC, *Annual Report 1989*, at 58.

⁵⁶ The ICRC, *Annual Report 1993*, at 103.

In 1994 one-third of all the war-wounded in Kabul was treated by those two hospitals, and they had to function beyond their capacity.⁵⁷ In the same year medical staff and facilities suffered artillery bombardments.⁵⁸

7.4.2. BOUGAINVILLE

Concerning the secessionist war in Bougainville, the UN Special Rapporteur transmitted a report that bodies of those who were extrajudicially executed by the PNG Defence Force had been either thrown away from helicopters into the sea or “covered with rubber tyres and burnt”.⁵⁹ Later, the BRA made a claim that a government helicopter had dropped into the sea the corpses of civilians who had been killed by PNG troops at Arawa hospital.⁶⁰ In June 1992, it was admitted by a PNG Defence Force officer that six civilians had been killed and their bodies dropped to sea by helicopters in February 1990.⁶¹ Except for those incidents, little reliable information is available.

7.4.3. CHECHNYA

Regarding the collection of bodies, in January 1995 talks were undertaken between the Russian and Chechen military authorities about collecting, identifying and burying bodies that lay on the streets of Grozny.⁶² The Russian Government made an appeal to

⁵⁷ The ICRC, *Annual Report 1994*, at 105.

⁵⁸ The ICRC, *Annual Report 1994*, at 103.

⁵⁹ U.N. Commission on Human Rights, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Mr. Bacre Waly N'diave, submitted pursuant to Commission resolution 1995/66, Addendum, Report by the Special Rapporteur on his mission to Papua New Guinea island of Bougainville from 23 to 28 October 1995* (hereinafter *Report on Bougainville*), para. 50, U.N. Doc. E/CN.4/1996/4/Add.2 (27 Feb. 1996).

⁶⁰ “Bougainville rebel radio says civilians killed by PNG forces dumped at sea”, broadcast by Radio Australia in English, 1900 gmt, 1 May 1993, reproduced in BBC Monitoring, Part 3 Far East, FE/1630, at B/8 (6 May 1993).

⁶¹ *Report on Bougainville*, supra. note 59, para. 73.

⁶² “Russian and Chechen forces meet to discuss burial of soldiers killed in conflict”, broadcast by ITAR-TASS news agency (World Service), Moscow, in Russian, 0709gmt, 6 Jan. 1995, reproduced in BBC Monitoring, SWB, Part 1, Former USSR, 3rd Ser., SU/2195, at B/6 (7 Jan. 1995).

the Chechen dissident to halt fighting for forty-eight hours,⁶³ and there was a report of the Chechen acceptance of the appeal.⁶⁴ However, according to the Russian Government press service, the Chechens did not react positively to the proposal for the temporary cease-fire.⁶⁵ About two weeks after the initial talks were held, the press service reported the presence of “many corpses on the street” and even the placement of booby-traps on them.⁶⁶

As for violations of the protection of medical facilities, Chechen fighters occupied a hospital in Kizlyar in which there were more than 3,000 patients.⁶⁷ The Chechen rebels killed “at least 13 civilians and seven policemen”,⁶⁸ and laid mines on the lower storeys of the hospital.⁶⁹ In addition, patients claimed that the hospital had been shot at by the Russian forces.⁷⁰ After the occupation of the hospital, Dudayev, Chechen leader, admitted in his interview that he had ordered the attack on Kizlyar to treat their own

⁶³ “Russian government proposal on 48-hour cease-fire”, broadcast by ITAR-TASS news agency (World Service), Moscow, in Russian, 2155gmt, 9 Feb. 1995, reproduced in BBC Monitoring, *SWB*, Part 1, Former USSR, 3rd Ser., SU/2198, at B/5 (11 Jan. 1995).

⁶⁴ “Dudayev accepts Russian government’s cease-fire conditions”, broadcast by RIA news agency, Moscow, in English, 1416gmt, 10 Jan. 1995, reproduced in BBC Monitoring, *SWB*, Part 1, Former USSR, 3rd Ser., SU/2199, at B/6 (12 Jan. 1995).

⁶⁵ “Government press service: Chechens did not respond to cease-fire offer”, by ITAR-TASS news agency (World Services), Moscow, in Russian, 1742gmt, 10 Jan. 1995, reproduced in BBC Monitoring, *SWB*, Part 1, Former USSR, 3rd Ser., SU/2199, at B/6 (12 Jan. 1995).

⁶⁶ “Government press service reports capture of presidential palace in Grozny”, broadcast by ITAR-TASS news agency (World Service), Moscow, in Russian, 1521gmt, 19 Jan. 1995, reproduced in BBC Monitoring, *SWB*, Part 1, Former USSR, 3rd Ser., SU/2207, at B/2 (21 Jan. 1995).

⁶⁷ Thomas de Waal, “Russian troops surround hostage-takers at border”, *The Times*, Jan. 11, 1996, at 11; Philippa Fletcher, “Patients tell of 24-hour terror”, *id.* Another well-reported incident was the hostage-taking of hospital patients and staff by the Chechens in Budennovsk. See U.N. Commission on Human Rights, *The situation of human rights in the Republic of Chechnya of the Russian Federation, Report of the Secretary-General*, para. 56, U.N. Doc. E/CN.4/1996/13 (26 Mar. 1996).

⁶⁸ De Waal, *id.* But Interfax reported “the deaths of 14 civilians, seven militiamen and two servicemen of the federal forces...”. See also “Kizlyar death toll put at 23”, broadcast by Interfax news agency, Moscow, in Russian, 2323 gmt, 10 Jan. 1996, reproduced in BBC Monitoring, *SWB*, Part 1, Former USSR, 3rd Ser., SU/2507, at B/11 (12 Jan. 1996).

⁶⁹ Philippa Fletcher, “Patients tell of 24-hour terror”, *The Times*, Jan. 11, 1996, at 11. See also “Mine clearance work completed at Kizlyar hospital”, broadcast by Radio Russia, Moscow, in Russian, 0800 gmt, 11 Jan. 1996, reproduced in BBC Monitoring, *SWB*, Part 1, Former USSR, 3rd Ser., SU/2507, at B/11 (12 Jan. 1996).

⁷⁰ Fletcher, *id.*

wounded fighters.⁷¹ The Russian side, too, did not respect the protection of medical facilities and staff. According to a Chechen doctor, the hospital in which he originally worked in Grozny was “flattened” by the Russian forces on December 31, 1994.⁷² Although the staff of the hospital had already transferred the wounded to a nuclear shelter, the Russian security forces not only took away a generator necessary for the critically injured but also ordered those in the shelter to leave it “to make way for six officers”.⁷³ Even after signing of the peace accord, when Grozny was recaptured by Chechen fighters on August 6, 1996, the Russians attacked hospitals in the city.⁷⁴ The Chechen doctor himself had his leg broken when he was evacuating with patients.⁷⁵

The emblem was not always respected, either. On one occasion a Russian doctor serving the Russian forces alleged that Chechen dissidents had downed “three ambulance helicopters with clearly seen red crosses on them”.⁷⁶ On December 17, 1996, six of the Red Cross staff working for a hospital near Grozny were killed in the institution by Chechen gunmen, which resulted in the fleeing of aid workers.⁷⁷ Aslan Maskhadov, Chechen Prime Minister, declared that “every measure to find the criminals” would be taken and “the punishment they deserve” be given to them,⁷⁸ and

⁷¹ ‘Dudayev predicts “hundreds of similar operations” to Kizlyar’, an interview with Dzhokar Dudayev originally published by ‘Moskovskiy Komsomolets’, Moscow, in Russian, 11 Jan. 96, reproduced in BBC Monitoring, *SWB*, Part 1, Former USSR, 3rd Ser., SU/2507, at B/8 (12 Jan. 1996).

⁷² Carey Scott, “Surgeon hero tells of Grozny’s hell”, *The Sunday Times*, 1 Sept. 1996, at 1. 15.

⁷³ *Id.*

⁷⁴ *Id.* See also “Chechen rebels: medical staff and patient killed in Russian attack on hospital”, broadcast by Ekho Moskvyy radio, Moscow, in Russian, 0400 gmt, 11 Aug. 1996, reproduced in BBC Monitoring, *SWB*, Part 1, Former USSR, SU/2688, at B/11 (12 Aug. 1996).

⁷⁵ Scott, *supra*. note 72.

⁷⁶ ‘Russians report activities of Chechnya “fanatics”’, broadcast by ITAR-TASS news agency (World Service), Moscow, in English, 0845gmt, 16 Jan. 1995, reproduced in BBC Monitoring, *SWB*, Part 1, Former USSR, 3rd Ser., SU/2203, at B/5 (17 Jan. 1995).

⁷⁷ Richard Beeston, “Aid workers quit Chechnya over Red Cross deaths”, *The Times*, 18 Dec. 1996, at 10; “Six Red Cross doctors murdered in Chechnya”, broadcast by Radio Russia, Moscow, in Russian, 0900 gmt, 17 Dec. 1996, reproduced in BBC Monitoring, *SWB*, Part 1, Former USSR, 3rd Ser., SU/2798, at B/7 (18 Dec. 1996).

⁷⁸ “Red Cross murder suspects arrested”, broadcast by NTV, Moscow, in Russian, 1600 gmt, 19 Dec. 96, reproduced in BBC Monitoring, *SWB*, Part 1, Former USSR, 3rd Ser., SU/2801, at B/14 (21 Dec. 1996).

it was indeed soon announced by the Chechen authorities that those suspected of committing this atrocity had been arrested.⁷⁹

7.4.4. EL SALVADOR

Efforts of the ICRC to provide and maintain medical facilities were continuous.⁸⁰ For instance the ICRC was able to assist people in places not under the Salvadoran Government's control in 1986, and transferred the wounded and sick, both civilian and combatant, to medical institutions where sufficient treatment was available.⁸¹ Besides, ICRC medical assistance even extended to those interned in detention places.⁸²

There were, however, reports on attacks against hospitals and their personnel. In March 1984 an ambulance was attacked and two local Red Cross staff were killed.⁸³ Next year there were incidents in which ambulances of the National Red Cross Society were fired, and the ICRC appealed to the rebel forces to respect the Red Cross emblem and its activities.⁸⁴ As the conflict intensified at the end of November 1989, ambulances belonging to the El Salvador Red Cross in a mission to evacuate the wounded were attacked.⁸⁵ Apart from Red Cross institutions, in April 1989 a mobile hospital of the FMLN was attacked by the Salvadoran air force, which resulted in the deaths of the staff and a patient.⁸⁶ The Truth Commission found "substantial

⁷⁹ Richard Beeston, "Chechen murder suspects held", *The Times*, Dec. 21, 1996, at 13.

⁸⁰ The ICRC, *Annual Reports 1981*, at 27; *1982*, at 32; *1983*, at 30-1; *1984*, at 33-4; *1985*, at 37-8; *1986*, at 39; *1987*, at 42-43; *1988*, at 45-6; *1989*, at 41-2.

⁸¹ The ICRC, *Annual Report 1986*, at 39. Similar transfer continued. The ICRC, *Annual Reports 1988*, at 45; *1989*, at 41.

⁸² The ICRC, *Annual Reports 1983*, at 30; *1984*, at 33-4; *1985*, at 38; *1986*, at 39; *1987*, at 41; *1988*, at 44.

⁸³ The ICRC, *Annual Report 1984*, at 32.

⁸⁴ The ICRC, *Annual Report 1985*, at 36.

⁸⁵ The ICRC, *Annual Report 1989*, at 39.

⁸⁶ See Security Council, *Letter dated 29 March 1993 from the Secretary-General to the President of the Security Council transmitting the report presented on 15 March 1993 by the Commission on the Truth*, S/25500 (1 Apr. 1993), at 333-334, reproduced in U.N., *The United Nations and El Salvador, 1990-1995*, Doc. 67, 290, U.N. Sales No. E. 95.I.12 (1995)

evidence” that at least a French nurse was captured alive and executed by an air force unit.⁸⁷ The Commission also ascertained “full evidence” that in September 1990 one Spanish doctor working for the FMLN had been summarily executed by the Government armed forces.⁸⁸

7.4.5. LIBERIA

The treatment of the wounded, sick and deceased was far from satisfactory and attacks against medical institutions and Red Cross facilities were rife. According to the account given by Huband, a journalist, who visited St Joseph’s Catholic hospital in July 1990, fighters of various parties were accommodated in the same rooms without difficulty.⁸⁹ However, when he visited the John Fitzgerald Kennedy hospital in Monrovia, the facility was deserted by doctors, and bodies were left without being buried.⁹⁰ He made the second visit to the JFK hospital two weeks later, and found no patients in the facility because, according to a nurse, the patients of a particular tribe were taken out of the hospital and killed.⁹¹

To name a few incidents about violations of medical facilities and places protected by the Red Cross emblem, which are reported in relatively reliable sources, in July 1990 soldiers belonging to the government armed forces massacred hundreds of civilian refugees in a Lutheran church which was protected by the Red Cross emblem.⁹² In September 1994, the Phebe hospital was attacked, resulting in several deaths among hospital workers as well as internally displaced people.⁹³ In December 1996, civilians

⁸⁷ *Id.*, at 334.

⁸⁸ *Id.*, at 334-336.

⁸⁹ Mark Huband, *The Liberian Civil War*, at 150-152 (1998).

⁹⁰ *Id.*, at 131-132.

⁹¹ *Id.*, at 153-154.

⁹² The ICRC, *Annual Reports 1990*, at 11; *1991*, at 23, n.7; Huband, *id.*, at 173-175, 203..

⁹³ See Security Council, *Seventh progress report of the Secretary-General on the United Nations Observer Mission in Liberia*, para. 38, U.N. Doc. S/1994/1167 (14 Oct. 1994); “Gunmen said to have

who sought refuge in a government hospital were forced out of the building and made human shields by soldiers belonged to the ULIMO-J faction.⁹⁴ The government hospital was attacked by a mortar, which resulted in civilian casualties.⁹⁵

The misuse of the Red Cross emblem was a matter of concern to the ICRC. According to its report, the sign was “commonly displayed in shop windows, pharmacies and even on vehicle windscreens” in order “[t]o provide [protection] against all contingencies”.⁹⁶

The ICRC was able to provide medical assistance in Liberia, even though its *Annual Reports* are not always suggestive of the extent of its support to the wounded, sick and dead. For instance, in 1991 the role of the ICRC was, it claimed, limited because of “a large number of assistance programmes” of other non-governmental organisations.⁹⁷ However, in 1996 there were few mentions about medical activities, presumably because the extreme situation made the ICRC difficult to conduct its activities generally in Liberia.⁹⁸

7.4.6. RWANDA

The Civil War in Rwanda saw a number of attacks against medical facilities and staff, and of disrespect of the Red Cross emblem. For example, patients were killed inside Red Cross ambulances, while the Kigali Central Hospital and its neighbouring surgical hospital set by the ICRC were attacked, resulting in casualties among both patients and

killed over 80 at hospital near Gbarnga”, broadcast by AFP news agency, Paris, in English, 1424 gmt, 5 Oct. 1994, reproduced in BBC Monitoring, *SWB*, Part 5, Africa and Latin America, 3rd. Ser., AL/2190, at A/9 (7 Oct. 1994).

⁹⁴ Security Council, *Fifteenth progress report of the Secretary-General on the United Nations Observer Mission in Liberia*, para. 24, U.N. Doc. S/1996/47 (23 Jan. 1996).

⁹⁵ *Id.*

⁹⁶ The ICRC, *ICRC Bulletin*, July 1991, No. 186, at 4.

⁹⁷ The ICRC, *Annual Report 1991*, at 26.

⁹⁸ The ICRC, *Annual Report 1996*, at 40-2.

staff.⁹⁹ According to Medecins Sans Frontieres-Belgium, in April 1994 patients whom the organisation treated were taken out of a hospital in Butare and killed by the Presidential Guard.¹⁰⁰ In May 1994 an orphanage in Butare was attacked where orphans and Rwandan Red Cross volunteers were killed.¹⁰¹ Bodies, either of victims of war crimes or genocide, were scattered around in Rwanda and, for instance, there is a gruesome description of corpses which were piled near the British camp in Kigali.¹⁰²

7.4.7. SOMALIA

Attacks against Red Cross facilities and staff were frequent in Somalia. In 1990 the secretary of the Somali Red Crescent Society and an ICRC official were killed on separate occasions.¹⁰³ The SNM captured and later released three Red Cross personnel who the SNM claimed had been transported in a military lorry of the Somali Government.¹⁰⁴ According to the ICRC's *Annual Report 1992*, there were "countless death threats and physical assaults" against ICRC personnel, and there were casualties among local employees of the organisation and National Society staff.¹⁰⁵ Security problems were also reported in the ICRC's *Annual Reports 1993* and *1994*.¹⁰⁶ In order to cope with such a violent situation, the ICRC was compelled to rely on armed guards,¹⁰⁷ but Sommaruga, the then President of the ICRC, later avowed that such

⁹⁹ The ICRC, *Annual Report 1994*, at 54-55, 59.

¹⁰⁰ "Government soldiers reported to have killed patients in Butare hospital", broadcast by Radio France Internationale, Paris, in French, 2130 gmt, 24 Apr. 1994, reproduced in BBC Monitoring, *SWB*, Part 5, Africa and Latin America, 3rd Ser., at A/3, AL/1981 (26 Apr. 1994).

¹⁰¹ See the ICRC, *Annual Report 1994*, at 55; "ICRC confirms reports that 21 orphans and 13 Rwanda Red Cross officials killed", broadcast by (a) RTBF Radio 1, Brussels, in French, 1500gmt, 3 May 1994 and (b) Swiss Radio International Bern, in English, 1500gmt, 3 May 1994, reproduced in BBC Monitoring, *SWB*, Part 5, Africa and Latin America, 3rd Ser., AL/1989, at A/2 (5 May 1994)

¹⁰² Christopher Bellamy, *Knights in White Armour*, at 7 (1996).

¹⁰³ *Keesing's*, Nov. 1990, at 37844-5; the ICRC, *Reference Report 1990*, at 28.

¹⁰⁴ *Keesing's*, Nov. 1990, at 37845.

¹⁰⁵ The ICRC, *Annual Report 1992*, at 45.

¹⁰⁶ The ICRC, *Annual Reports 1993*, at 83; *1994*, at 85-6.

¹⁰⁷ The ICRC, *Annual Report 1992*, at 46.

reliance on fighting parties would damage the ICRC's neutrality and impartiality.¹⁰⁸ He, however, admitted that the protection of ICRC property had been inevitably undertaken by armed guards on some occasions.¹⁰⁹

Under such difficulty, there were activities to rescue the wounded and sick. There is a report that doctors belonging to SOS Children's Village, a charitable organisation, undertook surgical operations to hundreds of wounded persons in Mogadishu, when fighting intensified in the city in January 1991.¹¹⁰ The ICRC and the Somali Red Crescent Society also provided medical facilities for those who were injured.¹¹¹ However, it is not certain to what extent the wounded and sick were treated humanely in the Somali Civil War.

7.4.8. SRI LANKA

In 1990 the parties to the Sri Lankan Civil War agreed to establish a "safety zone" around the Jaffna Teaching Hospital in which the wounded and sick were treated and protected under the ICRC.¹¹² It appears that there was no major violation of the zone, but at the end of 1993 the zone was infringed probably by the Government forces.¹¹³ The protection continued until 1995, when the Sri Lankan armed forces attacked Jaffna and the patients and staff vacated the Hospital.¹¹⁴ The deterioration of the situation in

¹⁰⁸ Cornelio Sommaruga, "Humanitarian action and peace-keeping operations", *IRRC*, Mar.-Apr. 1997, at 178, 181.

¹⁰⁹ *Id.*, at 181.

¹¹⁰ Peter Biles, "What Will Happen to Siad's Children", *BBC Focus on Africa*, Apr.-Jun. 1991, at 5, 7.

¹¹¹ The ICRC, *Annual Reports 1992*, at 47-8; *1993*, at 84-5; *1994*, at 87-88; *1995*, at 87-8; *1996*, at 97; *1997*, at 101; *1998*, at 112; *1999*, at 127-128.

¹¹² The ICRC, *Annual Report 1995*, at 113.

¹¹³ The ICRC's *Annual Report 1993* does not specify the responsibility of the Government of Sri Lanka, but the authorities were likely to be accountable, since a protest was sent to the Ministry of Defence by the head of the ICRC delegation. See the ICRC, *Annual Report 1993*, at 113.

¹¹⁴ The ICRC, *Annual Report 1995*, at 133.

1995 presented difficulty to ICRC medical activities in the Jaffna peninsula which most needed such assistance.¹¹⁵

7.4.9. THE FORMER YUGOSLAVIA

International humanitarian law was grossly violated in the former Yugoslavia. To name only a few cases, in spite of agreement reached by all the parties concerned about an evacuation of patients from a hospital in Zagreb to Pakrac in 1991, a convoy of vehicles with the emblem was attacked, resulting in an injury of a nurse.¹¹⁶ The respect of the Red Cross emblem was not observed,¹¹⁷ and an appeal was made by the ICRC to respect the emblem and also protect the wounded and sick.¹¹⁸ Many hospitals were subject to indiscriminate bombardments;¹¹⁹ supplying medical assistance to besieged towns was difficult; and the state of medical services became “desperate” in such places.¹²⁰

7.5. EXAMINATION OF CUSTOMARY STATUS

Despite extensive legal coverage over the protection of the wounded, sick and shipwrecked in international wars since the establishment of 1864 Geneva Convention, such protection in civil conflicts found place for the first time in Common Article 3, but in a much reduced form. Part III of Protocol II was therefore an advancement, for the rudimentary stipulations about medical protection set in Common Article 3 were strengthened.¹²¹

¹¹⁵ *Id.*, at 133-134.

¹¹⁶ The ICRC, *Annual Report 1991*, at 88.

¹¹⁷ *Id.*, at 91.

¹¹⁸ *Id.*, at 88.

¹¹⁹ See the ICRC, *Annual Report 1993*, at 145; Hilare McCoubrey and Nigel D. White, *International Organizations and Civil Wars*, at 135 (1995).

¹²⁰ The ICRC, *Annual Report 1993*, at 151.

¹²¹ Michael Bothe et al, *New Rules for Victims of Armed Conflicts*, at 657 (1982).

Concerning the determination of the customary status of this Part of Protocol II, the first difficulty lies in the fact that, as in many conflicts discussed above, available information on medical care of victims in internal conflict is extremely limited, and ascertaining practice and *opinio juris* is not facile. The ICRC's *Annual Reports* may be reliable sources, but if any, report on medical activities conducted by warring parties is very rare. Second, it appears to this author that scholars pay less attention to medical protection than to other humanitarian safeguards, e.g. the protection of detainees, refugees and civilian populations in general. For example, commentaries on Part III of Protocol II made by Bothe and others are very concise, compared with their commentaries on other Parts of the Protocol.¹²²

Regarding each article, Article 7(1) of Protocol II merely reaffirmed the customary rule incorporated in Common Article 3(2). In Article 7(2), the general humane treatment of the wounded and sick "In all circumstances" can be considered customary in the context of the introduction of Common Article 3(1). However, it is questionable if the rest of the paragraph is customary because there is little practice and *opinio juris* available. It may be presumed that the wounded and sick are treated "to the fullest extent practicable and with the least possible delay" and without distinction "other than [on] medical grounds" in certain facilities organised by the International Red Cross and NGOs. However, there is virtually no reliable document as to whether warring parties to internal conflicts treat their respective enemies in accordance with such priorities. *The ICRC's Commentary* states that Article 7 "reaffirms and develops" the obligations enshrined in Common Article 3.¹²³ Nevertheless, it appears to the present author that

¹²² See *id.*, at 655-665.

¹²³ *The ICRC's Commentary*, §4634.

paragraph 1 of Article 7 and part of paragraph 2 reaffirm the existing customary law, while most of paragraph 2 develops it.¹²⁴

It is difficult to consider that Article 8 of Protocol II on the whole reaffirmed the existing customary law of 1977,¹²⁵ even though Common Article 3(2) provides for collection of the wounded and sick. The fact that wounded and sick persons exist in every conflict implies that there have been certain efforts to search for them, but to what extent such endeavours have been conducted in internal conflicts - e.g. whether “all possible measures ... [are]... taken, without delay” and whether protection is given to the wounded and sick “against pillage and ill-treatment” - is not determinable. Practice and *opinio juris* regarding this issue are non-existent. Considering the collection of the dead, a failed proposal for a cease-fire to collect bodies in Grozny indicates the difficulty of such activity in actual combat. Besides, there was disregard for the respect of the deceased in Bougainville and Liberia. However, overall there is little evidence to reveal the customary status of the collection of the corpses.

Taking together Articles 7 and 8, there are two points to mention. First, even though part of these Articles reaffirm customary rules, they are not always complied with in many conflicts examined above. Second, the protection of the shipwrecked appears to be non-customary because of the fact that maritime fightings are extremely rare in recent civil wars, and there is virtually no practice and *opinio juris* regarding this point.

¹²⁴ Cf. Antonio Cassese, “The Geneva Protocols of 1977 on the Humanitarian Law of Armed Conflict and Customary International Law”, 3 *UCLA Pacific Basin Law Journal* 55, 111-2 (1984) (arguing that Articles 7 and 8 “reaffirm and enlarge upon a rule contained in Common Article 3”) (footnote omitted); The Rome Statute, Art. 8(2)(c).

¹²⁵ According to *the ICRC's Commentary*, “Article 8 develops and reaffirms the obligation... which is already contained in [Common Article 3(2)]”. *The ICRC's Commentary*, §4648. But see Cassese, *id.*, at 111-2.

Articles 9 to 12 have not obtained customary status¹²⁶ because of a lack of practice and *opinio juris* that would support such status. *The ICRC's Commentary* carefully avoids to declare that these Articles “reaffirm and develop” the existing law,¹²⁷ as it does so in Articles 7 and 8. Medical facilities, transports and personnel, including those of the International Red Cross, were attacked particularly in Afghanistan, Chechnya, Liberia, Rwanda, Somalia and the former Yugoslavia. The distinctive emblem was not always respected in these conflicts. It may be that the draftsmen of the 1949 Geneva Conventions presumed that a State in civil war would not attack the emblem, but States were not obliged to accept Red Cross activities at the start under Common Article 3,¹²⁸ and therefore the respect of the emblem was not automatic. Very little reliable documentation is available on detailed provisions, such as the prohibition to compel doctors to act “contrary to ... the rules of medical ethics” (Article 10(2)) or the cessation of protection of medical units and transports (Article 11(2)). In conclusion, a lack of practice and *opinio juris* does not endorse the contention that any of Articles 9 to 12 has become customary.

According to the Rome Statute, its Article 8(e)(ii) proscribes intentional assaults upon both medical facilities and the medical staff with “the distinctive emblems of the Geneva Conventions”, corresponding to Articles 11 and 12 of Protocol II. Article 8(e)(iv) prohibits intentional “attacks against... hospitals and places where the sick and wounded are collected, provided they are not military objectives”, relating with Article 11 of Protocol II. Article 8(e)(xi) prohibits “physical mutilation or .. medical experiments”, which can be regarded as a broad interpretation of Article 10(1) and (2)

¹²⁶ Cassese contends that Articles 9 to 12 are innovative and that “they will only become binding on those States which ratify the Protocol”. Cassese, *id.*, at 111.

¹²⁷ *The ICRC's Commentary*, §§4659 (Art. 9), 4680 (Art. 10), 4707 (Art. 11), 4730 (Art. 12).

¹²⁸ James E. Bond, *The Rules of Riot*, at 131 (1974).

of Protocol II. These provisions may pass into custom if a large number of “specially affected States” ratify the Statute.

CHAPTER 8

CUSTOM AND PROTOCOL II, PART IV: CIVILIAN POPULATION

8.1. THE LAWS OF WAR BEFORE 1949

Early scholars' views on the protection of civilians having been already mentioned in Chapter 6, they also considered that the poisoning of springs was against the laws of war,¹ which may be relevant to Article 14 of Protocol II. Those authorities also mentioned the protection of cultural properties.² Lieber's Code also prohibited the above methods of warfare.³

Humanitarian assistance to civilian populations in internal conflict was an innovative instrument devised in Common Article 3 and developed by Protocol II. During the Spanish Civil War, the ICRC did not generally consider "the feeding of the civilian population" to be "a part of [its] duties" with an exceptional case in which delegates in Madrid distributed tins of condensed milk to "the infants whose health was menaced".⁴ Evacuation of civilians was agreed in Salamanca and Barcelona, but the application of the agreements were "very limited".⁵ However, the proposal of the Committee to establish a "neutral zone" in Madrid in order to save civilians from

¹ Emer de Vattel, *The Law of Nations or the Principles of Natural Law: Applied to the Conduct and to the Affairs of Nations and of Sovereigns, Vol. III, Translation of the Edition of 1758 By Charles G. Fenwick With an Introduction by Albert de Lapradelle*, Book III, §157 (Michel E. Slatkine and Jiri Toman reprint eds., 1983) (James Brown Scott ed., 1916) (1758); Dana's note in Henry Wheaton, *Elements of International Law*, 360 n.166 (James Brown Scott ed., 1936) (Edition of Richard Henry Dana, Jr., ed. by George Grafton Wilson, 1866); Theodore D. Woolsey, *Introduction to the Study of International Law, Designed as an Aid in Teaching, and in Historical Studies*, §127 (1860).

² De Vattel, *id.*, §168; Woolsey, *id.*, §131. The most explicit was de Vattel, while the others did not argue for the protection of cultural objects *per se*.

³ As to the prohibition of the use of poisons, see Article 16. As to the protection of cultural properties, see Articles 34-6.

⁴ *General Report of the International Red Cross Committee on its activities from August, 1934 to March, 1938*, Doc. No. 12a., at 110-111 (1938).

⁵ *Id.*, at 122-123.

warfare was agreed and respected by both parties.⁶ Besides, the Royal Navy evacuated refugees from the Spanish Civil War for humanitarian reasons.⁷

8.2. THE REGIME OF THE 1949 GENEVA CONVENTIONS IN THE 1950S AND 1960S

Even in international wars there had been no multilateral convention specifically applicable to civilians before the adoption of 1949 Geneva Convention IV. In internal conflicts Common Article 3 indirectly refers to the protection of the civilian population, as the provision limits its personal scope of application to “Persons taking no active part in the hostilities”. Cassese argues that, during the Spanish Civil War, parties to the War, Great Powers and international organisations invoked rules upon the protection of civilians so frequently that “a *general* legal conviction evolved as to their applicability to all large-scale civil wars”.⁸ However, the present writer wonders why the protection of civilians was not inserted either in Common Article 3, had it become customary law during the Spanish Civil War.

Practice between 1949 and 1977 also shows the doubtfulness of the customary protection of civilians as such. In the Algerian War of Independence, acts of terrorism were rife, which resulted in a number of deaths among civilians.⁹ In the Yemeni Civil War, there was disregard of the protection of civilians, and “the distinction between military and civilian personnel”, Boals claimed, “practically did

⁶ A “neutral zone” was also established in Bilbao. See *id.*, at 125. Cassese also refers to this point. See Antonio Cassese, “The Spanish Civil War and the Development of Customary Law Concerning Internal Armed Conflicts”, in *Current Problems of International Law* 287, 297 and n.15 (Antonio Cassese ed., 1975).

⁷ James Cable, “Naval Humanitarianism”, 11 *International Relations* 335, 340-343 (1993).

⁸ Cassese, *supra*. note 6, at 298.

⁹ The Battle of Algiers in January to March 1957 and the bombing of a casino in June 1957 are two well-known examples. See Alistaire Horne, *A Savage War of Peace*, at 183-207 and 209-211 respectively (rev. ed., 1987).

not exist in Yemen”.¹⁰ In the Biafran secessionist war, the “Operational Code of Conduct for Nigerian Armed Forces” declared that the Nigerian forces would protect the civilian population, and the International Criminal Tribunal for the former Yugoslavia (ICTY) concludes that “the trend initiated with the Spanish Civil War” about the protection of civilians was confirmed by this Nigerian willingness to comply with such protection.¹¹ However, there were massacres of civilians, which prompted the ICRC to appeal to the warring parties to comply with humanitarian rules, among which was civilian protection.¹² Furthermore, the Nigerian Government was extremely reluctant to give permission for the ICRC to airlift relief operations to civilians in need.¹³

Resolution 2675(XXV), which provides the protection of civilians, was adopted in the General Assembly by a majority of States in 1970.¹⁴ The interpretation of this voting is not plausible because how States voted is not recorded, but support by the overwhelming number of States cannot be overlooked. Paragraphs 2 to 5 of the Resolution overlap the protection of the civilian population provided by Article 13(1) and (2) of Protocol II and the principles of distinction and military necessity. Paragraph 6 prohibits attack against “Places or areas designated for the sole protection of civilians, such as hospital zones or refugees”. Paragraph 7 provides that civilians “should not be the object of reprisals, forcible transfers or other assaults on their integrity”. Paragraph 8 claims the applicability of the Declaration of Principles

¹⁰ Kathryn Boals, “The Relevance of International Law to the Internal War in Yemen”, in *The International Law of Civil Wars* 303, 316 (Richard Falk ed., 1971).

¹¹ *The Prosecutor v. Dusko Tadic, a/k/a “Dule”, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, Case No. IT-94-1-AR72, 2 Oct. 1995, para. 106, reprinted in 35 *ILM* 32 (1996) [hereinafter *Tadic case*].

¹² Hans Haug, *Humanity for all*, at 112-3 (1993).

¹³ *Id.*, at 113-115.

¹⁴ UN GAOR, 25th Sess., 1922nd plen. mtg. para. 127, UN Doc. A/PV. 1922 (9 Dec. 1970). 109 States in favour, with 8 abstention.

for International Humanitarian Relief to the Civilian Population in Disaster Situations to “situations of armed conflict”.¹⁵

The ICTY regarded this resolution as well as a precedent resolution as “declaratory of the principles of customary international law regarding the protection of civilian populations and property in armed conflicts of any kind...”.¹⁶ It is true that the overwhelming number of States supported this resolution, which might be interpreted as their acknowledgement of the resolution as declaratory of custom. However, practice in the above civil conflicts could not confirm such interpretation, for there were violations of protection of civilians. It would also be appropriate to argue that, had the resolution been of declaratory character, it would have been smooth to adopt provisions relating to the protection of civilians in the Diplomatic Conference, but the following analysis of the records of the Conference would suggest otherwise.

8.3. DRAFTING PROTOCOL II IN THE DIPLOMATIC CONFERENCE OF 1974 TO 1977

8.3.1. ARTICLE 13 (DRAFT ARTICLE 26¹⁷)

Drafting Article 13 of Protocol II was a complicated process, with a number of proposals for amendments.¹⁸ Concerning Article 13(1) of Protocol II, no argument about this paragraph is documented. As regards Article 13(2), its first paragraph is almost identical to the first sentence of draft Article 26(1), while its second paragraph is a more detailed version of draft Article 26(2). The delegate of the ICRC explained

¹⁵ The Declaration was adopted in the twenty-first International Conference of the Red Cross. See “Resolutions adopted by the XXIst International Conference of the Red Cross”, *IRRC*, Nov. 1969, at 608, 632-633.

¹⁶ *Tadic* case, para. 112. Bond was rather sympathetic to the Nigerian reluctance to accept Red Cross relief. See James E. Bond, *The Rules of Riot*, at 130 (1974).

¹⁷ Draft Protocol II, Article 26, 1 *OR*, Part 3, at 40. Focus is placed upon the protection of civilians provided by paragraphs 1 and 2 of draft Article 26, and other paragraphs relating to the “Hague” law and reprisals will be discussed later.

¹⁸ See *The Law of Non-International Armed Conflict*, at 449-470 (Howard S. Levie ed., 1987).

that draft Article 26(1) “merely reaffirmed international law” with exception of the phrase “methods intended to spread terror” which “had been included to express intention”.¹⁹ As far as the former sentence is concerned, no strong opposition is recorded. However delegates were not in agreement with the introduction of prohibition of terrorism in the second paragraph. Thus the Canadian proposal for amendments included the deletion of the second sentence of paragraph 1,²⁰ and the USA supported these amendments.²¹ The Soviet delegate suggested that the wording ‘methods “intended to” spread terror’ be changed to ‘methods “that” spread terror’.²² The Swiss representative favoured the inclusion of the interdiction of terrorism.²³ With such various opinions upon the prohibition of terrorism, Committee III adopted the introduction and paragraph 1 of the amended Draft Article 26 together by consensus, which corresponded to the present Article 13(1) and (2) respectively.²⁴ Article 13(3) provides the scope of those who are considered civilians. This paragraph, which is almost identical with draft Article 26(3) was, together with paragraphs 2 and 3, was adopted by consensus,²⁵ but the wording of the paragraph was not supported by a number of States.²⁶

States, such as Norway and Switzerland, referred to the principle of civilian protection during the Diplomatic Conference,²⁷ but the references were exceptional.

¹⁹ The ICRC, 14 *OR*, CDDH/III/SR.5, para. 7, at 36. Draft Article 26(1) contained the second paragraph which prohibited the use of terrorism. This point will be shortly discussed.

²⁰ Canada, 4 *OR*, CDDH/III/36, at 76.

²¹ USA, 14 *OR*, CDDH/III/SR.8, para. 72, at 67.

²² USSR, 14 *OR*, CDDH/III/SR.9, para. 15, at 73. See also Algeria, Egypt, Democratic Yemen, Iraq, Kuwait, Libya, Mali, Mauritania, Morocco, Sudan, Syria, UAE, 4 *OR*, CDDH/III/48/Rev.1 and Add.1 and Add. 2, at 78.

²³ Switzerland, 14 *OR*, CDDH/III/SR.9, para. 22, at 74.

²⁴ See 14 *OR*, CDDH/III/SR.37, para. 14, at 390; Article 26 adopted by Committee III, 15 *OR*, CDDH/215/Rev.1, at 321.

²⁵ 7 *OR*, CDDH/SR. 52, para. 78, at 134.

²⁶ In Committee III, the wording “and for such time as” was put to a vote and adopted (28/5/29). 14 *OR*, CDDH/III/SR. 37, para. 14, at 390.

²⁷ Norway, 14 *OR*, CDDH/III/SR.9, para. 8, at 72; Switzerland, 14 *OR*, CDDH/III/SR.9, para. 23, at 74.

Furthermore, the ICRC's draft Article 26 originally consisted of five articles, but only the first two survived. In addition, draft Article 26 adopted by Committee III included articles relating indiscriminate bombings of civilians and the method of human shield,²⁸ but they were deleted in the last-minute proposal of Pakistan. In conclusion, this complicated process of drafting Article 13 should not be regarded as evidence that it was declaratory of firmly established rules concerning the protection of civilians in non-international armed conflict.

8.3.2. ARTICLE 14 (DRAFT ARTICLE 27²⁹)

A number of States, including Ireland, the Philippines and the USSR, expressed their support for either the ICRC text or amended ones.³⁰ However, Canada proposed the deletion of the draft Article, arguing that the provision would infringe upon State sovereignty,³¹ and the USA supported this contention.³² The Canadian delegate stated that they were against the draft Article because of the danger of interference and that he objected to attacks against civilian objects referred to in the provision.³³ Facing discord, Pakistan proposed to efface the draft Article,³⁴ but the amended form of the said Article was adopted by consensus.³⁵ Most statements recorded in the *Official Records* favour the adoption of the draft Article,³⁶ but the Canadian opposition was strong. The draft Article would have been deleted according to the Pakistan proposal

²⁸ Article 26(3) and (5) adopted by Committee III, 15 *OR*, CDDH/III/294, at 321.

²⁹ Draft Protocol II, Article 27, 1 *OR*, Part 3, at 40.

³⁰ Ireland, 14 *OR*, CDDH/III/SR.18, para. 5, at 152; Philippines, 14 *OR*, CDDH/III/SR.18, para. 8, at 152-153; USSR, 14 *OR*, CDDH/III/SR.18, para. 3, at 151.

³¹ Canada, 4 *OR*, CDDH/III/36, at 85 and 14 *OR*, CDDH/III/SR.17, para. 41, at 149-150.

³² USA, 14 *OR*, CDDH/III/SR.18, para. 7, at 152.

³³ Canada, 14 *OR*, CDDH/III/SR.17, para. 41, at 149-150. See also USA, 14 *OR*, CDDH/III/SR.18, para. 7, at 152.

³⁴ Pakistan, 4 *OR*, CDDH/427, at 87.

³⁵ 7 *OR*, CDDH/SR.52, para. 90, at 137.

³⁶ E.g. Holy See, 7 *OR*, CDDH/SR.52, paras. 82-3, at 136; USSR, 7 *OR*, CDDH/SR.52, para. 84, at 136; France, 7 *OR*, CDDH/SR.52, para. 86, at 137.

without intervention by the Holy See.³⁷ Taking into consideration both support by many States and strong opposition by certain States, i.e. Canada, it may be that the Diplomatic Conference had the generating effect upon Article 14 of Protocol II as customary law, even though subsequent practice and *opinio juris* may have prevented Article 14 from becoming firmly established customary law.

8.3.3. ARTICLE 15 (DRAFT ARTICLE 28³⁸)

Veuthey as the delegate of the ICRC expounded that the draft Article would introduce the “absolutely automatic” protection of the exhaustively listed facilities.³⁹ Among proposed amendments was one of Canada that propounded the deletion of the Article.⁴⁰ This amendment was rejected by thirty-nine votes to two, with twenty-two abstentions,⁴¹ but in its explanation of vote, Canada expressed the danger that some provisions of draft Protocol II would infringe upon State sovereignty.⁴² Iran and Nigeria found “a spirit of compromise” essential, but they also raised a question of sovereignty.⁴³ At the same time, Norway and Sweden showed their opposition to the Canadian proposal.⁴⁴ A simplified form of draft Article 28 was proposed by Pakistan⁴⁵ and was adopted by consensus.⁴⁶ The Canadian proposition having been defeated by voting, nevertheless, opposition towards draft Article 28 was strong, as explained by the above States, and the existence of customary law as to the

³⁷ See Michael Bothe et al, *New Rules for Victims of Armed Conflict*, at 681 (1982).

³⁸ Draft Protocol II, Article 28, 1 *OR*, Part 3, at 41.

³⁹ The ICRC, 14 *OR*, CDDH/III/SR.18, para. 16, at 154.

⁴⁰ Canada, 4 *OR*, CDDH/III/36, at 88.

⁴¹ 14 *OR*, CDDH/III/SR.37, para. 16, at 391.

⁴² Canada, 14 *OR*, CDDH/III/SR.37, paras. 21, 22, at 392. See also Romania, 14 *OR*, CDDH/III/SR.37, paras. 30, 31, at 394.

⁴³ Iran, 14 *OR*, CDDH/III/SR.37, paras. 26, 27, at 393; Nigeria, 14 *OR*, CDDH/III/SR.37, para. 23, at 393.

⁴⁴ Norway, 14 *OR*, CDDH/III/SR.37, para. 28, at 393; Sweden, 14 *OR*, CDDH/III/SR.37, para. 33, at 394.

⁴⁵ Pakistan, 4 *OR*, CDDH/427, at 90.

⁴⁶ 7 *OR*, CDDH/SR.52, at 138.

prohibition of attacks against the specified facilities in civil war would have been doubtful at the time of the Diplomatic Conference.

8.3.4. ARTICLE 16

Draft Protocol II originally had no provision concerning the protection of cultural heritage, and “specially affected States” in which historical properties centre proposed to insert a provision relating to the prohibition of attack against objects of cultural importance.⁴⁷ In subsequence, draft Article 20 *bis* that is almost identical to the present Article 16 was adopted in Committee III by consensus.⁴⁸ Pakistan, however, propounded the deletion of this draft Article,⁴⁹ and there was an intense discussion about the proposal between July 3 and 6, 1977.⁵⁰ Thirty-five voted in favour of the draft Article, which resulted in the final adoption of the draft Article, but fifteen opposed and thirty-two abstained.⁵¹ Reasons for oppositions and abstentions varied, and to give a few examples, India expressed its opposition in its explanation of vote because the introduction of the draft Article would be contrary to State sovereignty.⁵² The Netherlands abstained because of the absolute protection of the cultural heritage that it argued would result in violations of the said Article.⁵³ Finland voted against because it emphasised the protection of human beings rather than that of cultural assets.⁵⁴ Opposing or abstaining States claimed that they were not against the

⁴⁷ Afghanistan, Egypt, Ghana, Greece, Holy See, Italy, Iran, Japan, Jordan, Spain, Yugoslavia, 4 *OR*, CDDH/III/GT/95, at 65.

⁴⁸ 15 *OR*, CDDH/III/SR.49, para. 3, at 107; 15 *OR*, CDDH/236/Rev.1, at 418.

⁴⁹ Pakistan, 4 *OR*, CDDH/427, at 65.

⁵⁰ See the relevant discussion in 15 *OR*, CDDH/SR.51, CDDH/SR.52, CDDH/SR.53, at 121-143.

⁵¹ 7 *OR*, CDDH/SR.53, para. 12, at 143.

⁵² India, 7 *OR*, CDDH/SR.53, Annex, at 159.

⁵³ The Netherlands, 7 *OR*, CDDH/SR.53, Annex, at 161-162.

⁵⁴ Finland, 7 *OR*, CDDH/SR.53, Annex, at 156-157.

protection of cultural heritage *per se*,⁵⁵ but the voting pattern and statements by participants reveal the strong possibility that Article 16 was not customary in 1977.

8.3.5. ARTICLE 17 (DRAFT ARTICLE 29⁵⁶)

The delegate of Canada suggested that draft Article 29 be deleted because it would invite foreign interference.⁵⁷ Among States that objected to the Canadian overture and supported the draft Article were Finland, Honduras, Switzerland, and the USSR.⁵⁸ The Canadian proposal was put to the vote and was rejected.⁵⁹ Seven States voted for the deletion and twenty-five abstained, while thirty voted against.⁶⁰ Canada, Iran, Ireland, Nigeria and Romania voiced concern over danger of infringement of sovereignty by the draft Article in their explanations of votes.⁶¹ A Pakistani proposal that was not different from the original draft Article in content was adopted by consensus.⁶² It can be argued that the customary law relative to forced movement of civilians was not confirmed because of split views on the draft Article.

8.3.6. ARTICLE 18 (DRAFT ARTICLES 14, 33 AND 35⁶³)

Relief organisations, such as the Red Cross, having played an essential role in civil war, Article 18 of Protocol II regarding their activities was a product of large compromise in the Diplomatic Conference. The present Article 18(1), adopted by

⁵⁵ Finland, *id*; Indonesia, 7 *OR*, CDDH/SR.53, Annex, at 159-160; The Netherlands, 7 *OR*, CDDH/SR.53, Annex, at 161-162; UK, 7 *OR*, CDDH/SR.53, Annex, at 162-163.

⁵⁶ Draft Protocol II, Article 29, 1 *OR*, Part 3, at 41.

⁵⁷ Canada, 4 *OR*, CDDH/III/40, at 94 and 14 *OR*, CDDH/III/SR.24, para. 531, at 225.

⁵⁸ Finland, 14 *OR*, CDDH/III/SR.24, para. 58, at 226; Honduras, 14 *OR*, CDDH/III/SR.24, para. 57, at 226; Switzerland, 14 *OR*, CDDH/III/SR.24, para. 53, at 225-226; USSR, 14 *OR*, CDDH/III/SR.24, para. 54, at 226.

⁵⁹ 14 *OR*, CDDH/III/SR.37, para. 19, at 391.

⁶⁰ *Id.* How States voted is not clear from the *Official Records*.

⁶¹ Canada, 14 *OR*, CDDH/III/SR.37, paras. 21-22, at 392; Iran, 14 *OR*, CDDH/III/SR. 37, paras. 26-27, at 393; Nigeria, 14 *OR*, CDDH/III/SR.37, para.23, at 392; Romania, 14 *OR*, CDDH/III/SR.37, paras. 29-31, at 393-394.

⁶² Pakistan, 4 *OR*, CDDH/427, at 95; 7 *OR*, CDDH/SR.53, para. 14, at 143-144.

⁶³ Articles 14, 33 and 35, draft additional Protocol II, 1 *OR*, Part 3, at 38, 34 and 34 respectively.

consensus,⁶⁴ originated from Pakistan's amendment which was a combination of draft Article 14 and the amended draft Article 33(1),⁶⁵ while Article 18(2) resulted from the first sentence of the amended draft Article 33(2) and adopted by consensus.⁶⁶

The *Official Records* reveal that some Third World States *par excellence* feared that relief operations could become advantageous to rebel forces. The Nigerian delegate, for example, proposed an amendment to Article 33(5) to strengthen the power of a legitimate government so that the government could "reserve the right to terminate" relief efforts.⁶⁷ He justified such discretionary power by explaining that rebels were disguised as medical staff during his own country's civil war.⁶⁸ Another point was disagreement about which relief organisations draft Article 33(1) signified. Indonesia, on the one hand, claimed that a national society of the Red Cross was the only organisation to be trusted by both warring parties to a civil war.⁶⁹ Holy See, on the other, expressed a concern that draft Article 33(1) might force relief organisations other than the Red Cross to accept its own rules.⁷⁰ As regards relief activities by civilian populations, the Dutch and Soviet representatives were doubtful that civilians could extend their rescue efforts to the sea.⁷¹ In conclusion, strong objection to the insertion of Article 18 in Protocol II among Third World States indicates that the Article was not customary at the time of its adoption.

⁶⁴ 7 *OR*, CDDH/SR.53, para. 57, at 150.

⁶⁵ Pakistan, 4 *OR*, CDDH/427, at 51; 7 *OR*, CDDH/SR.53, para. 57, at 150. Draft Article 14 was therefore deleted by consensus. See 7 *OR*, CDDH/SR.53, para. 58, at 150.

⁶⁶ 7 *OR*, CDDH/SR.53, para. 30, at 146. Before adoption, Finland had proposed to delete draft Article 33(3) to (5) and also to amend draft Article 33(2). See Finland, 4 *OR*, CDDH/435, 437, at 105, 106 respectively. This Finnish proposal for deletion was adopted by fifty-eight votes to three, with twenty-two abstentions, while the other for amendment adopted by consensus. See Kuwait, 7 *OR*, CDDH/SR.53, para. 29, at 146.

⁶⁷ Nigeria, 12 *OR*, CDDH/II/SR.95, para. 4, at 413.

⁶⁸ Nigeria, 12 *OR*, CDDH/II/SR.95, para.13, at 415.

⁶⁹ Indonesia, 12 *OR*, CDDH/II/SR.88, para. 38, at 351.

⁷⁰ Holy See, 12 *OR*, CDDH/II/SR.98, para. 1, at 455.

⁷¹ The Netherlands, 11 *OR*, CDDH/II/SR.44, para. 29, at 490; USSR, 11 *OR*, CDDH/II/SR.44, para. 27, at 490.

8.4. SUBSEQUENT PRACTICE AND *OPINIO JURIS*

8.4.1. AFGHANISTAN

Indiscriminate bombings have left Afghanistan ruined since 1989. To give a few instances, in January 1994 fighting broke out in Kabul, with massive indiscriminate bombings which resulted in the killings of civilians and also in the creation of displaced people.⁷² The President of the Security Council made a statement which “deplores the continuing large-scale fighting in Afghanistan”,⁷³ while the Afghan Red Crescent Society undertook relief operations for the displaced.⁷⁴ In 1996 the Taliban attempted to capture the capital city of Kabul and fought fiercely with its opposition, which led to numerous civilian casualties.⁷⁵ In September 1996 a Taliban plane reportedly killed forty civilians, including women and children, in a village near Kabul.⁷⁶

Relief operations have been conducted by the ICRC and Afghan National Society even when many humanitarian agencies were forced to evacuate from Afghanistan. In 1995 during the blockade of Kabul the ICRC was still able to deliver goods to the city, despite difficulties in meeting all the needs.⁷⁷ In the next year the ICRC and Afghan Red Crescent Society were able to assist civilians both in Kabul and provinces.⁷⁸

⁷² UN Commission on Human Rights, *Final report on the situation of human rights in Afghanistan submitted by Mr. Felix Ermacora, Special Rapporteur, in accordance with Commission on Human Rights resolution 1993/66*, para. 16-25, UN Doc. E/CN.4/1994/53 (14 Feb. 1994).

⁷³ “Expression of concern over large-scale fighting in Afghanistan”, S/PRST/1994/4, Press Release Security Council, Resolutions and Statements of the Security Council 1994, UN Doc. SC/5974 (12 Jan. 1995).

⁷⁴ The ICRC, *Annual Report 1994*, at 104.

⁷⁵ The ICRC, *Annual Report 1996*, at 130-2.

⁷⁶ Michael Dynes, “Taleban bomb raid kills 40 civilians”, *The Times*, Oct. 25, 1996, at 15.

⁷⁷ The ICRC, *Annual Report 1995*, at 124.

⁷⁸ The ICRC, *Annual Report 1996*, at 131-2.

Afghanistan has had rich cultural heritages since prehistoric time but many have been continuously pillaged and destroyed since the 1979 Soviet invasion.⁷⁹ When the Special Rapporteur of the UN Commission on Human Rights visited the Kabul Museum, he “was shocked” at the devastation and pillage of the museum.⁸⁰ Later another Special Rapporteur was informed by Afghan authorities that they would protect the cultural objects, but at the same time looting continued.⁸¹ In 2001, the Taliban regime destroyed the Buddha statues in the Bamiyan Valley and other cultural objects.⁸² International efforts, including those of many Muslim States, to stop the destruction could not prevent the regime from demolishing the cultural heritage.⁸³ Concerning military use of cultural sites, it was reported that a castle in Kabul was occupied by the Taliban troops who had placed a tank aiming at the city of Kabul.⁸⁴

8.4.2. BOUGAINVILLE

Apart from information on violations of civilian protection in Bougainville given in Chapter 6, it is alleged that the blockade of the island brought hardship to the islanders. The UN Commission on Human Rights took note of information given by Amnesty International and Médecins sans Frontière as well as other sources.⁸⁵ According to Amnesty International, the PNG Government established “care centres”

⁷⁹ Christopher Thomas, “Lost forever: a nation’s heritage looted by its own people,” *The Times*, Oct. 22, 1996, at 1.

⁸⁰ See UN Commission on Human Rights, *Final report on the situation of human rights in Afghanistan submitted by the Special Rapporteur, Mr. Felix Ermacora, in accordance with Commission on Human Rights resolution 1994/84*, para. 41, UN Doc. E/CN.4/1995/64 (20 Jan. 1995). See also Thomas, *id.*

⁸¹ See UN Commission on Human Rights, *Final report on the situation of human rights in Afghanistan submitted by Mr. Choong-Hyun Paik, Special Rapporteur, in accordance with Commission on Human Rights resolution 1996/75*, para. 90, UN Doc. E/CN.4/1997/59 (20 Feb. 1997).

⁸² “Taliban Demolishes 2 Huge Stone Buddhas”, *International Herald Tribune* (Hague), Mar. 5, 2001, at 6.

⁸³ *Id.*

⁸⁴ See Thomas, *supra*. note 83.

⁸⁵ UN Commission on Human Rights, *Human rights violations in Bougainville, Report of the Secretary-General*, at 4-6, UN Doc. E/CN.4/1994/60 (26 Jan. 1994).

which were supposed to protect islanders of Bougainville.⁸⁶ However, the Government, Amnesty claimed, forced local people to move in those centres, in which “constant surveillance, intimidation and persecution” were conducted.⁸⁷ Médecins sans Frontière argued that Bougainvillians were suffering from the blockade, which made medical assistance to the island difficult.⁸⁸ Responding to the allegations of Amnesty International, the PNG Government categorically denied the maltreatment of civilians in care centres,⁸⁹ and stated that it “[was] doing the best it can to protect, feed and cloth[e] [displaced families]”.⁹⁰ Replying to a letter of Médecins sans Frontière, the Government insisted the non-existence of blockade and insecurity in Bougainville caused by the rebel group, which made the transportation of medicines difficult.⁹¹ According to a report of the Special Rapporteur on extrajudicial, summary or arbitrary executions published in 1996, blockade still continued and therefore there was a lack of basic needs for islanders.⁹²

8.4.3. CHECHNYA

There was massive aerial bombardment in Grozny by the Russian forces at the beginning of hostilities which caused a number of civilian casualties and the destruction of buildings, including hospitals.⁹³ President Yeltsin announced that instructions were given not to conduct bombings which could result in civilian deaths

⁸⁶ *Id.*, at 4.

⁸⁷ *Id.*, at 4.

⁸⁸ *Id.*, at 5.

⁸⁹ UN Commission on Human Rights, *Human rights violations in Bougainville, Report of the Secretary-General*, at 20, UN Doc. E/CN.4/1995/60 (16 Feb. 1995).

⁹⁰ *Id.*, 29.

⁹¹ *Id.*, 20-1.

⁹² UN Commission on Human Rights, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Mr. Bacre Waly N'diaye, submitted pursuant to Commission resolution 1995/66, Addendum, Report by the Special Rapporteur on his mission to Papua New Guinea island of Bougainville from 23 to 28 October 1995*, para. 39, UN Doc. E/CN.4/1996/4/Add.2 (27 Feb. 1996).

⁹³ US Department of State, *Country Reports on Human Rights Practice for 1994*, at 940 (1995). See also Richard Beeston, “Lebed puts death toll at 90,000 in separatist conflict”, *The Times*, Sept. 4, 1996, at 13.

in Grozny.⁹⁴ However, even he wondered why bombing had not been stopped since he had information on bombardments in Grozny.⁹⁵ There are so many contradicting and unconfirmed reports on these bombardments, and it is difficult to ascertain what exactly occurred in Grozny from late December of 1994 to early January of 1995, but it is almost certain that there were indiscriminate bombings by the Russian forces in the city.⁹⁶

One of the most infamous massacres in Chechnya is the one which occurred in Samashki in April 1995 in which hundreds of civilians were attacked by Russian soldiers, many of whom were influenced by alcohol or drugs.⁹⁷ It was reported that there had not been Chechen rebels in the village when the Russians bombed it.⁹⁸ Young men were subjected to beating, torture and execution because of the fact that they were of military age.⁹⁹ Moreover, grenades were thrown into basements indiscriminately in which there were civilians, most of whom were women, children and old people.¹⁰⁰

The ICRC brought goods for the relief of internally displaced persons, but its effort was not always successful because of the security situation in Chechnya.¹⁰¹ At the

⁹⁴ "Yeltsin's speech on Chechnya", Text of live broadcast of Russian President Boris Yeltsin's address to the nation on the situation in Chechnya, broadcast by Ostankino Channel 1 TV, Moscow, in Russian, 1305gmt, 27 Dec. 1994, reproduced in BBC monitoring, *SWB*, Part 1, Former USSR, 3rd Ser., SU/2187, at B/6 (28 Dec. 1994).

⁹⁵ See "Russian Security Council meeting on Chechen crisis; Yeltsin calls for date to end of military operations", broadcast by Interfax news agency, Moscow, in English, 1124gmt, 6 Jan. 95, reproduced in BBC Monitoring, *SWB*, Part 1, Former USSR, 3rd Ser., SU/2195, at B/4 (7 Jan. 1995).

⁹⁶ See e.g. *Keesing's*, December 1994, at 40325; *Keesing's*, January 1995, at 40368-9.

⁹⁷ UN Commission on Human Rights, *The situation of human rights in the Republic of Chechnya of the Russian Federation, Report of the Secretary-General* [hereinafter *The situation of human rights in Chechnya*], paras. 58-60, UN Doc. E/CN.4/1996/13 (26 Mar. 1996); Thomas Goltz, "Slaughter of the innocents", *The Sunday Times*, 16 Apr. 1995, at 1. 16.

⁹⁸ Goltz, *id.*

⁹⁹ *Id.*

¹⁰⁰ See *The situation of human rights in Chechnya*, *supra*. note 97, para. 59; Goltz, *id.*

¹⁰¹ The ICRC, *Annual Report 1995*, at 206.

end of 1996 security became so problematic that all humanitarian institutions, except for the ICRC, had to evacuate from Grozny.¹⁰²

8.4.4. EL SALVADOR

Contrary to the claimed willingness of both parties to the Salvadoran Civil War to observe international humanitarian law,¹⁰³ there were a number of reports on assaults upon civilians, one of which was a massacre which took place in El Mozote which has already been mentioned in Chapter 5. The Truth Commission examined another widely known killing of civilians which occurred in Las Hojas.¹⁰⁴ It was alleged that in February 1983 sixteen peasants had been arrested and shot dead by army personnel.¹⁰⁵ Criminal proceedings ensued, but the case was dismissed by courts, among which the Supreme Court of El Salvador argued that amnesty should be applied to the accused.¹⁰⁶ The Inter-American Commission on Human Rights issued a resolution suggesting the Salvadoran Government undertake investigations,¹⁰⁷ and the Truth Commission, which found “full” or “substantial evidence” against the culprits, supported this resolution.¹⁰⁸

Among violations of international humanitarian law committed by the FMLN, the killing of mayors in the period of 1985 to 1988 is particularly noteworthy.¹⁰⁹ What is different from clandestine assassinations of mayors is that the rebel group openly regarded mayors whom the organisation claimed to have close links with the military,

¹⁰² *Id.*, at 204.

¹⁰³ See *supra*, Ch. 5.

¹⁰⁴ See Security Council, *Letter dated 29 March 1993 from the Secretary-General to the President of the Security Council transmitting the report presented on 15 March 1993 by the Commission on the Truth*, S/25500, 1 Apr. 1993, at 328-330, reproduced in UN, *The United Nations and El Salvador, 1990-1995*, Doc. 67, at 290, UN Sales No. E. 95.I.12 (1995).

¹⁰⁵ See *id.*, at 328.

¹⁰⁶ *Id.*, at 329.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*, at 329-330.

as “military targets”.¹¹⁰ The Truth Commission rightly argued that the execution of mayors by the dissident group had not only disregarded the due process of law but also ignored the fact that they were not combatants.¹¹¹ Unlike Article 50 of Protocol I, Article 13 of Protocol II does not define the term “civilians”, but Article 13(3) at least provides that the protection of civilians “unless and for such time as they take a direct part in hostilities”. Hence mayors who were killed in pursuant to the policy of the FMLN should have been civilians because they were not in combat.¹¹²

With reference to relief activities, the ICRC and Salvadoran Red Cross were able to assist civilian population throughout the Civil War in El Salvador, despite interruptions which were caused by intense military situations or by unwillingness of both the Government and rebel forces.¹¹³

8.4.5. LIBERIA

In the conflict in Liberia, there have been a number of massacres.¹¹⁴ One occasion that drew the attention of the Security Council was the massacre near Harbel on 6 June 1993 in which a number of civilians were killed and wounded. The President of the Council issued a note that expressed a shock and sadness of the Security Council over the matter and condemnation of the massacre.¹¹⁵ In addition, the representative of Liberia attributed the massacre to the National Patriotic Front of Liberia that he

¹⁰⁹ See *id.*, at 365-368.

¹¹⁰ *Id.*, at 367.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ See e.g. the ICRC, *Annual Report 1983*, at 30-31.

¹¹⁴ As to a journalist’s visual account of a massacre of civilians, see Mark Huband, *The Liberian Civil War*, at 101 (1998).

¹¹⁵ Security Council, “Note by the President of the Security Council”, UN Doc. S/25918 (9 Jun. 1993).

regarded as “a terrorist organization”.¹¹⁶ The massacre resulted in the appointment of a panel of inquiry by the Secretary-General.¹¹⁷ In September 1995, soldiers belonged to the NPFL killed “an undermined number of civilians” in Tapeta, which led to the detention of those who were allegedly involved.¹¹⁸ The NPFL announced that a national court would try the detained,¹¹⁹ but there is no available information on the trials, if any.

Under such extreme violence, the undertaking of relief operations depended upon the situation. The ICRC was one of the few organisations which was able to conduct relief activities throughout the civil war, but unlimited access to civilians was not always possible. The year 1996 in particular saw complete anarchy in Liberia, and all humanitarian institutions, including the ICRC, withdrew from the lawless State.¹²⁰ The ICRC considered the resumption of humanitarian assistance unlikely without political settlement, for resources to relieve civilians turned to be beneficial to contending factions which looted those supplies.¹²¹ When ICRC delegates returned to Liberia in 1997, however, the organisation found assistance unnecessary because of the return of peace to the country.¹²²

¹¹⁶ Security Council, *Letter dated 8 June 1993 from the representative of Liberia to the Secretary-General*, SCOR 48th Sess., Supp. for Apr., May and Jun. 1993, at 323, UN Doc. S/25919 (9 Jun. 1993).

¹¹⁷ Security Council, *Letter dated 4 August 1993 from the Secretary-General to the President of the Security Council*, SCOR, 48th Sess., Supp. for Jul., Aug. and Sept. 1993, at 156, UN Doc. S/26265 (7 Aug. 1993). It appears that the panel has not published its findings.

¹¹⁸ Security Council, *Thirteenth progress report of the Secretary-General on the United Nations Observer Mission in Liberia*, para. 52, UN Doc. S/1995/881 (23 Oct. 1995).

¹¹⁹ See *id.*

¹²⁰ The ICRC, *Annual Report 1996*, at 40-41; see also Martin Fletcher and Peter Capella, “US force sails for Liberia as anarchy imperils rescue”, *The Times*, Apr. 13, 1996, at 13.

¹²¹ The ICRC, *Annual Report 1996*, at 41.

¹²² The ICRC, *Annual Report 1997*, at 44, 46.

8.4.6. RWANDA

According to a report by the UN High Commissioner for Human Rights to Rwanda, there were about 1,650,000 internally displaced persons and more than half a million refugees.¹²³ Among them were those who were compelled to move with the advancement of front lines.¹²⁴ The security of the places where displaced persons and refugees were accommodated was not adequate, as abductions and killings were reported inside those camps.¹²⁵ There were occasions in which humanitarian assistance could not be conveyed, which resulted in the starvation of those who needed it.¹²⁶ Water was contaminated by the bodies which were “thrown into rivers and lakes”.¹²⁷

The presence of delegates of the ICRC was able to spare the lives of those who would have been otherwise killed, but the Committee admitted that it had been able to protect the civilians “only on a very limited scale”.¹²⁸ As far as internally displaced persons and refugees were concerned, the International Red Cross,¹²⁹ the UNHCR and other organisations¹³⁰ brought assistance to them.

¹²³ Security Council, *Letter dated 21 July 1994 from the Secretary-General to the President of the Security Council transmitting the report on violations of international humanitarian law in Rwanda during the conflict, prepared on the basis of the visit of the United Nations High Commissioner for Human Rights to Rwanda (11-12 May 1994)*, para. 11, UN Doc. S/1994/867 (25 Jul. 1994) [hereinafter *The report of the UNHCR on Rwanda*], reproduced in UN *The United Nations and Rwanda 1993-1996*, Doc. 77, at 313, UN Sales No. E.96.I.20 (1996). According to the ICRC’s *Annual Report*, there were two million refugees and half a million displaced persons at the end of 1994. The ICRC, *Annual Report 1994*, at 54.

¹²⁴ *The report of the UNHCR on Rwanda*, *id.*, para. 12. See also the ICRC, *id.*

¹²⁵ *The report of the UNHCR on Rwanda*, *id.*, para. 13.

¹²⁶ *Id.*, para. 14.

¹²⁷ *Id.*, para. 15.

¹²⁸ The ICRC, *Annual Report 1994*, at 55.

¹²⁹ See *id.*, at 55-7.

¹³⁰ As to activities of the UNHCR and other organisations in Rwanda, see generally General Assembly, *Update on the Rwandan emergency by the Executive Committee of the Programme of the United Nations High Commissioner for Refugees*, paras. 16-40, UN Doc. A/AC.96/825/Add.1 (26 Sept. 1994), reproduced in UN, *The United Nations and Rwanda 1993-1996*, Doc. 90, at 337, Sales No. E.96.I.20 (1996).

8.4.7. SOMALIA

Civilians were affected to a considerable degree in Somalia, as “The indiscipline of the combatants and the total lack of respect for the most elementary rules of combat took a heavy toll of the civilian population...”.¹³¹ At the beginning of the civil war in 1988, the northern part of Somalia suffered from indiscriminate killings of civilians, which was denied by the Somali Government.¹³² In September 1990 the European Community condemned killings of twenty people which were conducted by the Somali forces in Berbera.¹³³ Ferocious fighting ensued the collapse of the Government in Mogadishu, and in the contention of late November 1991 alone one thousand civilians were estimated to have been indiscriminately slaughtered.¹³⁴ At that time only a handful of organisations, including Médecins Sans Frontière and the ICRC, were coping with a flood of injured persons in Mogadishu.¹³⁵

The ICRC undertook what it regarded as “its biggest relief operation since the Second World War” in Somalia,¹³⁶ but such efforts were subject to disruption because of the worsening of the situation during 1992.¹³⁷ Nevertheless, the ICRC was able to downsize its relief activities in 1993, as situations greatly improved with the start of distribution of food by other institutions.¹³⁸ Little attention has been paid to Somalia since the complete withdrawal of the UN forces from the country, but relief efforts

¹³¹ The ICRC, *Annual Report 1991*, at 35.

¹³² *Keesing's*, Jul. 1988, at 36005. See also *Keesing's*, Jun. 1989, at 36757.

¹³³ *Letter dated 14 September 1990 from the Permanent Representative of Italy to the United Nations addressed to the Secretary-General*, at 2, UN Doc. A/45/517 (18 Sept. 1990).

¹³⁴ *Keesing's*, Jul. 1991, at 38564.

¹³⁵ *Id.*

¹³⁶ The ICRC, *Annual Report 1992*, at 44.

¹³⁷ *Id.*, at 46.

¹³⁸ The ICRC, *Annual Report 1993*, at 85-86.

have been continually made,¹³⁹ despite a report of “severe malnutrition” of civilians in 1995.¹⁴⁰

8.4.8. SRI LANKA

Civilians in the northern part of Sri Lanka in particular have suffered severely from continuing civil conflict. The Government of Sri Lanka has provided those civilians with food and other items necessary for survival, but the actual conveyance of the goods has been conducted by the ICRC.¹⁴¹ The Sri Lankan Red Cross Society, in cooperation with the ICRC, has also played a significant part in helping displaced people in the war-torn State.¹⁴² In spite of these efforts made by the International Red Cross, it is reported that many civilians were suffering from malnutrition in 1997, because of worsening situations.¹⁴³ In 1999, the deliveries of assistance as well as civilian movements were blocked due to fighting in the northern part of Sri Lanka.¹⁴⁴

Sri Lanka is a multi-religious society and religious sites have been targets of Tamil forces. The Tamils and Muslims who used to have amicable relationships have had clashes since 1985,¹⁴⁵ and on two separate occasions in 1990 the LTTE killed one hundred Muslims in each mosque while prayer was in progress.¹⁴⁶ The LTTE however later denied its direct involvement in the bombing of August 3.¹⁴⁷

¹³⁹ See the ICRC, *Annual Reports 1994*, at 87; *1995*, at 86-87; *1996*, at 93; *1997*, at 100-101; *1998*, at 111-115; *1999*, at 126-127.

¹⁴⁰ The ICRC, *Annual Report 1995*, at 87.

¹⁴¹ See the ICRC, *Annual Reports 1990*, at 17; *1991*, at 76; *1992*, at 67; *1993*, at 12; *1994*, at 113-114; *1995*, at 133; *1996*, at 141; *1997*, at 157; *1998*, at 173-174; *1999*, at 169.

¹⁴² The ICRC, *Annual Reports 1990*, at 17; *1991*, at 76; *1992*, at 67-68; *1993*, 113-114; *1994*, at 114; *1995*, at 135-136; *1996*, at 141-142; *1997*, at 158, 160; *1998*, at 174-175; *1999*, at 171.

¹⁴³ The ICRC, *Annual Report 1997*, at 156-157.

¹⁴⁴ The ICRC, *Annual Report 1999*, at 169.

¹⁴⁵ See Hellmann-Rajanayagam, *The Tamil Tigers*, at 89-92 (1994).

¹⁴⁶ See UN Commission on Human Rights, *Report on the visit to Sri Lanka by three members of the Working Group on Enforced or Involuntary Disappearances (7-18 October 1991)*, para. 35, UN Doc. E/CN.4/1992/18/Add.1 (8 Jan. 1992).

¹⁴⁷ Hellmann-Rajanayagam, *supra*. note 148, at 90 and n.151.

8.4.9. THE FORMER YUGOSLAVIA

There were massive violations of the protection of civilians. One of well-known incidents was the bombing of a market in Sarajevo in February 1994, resulting in sixty-nine deaths and more than two hundred injuries.¹⁴⁸ The Bosnian Serbs were suspected of the attack, even though their leader denied such allegation.¹⁴⁹ The same market was bombed by a shell again in August 1995, which left at least thirty-three dead.¹⁵⁰ The EU regarded the assault as “barbaric”, and the USA had condemned the Bosnian Serbs before the responsibility for the attack was established.¹⁵¹

Civilian populations inside “ethnic enclaves”, which were environed by opposing forces, became short of food and medicines, and means of transportation of relief assistance were not immune from attacks.¹⁵² One of the “ethnic enclaves” was Srebrenica, which had been encircled by the Serbs who took control of the town in July 1995.¹⁵³ During the siege, food became scarce, as few humanitarian relief convoys were allowed in.¹⁵⁴ In 1993 sick and wounded people were evacuated to Tuzla under the ICRC, which was able to deliver goods, such as medicine and food to people in Srebrenica.¹⁵⁵

There were a number of reports about assaults against cultural objects and places of worship, which would not be incredible if one considers the nature of the conflict to

¹⁴⁸ Hilare McCoubrey and Nigel D. White, *International Organizations and Civil Wars*, at 107 (1995); Laura Silber and Allan Little, *The Death of Yugoslavia*, at 343-5 (1995).

¹⁴⁹ Silber and Little, *id.*, at 343-5.

¹⁵⁰ Stacy Sullivan, “Shell in Sarajevo market kills 33”, *The Times*, Aug. 29, 1995, at 1.

¹⁵¹ Michael Dynes and Ian Brodie, “Germany leads the condemnation of market massacre”, *The Times*, Aug. 29, 1995, at 8.

¹⁵² McCoubrey and White, *supra*. note 148, at 114, 131.

¹⁵³ See generally Silber and Little, *supra*. note 148, at 293-305.

¹⁵⁴ *Id.*, at 294-295.

¹⁵⁵ The ICRC, *Annual Report 1993*, at 151.

be religious and ethnic.¹⁵⁶ For instance, a bridge in Mostar, which was built in the sixteenth century and renowned for its beauty, was destroyed by artillery bombings of the Bosnian Croats in November 1993.¹⁵⁷ A Bosnian radio programme condemned the destruction of the bridge,¹⁵⁸ while its Croatian counterpart claimed that it was used “on a daily basis” by the Muslims for military transportation.¹⁵⁹ The Government of Bosnia-Herzegovina condemned the Croats for the destruction of the Mostar bridge.¹⁶⁰ Apart from the destruction of this well-known bridge, there was a report of art objects pillaged throughout the former Yugoslavia which were brought to, and sold in the UK.¹⁶¹

“Ethnic cleansing” took place in the former Yugoslavia,¹⁶² and the ICRC resorted to publicly appeal to the warring groups not to transfer civilians in a forcible and brutal way.¹⁶³ Among the examples of “ethnic cleansing” was the forcible movement of Muslim population from Srebrenica. After the fall of the town, forty thousand Muslims, one estimate claims, fled the town.¹⁶⁴

¹⁵⁶ McCoubrey and White, *supra*. note 148, at 117.

¹⁵⁷ Silber and Little, *supra*. note 148, at 323.

¹⁵⁸ “Sarajevo, Zagreb radios report destruction of Mostar’s Old Bridge”, broadcast by Radio Bosnia-Herzegovina, Sarajevo, in Serbo-Croat, 1400gmt, 9 Nov. 1993, *reproduced in* BBC Monitoring, *SWB*, Part 2: Central Europe, the Balkans, 3rd Ser., EE/1843, at C/6 (11 Nov. 1993).

¹⁵⁹ “Sarajevo, Zagreb radios report destruction of Mostar’s Old Bridge”, broadcast by Croatian Radio, Zagreb, in Croatian, 1400gmt, 9 Nov. 1993, *reproduced in* BBC Monitoring, *SWB*, Part 2: Central Europe, the Balkans, 3rd Ser., EE/1843, at C/7 (11 Nov. 1993).

¹⁶⁰ “Bosnian authorities protest over destruction of Mostar Old Bridge”, broadcast by Radio Bosnia-Herzegovina, Sarajevo, in Serbo-Croat, 2100gmt, 9 Nov. 1993, *reproduced in* BBC Monitoring, *SWB*, Part 2: Central Europe, the Balkans, 3rd Ser., EE/1843, at C/7 (11 Nov. 1993).

¹⁶¹ Stephen Grey, “Bosnian art plunder sold in Britain”, *The Sunday Times*, 16 Jun. 1996, at 1.7.

¹⁶² As to “ethnic cleansing” and international humanitarian law, see Yves Sandoz, “The International Committee of the Red Cross and the Law of Armed Conflict Today”, *International Peacekeeping*, Winter 1997, at 86, 88-90.

¹⁶³ “Bosnia-Herzegovina: ICRC’s solemn appeal to all parties to the conflict”, *IRRC*, Sept.-Oct. 1992, at 492, 492-493.

¹⁶⁴ Silber and Little, *supra*. note 148, at 304.

8.5. EXAMINATION OF CUSTOMARY STATUS

8.5.1. ARTICLE 13 AND ARTICLE 4(2)(d)

The above study shows that the protection of civilians is not obeyed by belligerents in many of the recent conflicts.¹⁶⁵ Even in the Salvadoran Civil War, in which Protocol II was *de facto* applied, there were violations of this protection.¹⁶⁶ Massive violations of civilian lives have been observed in Liberia, Rwanda, Somalia and the former Yugoslavia. In Chechnya there were indiscriminate bombardments at the beginning of the hostilities. Violations of the laws of war may be often exaggerated, but the above conflicts show that the protection of civilian population has been continuously breached. McCoubrey and White write:

As a general principle [Article 13(1)] may sound decidedly utopian; it is important to stress that the principle neither is, nor is intended to be, in any sense talismanic.¹⁶⁷

According to *the ICRC's Commentary*, "Article 13 codifies the general principles ... [of the protection of civilians] ... already recognized by customary international law and by the laws of war as a whole".¹⁶⁸ It is true that the general principle of the protection of civilians was codified in Article 13, but it is questionable that the principle was "already recognized by customary international law". As discussed in Chapter 2, the general principles can be transformed into custom only when the requirements of practice and *opinio juris* are met. As there have been so many

¹⁶⁵ See also McCoubrey and White, *supra*. note 148, at 196.

¹⁶⁶ See also *supra*. Ch. 6.

¹⁶⁷ McCoubrey and White, *supra*. note 148, at 105. Note that the commentators did not make this statement in the context of customary law.

¹⁶⁸ *The ICRC's Commentary*, para. 4761.

violations of the principle of civilian protection, it remains to be moral as long as a State in internal conflict is not a party of Protocol II.¹⁶⁹

There is one problem left for discussion, namely terrorism. Acts of terrorism should be suppressed because they are contrary to the principles of humanity and distinction, but the problem of terrorism in civil war is “one man’s terrorism is another man’s legitimate act for freedom”.¹⁷⁰ The Rome Statute, while considering the protection of civilians to be “serious violations of the laws and customs”, does not refer to terrorism.¹⁷¹ Furthermore, the interpretation of terroristic acts are not well-established.¹⁷² Article 13(2) provides that “Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited” and this would be the only definition of terrorism available in Protocol II. For example, if a rebel group places a bomb in a crowded bus whose explosion results in the deaths of all passengers, will it be regarded as an act of terrorism according to the definition given by Article 13(2)?¹⁷³ First, it would be difficult to ascertain whether spreading terror was the primary purpose of the rebels to lay the bomb. Second, the dissidents may legitimise the bombing, believing that it was not their “primary purpose to spread terror among civilian population”. Last, the definition of “terror” is not clearly established in international law,¹⁷⁴ and therefore it is not certain if, in the above hypothetical case, terror is a situation where other commuters feel uneasy to take the bus every morning or whether they decide not to use the bus anymore.

¹⁶⁹ As a treaty provision, the principle has legal value. But see Antonio Cassese, “The Geneva Protocols of 1977 on the Humanitarian Law of Armed Conflict and Customary International Law”, 3 *UCLA Pacific Basin Law Journal* 55, 112 (1984).

¹⁷⁰ See McCoubrey and White, *supra*. note 148, at 68.

¹⁷¹ Article 8(2)(e)(i).

¹⁷² See Frits Kalshoven in “Should the Laws of War Apply to Terrorists?”, *Proceedings of ASIL* 109, 117 (1985).

¹⁷³ McCoubrey and White consider certain conducts, e.g. “leaving bombs in crowded shopping centres” to be “almost universally ... classified as ‘terrorist’.” McCoubrey and White, *supra*. note 148, at 68.

Another related problem would be a proliferation of the use of the term “terrorism”. The Special Rapporteur’s report on Afghanistan referred to terrorist acts committed by both the Government and rebel forces, but he seemed to have included indiscriminate attacks against civilians into a category of terrorism.¹⁷⁵ Thus, for instance, in his 1990 report, he gave an account of dissidents’ missile attacks on Kabul that killed numerous number of civilians.¹⁷⁶ The opposition group explained that missiles were targeted to military objects but the Special Rapporteur dismissed this claim because he eyewitnessed that the rockets “mostly” had struck civilians, “regardless of their target”.¹⁷⁷ He, therefore, failed to explain whether it was the rebel’s primary purpose to spread terror among civilians in Kabul. Indeed, he rejected the contention of the dissidents that they were attacking military targets. In conclusion, Article 4(d) and the second paragraph of 13(2) are not customary because of the difficulty in interpreting the term terrorism¹⁷⁸ even though such acts are contrary to the principles of humanity and distinction.

8.5.2. ARTICLE 14

The prohibition of starvation might be implicit in Common Article 3, which provides the humane treatment of non-combatants, but Article 14 of Protocol II is a new specific rule in non-international armed conflict.¹⁷⁹ The problem of Article 14 is that the prohibition of starvation is limited, as *the ICRC’s Commentary* stated that: “Starvation is prohibited as a method of combat, i.e., when it is used as a weapon to

¹⁷⁴ See *id.*

¹⁷⁵ E.g. UN Commission on Human Rights, *Report on the situation of human rights in Afghanistan prepared by the Special Rapporteur, Mr. Felix Ermacora, in accordance with Commission on Human Rights resolution 1989/67*, paras. 72-73, UN Doc. E/CN.4/1990/25 (31 Jan. 1990).

¹⁷⁶ UN Commission on Human Rights, *Report on the situation of human rights in Afghanistan prepared by the Sepcial Rapporteur, Mr. Fenlix Ermacora, in accordance with Commission on Human Rights resolution 1990/53*, para. 69, UN Doc. E/CN.4/1991/31 (28 Jan. 1991).

¹⁷⁷ *Id.*

¹⁷⁸ But see Cassese, *supra*. note 169, at 111.

destroy the civilian population”.¹⁸⁰ Among the civil wars which have been examined, the Civil War in the former Yugoslavia should be the only occasion when starvation was used as an instrument to cause the sufferings of civilians. In the northern part of Sri Lanka people are reportedly suffering from malnutrition, but it is not certain whether the Sri Lankan Government deliberately takes measures to destroy the population of the region.

One author claimed the illegality of the ECOWAS blockade of part of Liberian territory under control of the NPFL, which resulted in the starvation of people in that area,¹⁸¹ but this contention is based on his claim that the Liberian Civil War was internationalised. The present writer has already held that this conflict is in the scope of Common Article 3, which does not provide siege warfare. Should the war be in the ambit of Protocol II, it would be still difficult to regard the blockade as contrary to the treaty, for the application of Article 14 of Protocol II is limited, as has been already discussed. It appears that the embargo was introduced not to starve civilians but to reduce the NPFL to submission,¹⁸² and Article 14 seems to be inapplicable to the given situation.

In conclusion, except for massive violations in the former Yugoslavia, there is no evidence to suggest that starvation has been used against civilians “as a means of combat”. States and rebels may have been refraining from such conduct, but there is no *opinio juris* to explain such abstention. Therefore, Article 14 has not become customary.¹⁸³

¹⁷⁹ *The ICRC's Commentary*, para. 4794.

¹⁸⁰ *Id.*, para. 4799.

¹⁸¹ See K. Oteng Kufuor, “Starvation as a Means of Warfare in the Liberian Conflict”, 41 *NILR* 313 (1994).

¹⁸² See *id.*, at 315.

¹⁸³ See Cassese, *supra*. note 169, at 110.

8.5.3. ARTICLE 15

Virtually no information is available on the protection of facilities, such as dams, dykes and nuclear electrical generating stations, and the nonexistence of information, therefore, neither favours nor denies the formation of customary law.¹⁸⁴

8.5.4. ARTICLE 16

The protection of cultural objects and of places of worship is one of the most underresearched areas of international humanitarian law, and few scholars discuss State practice and *opinio juris* concerning this topic.¹⁸⁵ Apart from practice and *opinio juris* about the destruction of cultural objects in Afghanistan and the former Yugoslavia, little information is available on the protection of cultural objects,¹⁸⁶ and in conclusion Article 16 of Protocol II has not become customary.¹⁸⁷

The 1954 Hague Convention on cultural property exists separately from Protocol II.¹⁸⁸ According to Article 19 of the Hague Convention, this treaty is applicable “In the event of an armed conflict not of an international character occurring within the territory of one of the High Contracting Parties...”. This definition of civil conflict is almost identical to that of Common Article 3; neither Articles precisely defines such conflict.¹⁸⁹ Therefore, the ambit of application of the Hague Convention is broader

¹⁸⁴ See *id.*

¹⁸⁵ For instance Tanja in his article briefly noted the destruction of cultural objects in the Gulf War and the conflict in the former Yugoslavia. See Gerard J. Tanja, “Recent Developments Concerning the Law for the Protection of Cultural Property in the Event of Armed Conflict”, 7 *Leiden Journal of International Law* 115, 115-116 (1994).

¹⁸⁶ Information on the protection of cultural objects in Sri Lanka is fragmentary.

¹⁸⁷ But see Cassese, *supra*. note 169, at 112.

¹⁸⁸ Article 16 of Protocol II provides “Without prejudice to the provisions of the [1954] Hague Convention...”.

¹⁸⁹ Jiri Toman, *The Protection of Cultural Property in the Event of Armed Conflict: Commentary on the Convention for the Protection of Cultural Property in the Event of Armed Conflict and its Protocol, signed on 14 May 1954 in The Hague, and on other instruments of international law concerning such protection*, at 210 (1996).

than Protocol II, which sets four requirements in its Article 1.¹⁹⁰ Notwithstanding the possibility of wider application, the above study does not show that the Convention has been invoked. Furthermore, the ratification of the 1954 Hague Convention is not as smooth as 1977 Protocol II, and such “specially affected States” as Afghanistan, Algeria, China, Sri Lanka, Japan, the UK and the USA have not ratified the treaty.¹⁹¹ In subsequence, one can maintain that the protection of cultural objects remains to be treaty based.¹⁹²

8.5.5. ARTICLE 17

Forcible transfer of civilian population has become a grave problem particularly in the conflicts in Rwanda and the former Yugoslavia. Indiscriminate bombardments in Afghanistan and Chechnya also caused displaced people. These forced movements of civilians have been condemned by States, the UN and the ICRC, and the Rome Statute inserts the forcible displacement of civilians in a list of “serious violations of the laws and customs”.¹⁹³ Yet there is practice of violating this prohibition of compelling non-combatants to move, and therefore the customary law prohibiting such movements has not been established yet.

8.5.6. ARTICLE 18

It appears to the present writer that there are two separate provisions concerning relief activities: paragraph 2 of Common Article 3 and Article 18 of Protocol II. Common Article 3 explicitly confers the right to initiative to the ICRC, and is more detailed

¹⁹⁰ *Id.*, at 386-7.

¹⁹¹ As at August 4, 2000, 99 States were parties to the Convention. See UNESCO, “Convention and Protocol for the Prohibition of Cultural Property in the Event of Armed Conflict (The Hague, 14 May 1954)” at http://www.unesco.org/culture/laws/hague/html_eng/page9.shtml.

¹⁹² But see Cassese, *supra*. note 169, at 108-9, 112.

¹⁹³ Article 8(2)(e)(viii).

than Protocol II in a sense that the Protocol does not mention the role of the ICRC.¹⁹⁴ As Common Article 3 is customary on the whole and its threshold is lower than that of Protocol II, the ICRC can take initiative in any non-international armed conflict.¹⁹⁵ Despite the ICRC's right to initiative, the receiving government is not committed to accepting such offer.¹⁹⁶ However, some scholars disagree. For instance, one scholar argues that Common Article 3(1)(a) implicitly obliges a government and rebel organisation to accept humanitarian relief.¹⁹⁷ Müllerson, while admitting the possibility that legitimate governments or other groups can refuse humanitarian assistance during internal conflict, contends that "they cannot do so without any adverse consequences for them" and further that "as an extreme measure, assistance can be given even without consent".¹⁹⁸

The fact is that the ICRC is almost always allowed to undertake relief operations in civil conflicts,¹⁹⁹ but whether it can fully function depends on the intensity of the conflicts and also on the will of the parties concerned. In El Salvador the ICRC was able to function well, while humanitarian organisations, including the ICRC, had to withdraw from Liberia for security reasons. Therefore, it can be held that, though States can refuse assistance, it does not imply that States do often refuse it.

¹⁹⁴ See Georges Abi-Saab, "Non-International Armed Conflicts", in UNESCO, *International Dimensions of Humanitarian Law* 217, 232 (1988) (stating that "this omission [of the role of the ICRC in Protocol II] cannot change the legalities of the situation").

¹⁹⁵ See *id.* Having said so, certain magnitude is indispensable for Common Article 3 to be applied to civil conflict. See *supra*. 5.2. The Regime of the 1949 Geneva Convention in the 1950s and 1960s.

¹⁹⁶ See *Pictet's Commentary*, at 58. See also Abi-Saab, *supra*. note 194, at 224-225; James E. Bond, *supra*. note 16, at 132. Compare with "The ICRC and internally displaced persons", *IRRC*, Mar.-Apr. 1995, at 181, 188.

¹⁹⁷ John Baloro, "International Humanitarian Law and Situations of Internal Armed Conflicts in Africa", 4 *RADIC* 449, 462 (1992).

¹⁹⁸ Reis Müllerson, "International Humanitarian Law in Internal Conflicts", *Journal of Armed Conflict Law* 109, 128 (1997).

¹⁹⁹ See "The ICRC and internally displaced persons", *supra*. note 196, at 190; Claudio Caratsch, "Humanitarian Design and Political Interference: Red Cross Work in the Post-Cold War Period", 11 *International Relations* 301, 310 (1993).

Relief organisations, other than the ICRC, play an essential part in recent civil conflict, and these organisations can be supplemental to each other. The above examination of the wars reveal that National Red Cross Societies play an important role, along with the ICRC. The UNHCR helps specifically refugees who have fled outside their original State.²⁰⁰ International humanitarian law, on the other hand, does not categorise the refugees, and particularly those who are displaced within the boundaries of a State are under protection of Common Article 3 and Protocol II.²⁰¹ Therefore ICRC's right to initiative stemming from Common Article 3 includes the rendering of its services to internally displaced persons.²⁰²

The Security Council has often referred to humanitarian assistance in its resolutions. For example, under Resolution 788 (1992), "Member States, the United Nations system and humanitarian organizations" were "commend[ed]" to "provid[e] humanitarian assistance to the victims of the conflict in Liberia".²⁰³ The 1993 Cotonou Agreement also states that "The Parties agree that every effort should be made to deliver humanitarian assistance to all Liberians, particularly children".²⁰⁴

Notwithstanding various activities undertaken by various international organisations, the contention that Article 18 has become customary is doubtful. First, there are occasions where relief organisations cannot conduct their activities, and even the ICRC is no exception. Second, even if a State allows humanitarian institutions to undertake operations, it is difficult to determine whether she does so out of legal

²⁰⁰ See Baloro, *supra*. note 197, at 467-469, 470.

²⁰¹ See "The ICRC and internally displaced persons", *supra*. note 196, at 187-189; Frédéric Maurice and Jean de Courten, "ICRC activities for refugees and displaced civilians", *IRRC*, Jan.-Feb. 1991, at 9, 13; Françoise Krill, "ICRC action in aid of refugees", *IRRC*, Jul.-Aug. 1988, at 328, 335.

²⁰² See "The ICRC and internally displaced persons", *id.*, at 190; also Baloro, *supra*. note 197, at 470.

²⁰³ S/RES/788 (1992), SCOR, 47th Year., Res. and Dec., 1992, at 99, Article 12.

²⁰⁴ Security Council, *Letter dated 6 August 1993 from the representative of Benin to the Secretary-General*, U, SCOR 48th Year., Supp. for Jul., Aug. and Sept. 1993, at 158, UN Doc. S/26272 (9 Aug. 1993), Annex, Agreement, Article 17, Section E.

obligation or out of humanitarian concern. In the former Yugoslavia, all parties agreed to comply with international humanitarian law, and in El Salvador the parties to the conflict were applying Protocol II almost *de jure*. However, apart from these examples, *opinio juris* about the acceptance of relief activities is not easy to obtain. Third, as there are so many organisations which offer their services to the situation of civil war that the examination of all their activities would be simply impossible. In conclusion, Article 18 of Protocol II is not customary,²⁰⁵ even though in practice humanitarian organisations are allowed to perform their functions in many conflicts. Besides, Common Article 3 remains to be customary, despite difficulties that the ICRC have faced in certain recent civil wars.

²⁰⁵ See Cassese, *supra*. note 169, at 110.

CHAPTER 9

CUSTOM AND “IMPLEMENTATION”¹

9.1. INTRODUCTION

Protocol II has only one provision for its implementation, namely Article 19 regarding dissemination, and discussion on this Article would suffice for the ascertainment of the customary status of Article 19. However, methods for implementation is so important for the actual application of international humanitarian law that analysis on those methods needs to be conducted in this Chapter.

In this Chapter, to avoid confusion, the word “implementation” *with quotation marks* includes implementation, enforcement and reconciliation while implementation without quotation marks signifies implementation only. The present author interprets “implementation” as the whole process of implementation, enforcement and reconciliation. Implementation is a system to secure the application of international humanitarian law before a breach takes place.² Enforcement is a set of rules to rectify a violation of the law which has already been carried out.³ There are a number of devices, both legal and non-legal, concerning implementation and enforcement, but in this thesis those of a legal nature are chiefly considered, i.e. dissemination and the ICRC for implementation, and reciprocity, reprisal, war crimes, internal reports and UN action for enforcement. The third category of “implementation” is reconciliation, which is the process of rebuilding a devastated State by lenient means of law and politics.

¹ This Chapter is based on the present author’s research paper submitted to the ICRC in 1997 for the Summer Course on International Humanitarian Law held in Warsaw in August 1996.

² See G.I.A.D. Draper, “The implementation and enforcement of the Geneva Conventions of 1949 and of the two Protocols of 1978”, 164 *Recueil des Cours* 1, 9 (1979-III).

9.2. TREATY OBLIGATIONS AND “IMPLEMENTATION”

Today almost all States are parties to the Geneva Conventions, and this fact alone has a significance in the States' willingness to accept the treaties.⁴ The ratification of Protocol II is not as prevalent as that of the Geneva Conventions, but the figure should not be underestimated; 149 States, including Britain, China, Russia and France, are parties to the Protocol.⁵ Despite these figures, international humanitarian law is not always “implemented”, and one may be tempted to conclude that the law is extremely vulnerable to policy of the State. In addition, because the government and rebels are reluctant to enforce international humanitarian law, an approach which involves the creation of international instrument(s) as the key to the “implementation” of the law of armed conflict, may be appealing. Obradovic, for instance, proposed that a special agency be established in the United Nations with special but optional competences over civil war.⁶ However, treaty obligations require the State to establish domestic mechanisms for “implementation”.

As provided by Article 26 of the Law of Treaties, it is fundamental that a treaty “is binding upon the parties to it and must be performed by them in good faith”.⁷ The significance of this principle, namely *pacta sunt servanda*, is confirmed by the ICJ.⁸

³ See *id.*

⁴ See “Geneva Conventions of 12 August 1949 and Additional Protocols of 8 June 1977: ratifications, accessions and successions” (as at 29 Aug. 2000), which can be found in the ICRC’s homepage at <http://www.icrc.org/>.

⁵ *Id.*

⁶ Konstantin Obradovic, “Enquiry Mechanisms and Violations of Humanitarian Law”, in Independent Commissions on International Humanitarian Issues, *Modern Wars* 121, 139-140 (1986). However, his definition of international conflict expands to “an ‘internal’ conflict which entails *any* form of intervention by foreign power(s) automatically leads to the application of the Geneva Conventions” (emphasis added). It seems to the present writer that almost all the civil wars are international according to his interpretation. See *id.*, at 140.

⁷ Malcolm Shaw, *International Law*, at 633 (4th ed. 1997); Edward Kwakwa, *International Law of Armed Conflict*, at 171, 172 (1992).

⁸ *Nuclear Tests (Australia v. France)*, Judgment of 20 December 1974, ICJ Report 1974, p. 253, para. 49; *Nuclear Tests (New Zealand v. France)*, Judgment of 20 December 1974, ICJ Report 1974, p. 457, para. 46. The Court referred to these cases in *Case Concerning Military and Paramilitary Activities in and*

Besides, Article 27 of this Convention provides that domestic law may not be invoked by a party to a treaty “as justification for its failure to perform a treaty”. In addition to the Vienna Convention, Common Article 1 reads:

The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.⁹

According to *Pictet's Commentary*, the State shall “prepare ..., in peacetime, the legal, material or other means of loyal enforcement of the Conventions” and, should the State fail to execute its duties, other parties to the Convention shall direct the failing State's attitude to respect for these Conventions.¹⁰ Besides, the expression “in all circumstances” signifies that “the application of the Convention does not depend on *the character of the conflict*”.¹¹ It is therefore logical to maintain that Common Article 1 accommodates the basis of “implementation”, and that it is applicable to non-international armed conflict.¹² Thus, one can hold that the parties to the Geneva Conventions and/or Protocol II, are obliged to implement these treaties “in good faith” and to introduce domestic law, if necessary.¹³

against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, ICJ Reports 1984, p. 392, para. 60.

⁹ On Common Article 1, see Adam Roberts, “The Laws of War: Problems of Implementation in Contemporary Conflicts”, in 1 *European Commission, Law in humanitarian crises* 13, 31-32 (1995); Kwakwa, *supra*. note 7, at 180.

¹⁰ *Pictet's Commentary*, at 26.

¹¹ *Id.*, at 27. Emphasis added.

¹² See Umesh Palwankar, “Measures available to States for fulfilling their obligation to ensure respect for international humanitarian law”, *IRRC*, Jan.-Feb. 1994, at 9, 12; Denise Plattner, “The penal repression of violations of international humanitarian law applicable in non-international armed conflicts”, *IRRC*, Sept.-Oct. 1990, at 409, 419.

¹³ See G.I.A.D. Draper, *supra*. note 2, at 20 (1979-III).

9.3. IMPLEMENTATION¹⁴

Contrary to enforcement which is not explicitly included in Common Article 3 and Protocol II, the two major devices for the implementation of international humanitarian law, namely the ICRC and dissemination, are stipulated in them. However, the implementation of international humanitarian law, in particular its dissemination, is not always easy, because States as well as rebels are usually reluctant to implement international humanitarian law. It is hence necessary to show why the two devices for implementation are so important as to be willingly accepted by both States and rebels.

9.3.1. DISSEMINATION

9.3.1.1. DIPLOMATIC CONFERENCE

In order to prevent violations of humanitarian law, the sufficient dissemination of the law is essential.¹⁵ In general, peacetime dissemination is necessary since it takes time for the law to be instructed in a State.¹⁶ Common Article 1 introduces the necessity for the Contracting Parties to “respect and to ensure respect” of international humanitarian law, which is materialised by Article 19 of Protocol II. Article 19 reads:

This Protocol shall be disseminated as widely as possible.

Debate about draft Article 37,¹⁷ which provided the dissemination of Protocol II, in the Diplomatic Conference is not noticeable, even though the *Official Records* reveal the support by Canada, the USA and the UK.¹⁸ The Pakistani delegate proposed to delete

¹⁴ It is worth mentioning that neither Common Article 3 nor Protocol II provides the system of Protecting Powers, mainly because the legitimate government would regard it as interference. See Kwakwa, *supra*. note 7, at 22-25 (Kwakwa is critical about a lack of supervisory or implementation mechanism in Common Article 3 and Protocol II).

¹⁵ See Hilare McCoubrey, *International Humanitarian Law*, at 66-67 (2nd ed., 1998).

¹⁶ See Geoffrey Best, *War and Law Since 1945*, at 146 (1994); Kwakwa, *supra*. note 7, at 172, 173.

¹⁷ Draft Protocol II, Article 37, 1 *OR*, P3, at 44.

¹⁸ Canada, 9 *OR*, CDDH/I/SR.59, para. 243, at 243; USA, 9 *OR*, CDDH/I/SR.59, paras. 37-8, at 243; UK, 9 *OR*, CDDH/I/SR.59, paras. 42, at 244.

the draft Article, but in the last minute he simplified the Article, which was adopted by consensus.¹⁹ Considering the fact that the availability of records about discussion on draft Article 37 is limited, it is not plausible to determine whether Article 19 was declaring the existing customary law. However, if one bears in mind that the Article was saved in the final moment in a much reduced form, it would be possible to argue that there was conflicting view on the obligation of disseminating international humanitarian law on civil conflict.

9.3.1.2. THE IMPORTANCE AND RECENT DEVELOPMENT OF DISSEMINATION

Compared with Article 83 of Protocol I, one noticeable difference is that Article 19 of Protocol II is written in the passive form and the objects of dissemination are not indicated.²⁰ This alone shows the sensitivity of the laws of war applicable to civil conflict. *The ICRC's Commentary* states that it is the responsibility of the legitimate government and insurgents to introduce all necessary means to disseminate international humanitarian law to both military personnel and civilians.²¹ It is imperative for the government to disseminate that branch of law to its armed forces since their personnel are most likely to use the knowledge of the law.²² However, few governments are willing to disseminate humanitarian law applicable to situations in which its very existence is at stake.²³ The dissidents may also find it difficult to undertake dissemination programmes for various reasons; they may be lacking in knowledge of international humanitarian law; they may not have both manpower and finances to

¹⁹ 7 OR, CDDH/SR.53, para. 62, at 151.

²⁰ The ICRC draft was similar to Article 83. See *the ICRC's Commentary*, para. 4905.

²¹ *The ICRC's Commentary*, para. 4909.

²² See Michael Bothe, "The role of national law in the implementation of international humanitarian law", in *Studies and essays on international humanitarian law and Red Cross principles in honour of Jean Pictet* 301, at 304 (Christophe Swinarski ed., 1984).

²³ See *id.*, at 301.

disseminate the law; or they may not want to spend their resources for dissemination since their ultimate goal is to achieve victory at all costs.²⁴

In practice, for example, the ICRC was authorised by the Salvadoran Government to give instruction to its armed forces, which resulted in some improvements in El Salvador.²⁵ The ICRC has been continuously able to spread the knowledge of international humanitarian law to both the Sri Lankan Government and LTTE forces.²⁶ During the conflict in Chechnya, the ICRC undertook dissemination programmes for the Russian armed forces.²⁷

Notwithstanding such instances, the dissemination of international humanitarian law is not always satisfactory. Dissemination for Russian soldiers having been already mentioned, the ICRC's *Annual Report* wrote that in the Caucasus region, to which Chechnya belongs, "there was little knowledge of humanitarian law".²⁸ This demonstrates the fact that peacetime dissemination was inadequate. When the Somali Civil War intensified in 1992, "posters, leaflets for distribution at check-points and booklets explaining international humanitarian law and Red Cross/ Red Crescent principles had gone to press".²⁹ However, there was no government in Somalia then, and whether the ICRC was able to disseminate the law of armed conflict to contending factions is not clear. Besides, there were massive violations of humanitarian law in Somalia, which reveals the insufficiency in dissemination in the war-torn State. The

²⁴ See Kwakwa, *supra*. note 7, at 176 (referring to the difficulty of dissemination in national liberation movements).

²⁵ See McCoubrey, *supra*. note 15, at 74-75.

²⁶ See e.g. the ICRC, *Annual Report 1997*, at 158-9.

²⁷ The ICRC, *Annual Report 1995*, at 201-203, particularly 201.

²⁸ *Id.*, at 201.

²⁹ The ICRC, *Annual Report 1992*, at 49.

same was true in Liberia, and for instance in the ICRC's *Annual Report 1996* little mention is made about dissemination.³⁰

Another problem is dissemination to civilian population, which is regarded as a "deplorable situation" by Kalshoven.³¹ In general, it is not practicable to expect civilians to obtain deep understanding of humanitarian rules,³² but they must have a certain knowledge of it since they have rights and obligations based on those rules in armed conflict. For instance, the War Crimes Tribunal in Nuremberg established the principle of individual responsibility, which is strengthened by the Geneva Conventions and Protocol I.³³

It can be held, judging from the above information, that the dissemination of international humanitarian law on civil war is still not satisfactory, and therefore it has not become customarily obligatory. The ICRC as well as National Societies often assume dissemination programmes, but to what extent a government, which is legally and principally obliged to conduct dissemination, spreads the knowledge of the laws of war, is not certain. The establishment of the Advisory Service in the ICRC which provides information on national implementation is encouraging,³⁴ but it is important to emphasise that a State should disseminate humanitarian law in peacetime so that the knowledge of the law would be useful in wartime.

³⁰ The ICRC, *Annual Report 1996*, at 40.

³¹ Frits Kalshoven, *Constraints on the Waging of War*, at 70 (2d ed., 1991). See also *the ICRC's Commentary*, para. 4911.

³² See McCoubrey, *supra*. note 15, at 72-73.

³³ Charter of the International Military Tribunal, Article 6, in *Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November - 1 October 1949*, at 10 (1947); *Judgment of the International Military Tribunal for the Trial of German Major War Crimes*, at 3, Cmd. 6964 (1946). See also Articles 50 (Geneva Convention I)/51 (II)/130 (III)/147 (IV); Article 85 (Protocol I)

³⁴ On the Advisory Service, see Paul Berman, "The ICRC's Advisory Service on International Humanitarian Law: the challenge of national implementation", *IRRC*, May-Jun. 1996, at 338.

9.3.2. THE INTERNATIONAL COMMITTEE OF THE RED CROSS

The ICRC has long-standing principles of neutrality and impartiality which are trusted by the parties to conflict.³⁵ In particular, the ICRC plays an important part in visiting detainees and improving their conditions. For instance, ICRC delegates visited Algerian detainees in France during the Algerian conflict, which resulted in “considerable improvements” for the prisoners.³⁶ A more recent example is the Sri Lankan Civil War where ICRC delegates undertook visits to more than three thousand detainees held by the Sri Lankan Government and also to thirty-eight detainees held by the Tamil Tigers.³⁷ It is almost inconceivable that other organisations would be allowed to visit the captured by the parties to the conflict.

Despite such encouraging endeavours, the ICRC faces problems with its operations in civil conflict. First, the legitimate government and rebels are not always keen to accept ICRC delegates. The government may refuse ICRC representatives by claiming that no armed conflict exists. In the former Portuguese colonies, Portugal insisted the non-existence of conflict and the ICRC was invited by the new Government to visit captured rebels only after the coup in Portugal in 1974.³⁸ The rebels may be suspicious of the ICRC because of its confidentiality and ties with the legitimate government.³⁹ Another difficulty is that, in some conflicts, the ICRC has to call off its operations because of the dangers that its staff faces. In December 1996, Red Cross aid workers were killed in Chechnya, which led to the ICRC order to evacuate its personnel immediately from

³⁵ See Best, *supra*. note 13, at 376-377.

³⁶ The ICRC, *The ICRC and the Algerian Conflict*, at 6 (1962).

³⁷ The ICRC, *Annual Report 1999*, at 172.

³⁸ Heather Wilson, *International Law and the Use of Force by National Liberation Movements*, at 156 (1988) (referring to Allan Rosas, *The Legal Status of Prisoners of War: A Study in International Humanitarian Law Applicable in Armed Conflict*, at 162-163 (1976)).

³⁹ See Best, *supra*. note 16, at 379-380.

Chechnya.⁴⁰ The third point is its rejection to take part in enforcement process. Even though the ICRC encounters atrocities and thus obtain evidence, it declares that it would not give any testimony to international war crimes tribunals.⁴¹

Common Article 3 provides the role of the ICRC which “may offer its services to the Parties to the conflict”. *Pictet’s Commentary* states that this article “is of great moral and practical value”.⁴² The ICRC’s right to initiative became customary when the Geneva Conventions on the whole were ratified by “specially affected States”,⁴³ and the above information indicates that its right has not been seriously challenged. On the other hand, it depends on each party to accept the initiative, and recently there have been incidents impairing the safety of the ICRC staff, which undermines implementation of the unique role of the organisation.

Despite such difficulty, it can be maintained that the ICRC should keep its role as a neutral organisation which has been trusted by both legitimate governments and insurgents. It is obvious that in many recent civil wars, various ICRC activities are accepted by warring parties.⁴⁴ The observance of neutrality therefore only reinforces the position of the ICRC, which can contribute to creating belligerents’ confidence in the organisation and also help prevent tragedies occurring to ICRC delegates. Its refusal to provide evidence to international tribunals is justified in order to maintain its neutrality. Traditionally, the ICRC has refrained from resorting to public opinion, but it has made appeals in public to bring extremely gross violations of international humanitarian law

⁴⁰ Richard Beeston, “Aid workers quit Chechnya over Red Cross deaths”, *The Times*, Dec. 18, 1996, at 10.

⁴¹ Hans-Peter Gasser, “The United Nations and International Humanitarian Law: The International Committee of the Red Cross and the United Nations’ involvement in the implementation of international humanitarian law”, paper presented in the International Symposium on the occasion of the fiftieth anniversary of the United Nations, Geneva, 19-21 October (19 Oct. 1995), which can be found in the ICRC’s homepage at <http://www.icrc.org/>.

⁴² *Pictet’s Commentary*, at 58.

⁴³ See *supra*. Ch. 4.

⁴⁴ See *supra*. Chs. 5-8.

to an end if no alternative exists.⁴⁵ For instance, the ICRC censure of an attack against civilians in Tuzla, Bosnia-Herzegovina, was appropriate because of the extremely gruesome nature of this shelling.⁴⁶ Such public statements are not contrary to neutrality and confidentiality, since the aim is to return an extreme situation to one which resembles normality, rather than to condemn a belligerent's existence or conduct.

9.4. ENFORCEMENT

A lack of enforcement is probably the most serious problem for public international law, and international humanitarian law is no exception.⁴⁷ The punishment of war criminals, which seems the most well-known enforcement mechanism, usually does not take place. Such a predicament is exacerbated in non-international armed conflict where justice is hardly obtainable. In such circumstances, the State's duty to enforce the law is in danger, and therefore the examination of enforcement is an essential area of study, even though Protocol II does not have provisions for enforcement. In light of this, this section will place emphasis on the problems of war crimes, but the possibility of the introduction of other measures are also explored.

9.4.1. RECIPROCITY AND BELLIGERENT REPRISAL

Traditionally, reciprocity was invoked by the State which claimed that it would not obey the laws of war since its enemy did not observe them. The phrase "in all circumstances" in Common Article 1 dismisses reciprocity both in international and non-international

⁴⁵ Michael Veuthey, "Implementation and Enforcement of Humanitarian Law and Human Rights Law in Non-International Armed Conflicts: The Role of the International Committee of the Red Cross", 33 *AULR* 83, 89-90 (1983).

⁴⁶ Press Release 95/18, "Bosnia-Herzegovina: ICRC strongly condemns shelling of civilians in Tuzla", (26 May 1995) which can be found in the ICRC's homepage at <http://www.icrc.org/>.

⁴⁷ Best, *supra*. note 16, at 391.

armed conflict.⁴⁸ On the other hand, positive reciprocity is used by the ICRC to persuade the parties in conflict to mutually observe international humanitarian law.⁴⁹

Reprisal is an unlawful act against the illegal conduct of the enemy State which becomes legal because of the nature of the original illegal assault. Both Common Article 3 and Protocol II are silent on reprisal, though *Pictet's Commentary* states that they are “implicitly prohibited”.⁵⁰ The Diplomatic Conference could not reach an agreement to prohibit acts of reprisal in internal war.⁵¹ For instance, the British representative argued that only in international conflict did reprisal exist,⁵² but his Swedish counterpart refuted this contention by supporting the inclusion of a provision about reprisal in Protocol II.⁵³ Finland was eager to insert the proscription of reprisals in Article 4, what was then draft Article 6.⁵⁴ A few States explicitly supported the Finish proposal.⁵⁵

However, the interpretation of this reticence would be that reprisals are not totally banned in situations of non-international armed conflict.⁵⁶ As Aldrich noted, reprisal is a “downward spiral into greater savagery”, and therefore may only result in a reciprocal action by the enemy reprisal.⁵⁷ For instance, during the Algerian War of Independence, reprisals were extremely severe.⁵⁸ Notwithstanding this defect, the fear that the enemy might resort to reprisal could have considerable deterrent effects on belligerents not to undertake acts contrary to international humanitarian law. Furthermore, in the situation

⁴⁸ *Pictet's Commentary*, at 25.

⁴⁹ Veuthey, *supra.* note 45, at 89.

⁵⁰ *Pictet's Commentary*, para. 4530.

⁵¹ See *id.*, at 1372 n.17.

⁵² UK, 14 *OR*, CDDH/III/SR.20, para. 41, at 177.

⁵³ Sweden, 14 *OR*, CDDH/III/SR.20, para. 50, at 178.

⁵⁴ See proposed amendment of Finland, 4 *OR*, CDDH/I/93, at 18.

⁵⁵ See e.g. Sweden, 8 *OR*, CDDH/I/SR.32, para. 45, at 331.

⁵⁶ See James E. Bond, *The Rules of Riot*, at 101 (1974); Draper, *supra.* note 2, at 49.

⁵⁷ George H. Aldrich, “Compliance with the Law: Problems and Prospects”, in 2 *Armed Conflict and the New Law, Effecting Compliance* 3, at 8 (Hazel Fox and Michael A. Meyer eds., 1993).

⁵⁸ One of the worst reprisals was the massacre in Philippeville. See Alistair Horne, *The Savage War of Peace*, at 118-122 (revised ed., 1987).

where the parties in civil conflict attempt to deny each other's existence, the deterrence of belligerent reprisals may be one of the few effectual instruments to make the enemy observe the laws of war. Practice of States and rebel groups in recent conflict is scarce, which signifies a lack of practice to make the prohibition of reprisal customary. In Chechnya, Chechen rebels menaced the shooting of five Russian prisoners a day if the Russian forces did not stop bombing Shatoi, and five executions were reported that day, followed by four others the next day.⁵⁹ After forty-eight paratroopers were captured by the Chechen separatists, the Russian forces sent an ultimatum to the effect that failure to immediately release them would result in bombing mountain villages.⁶⁰ However, apart from this example, no available information indicates instances of reprisal.

It is, however, necessary to examine the views expressed by the ICTY regarding reprisal. In the *Martić* case, the Court stated that the prohibition of reprisal could be inferred from Article 4 of Protocol II⁶¹ and therefore that “the rule which states that reprisals against the civilian population as such, or individual civilians, are prohibited in all circumstances, even when confronted by wrongful behaviour of the other party, is an integral part of customary international law and must be respected in all armed conflicts”.⁶² Later in the *Kupreskić* case, the Court also held that the prohibition of reprisal has emerged “[d]ue to the pressure exerted by the requirements of humanity and the dictates of public conscience”.⁶³

⁵⁹ See U.N. Commission on Human Rights, *The situation of human rights in the Republic of Chechnya of the Russian Federation, Report of the Secretary-General*, para.57 and at 25 n.17, U.N. Doc. E/CN.4/1996/13 (26 Mar. 1996).

⁶⁰ “Russian troops losses; paratroopers taken prisoner”, broadcast by NTV, Moscow, in Russian, 1600gmt, 9 Jan. 1995, reproduced in BBC Monitoring, *SWB*, Part 1, Former USSR, 3rd Ser., SU/2198, at B/3 (11 Jan. 1995).

⁶¹ *Prosecutor v. Milan Martić, Decision*, Case No. IT-95-11-R61, 8 Mar. 1996, para. 16, reprinted in 108 *International Law Reports* 39 (1998) [hereinafter *Martić* case].

⁶² *Id.*, para. 17.

⁶³ *Prosecutor v. Zoran Kupreskić et al, Judgement*, Case No. IT-95-16-T, 14 Jan. 2000, para. 531, at <http://www.un.org/icty/kupreskić/trialc2/judgement/kup-tj000114e.pdf> [hereinafter *Kupreskić* case].

Comments should be made on the Court's finding. Regarding the *Martic* case, this author would emphasise the fact that the Diplomatic Conference dropped the inclusion of the prohibition of reprisals. Such important matters as reprisal, which caused disagreement during the Diplomatic Conference, could be difficult to be inferred. Moreover, the Rome Statute did not have a provision on reprisals. Regarding the *Kupreskic* case, the Court first relies on many States' acceptance of prohibition of reprisals and second on the fact that in the past fifty years reprisals against civilians have been "normally refrained from" by "the States that have participated in the numerous international or internal armed conflicts".⁶⁴ It may be true, as the Court points out, that very rarely have States claimed that reprisals against civilians are legitimate,⁶⁵ but as this writer points out in Chapter 4 the reason why States abstain from certain conduct is not always clear, and in his opinion such abstention neither favours nor hinders the creation of custom. In addition, the Court should have closely examined conflicts, as this author does in this thesis, to examine if there is an example of reprisal or abstention from reprisal. For the above reason, his opinion differs from the Court's finding.

9.4.2. WAR CRIMES

There is no explicit provision for war crimes in Common Article 3 and Protocol II, which makes the prosecution of war crimes extremely difficult in non-international armed conflict. It is, however, possible to infer legal obligations upon both States and rebel groups to prosecute war crimes. Regarding States, they are bound by Common Article 3, and Common Article 1 obliges them to "respect and ensure respect for" the four Conventions, including Common Article 3, "in all circumstances".⁶⁶ Therefore, based on those two provisions, States have to deal with war crimes in civil conflicts.

⁶⁴ *Id.*, paras. 532-533.

⁶⁵ *Id.*, para. 533.

Furthermore, since Protocol II “develops and supplements” Common Article 3, it is logical to conclude that the States’ obligations to prosecute war crimes extends to Protocol II. Concerning rebel groups, they are also required to conform with Common Article 3,⁶⁷ but the obligations in Common Article 1 do not extend to them since they are not “High Contracting Parties”. Having said so, as this author discussed in reference to Cassese’s argument in Chapter 4, rebels are bound by Protocol II. Moreover, since Protocol II applies to both States and rebel groups when the latter satisfy the requirements set by Article 1 of Protocol II,⁶⁸ it is logical to argue that rebel groups assume all the responsibilities, including prosecution of war crimes, vis-à-vis States. As regards third parties, rebel groups again assume responsibilities towards third States since it would not be fair to impose the duties of Protocol II only upon the legitimate government, but not rebel groups.⁶⁹ The above contention, therefore, support the idea that both States and rebel groups are obliged to prosecute war crimes. The problem is, however, that there is no mechanism in international law to ensure that the obligations are fulfilled. Indeed there is no notion of war crimes in Common Article 3 or Protocol II, and national courts or rebels’ tribunals, if any, would find it difficult to try war criminals without any clear standards.

Facing with the difficulty in prosecuting war criminals in national level, an international tribunal set up by the Security Council can also have jurisdiction over war crimes, as the foundation of the Tribunal for Rwanda proves.⁷⁰ Regarding the hierarchy of those competences, Article 8(1) of the Statute for Rwanda provides “concurrent jurisdiction” of national and international tribunals, while Article 8(2) renders “primacy over the

⁶⁶ *Pictet’s Commentary*, at 26 (“It is for the State to supervise their execution [in accordance with Common Article 1].”)

⁶⁷ *Pictet’s Commentary*, at 51.

⁶⁸ Antonio Cassese, ‘The Status of Rebels under the 1977 Geneva Protocol on Non-International Armed Conflicts’, 30 *ICLQ* 416, 430 (1981).

⁶⁹ *Id.*, at 431.

national courts” to the International Tribunal. In addition, according to Article 9(2) of this Statute, the Tribunal can try a person who has already been tried in a national court if the proceedings or prosecution were inadequate. Furthermore, according to Article 8(2)(c) to (e) of the Rome Statute, the International Criminal Court has jurisdiction over “serious violations” of certain humanitarian rules.

There are two contentious points concerning war crimes. The first concerns the definition of war crimes, crimes against humanity, and genocide, since even if humanitarian law and the Security Council provide the competences of national and international tribunals respectively, they cannot judge suspects for these crimes if the crimes are not defined. The Statute for Rwanda, however, specifies “serious violations” of Common Article 3 and Protocol II, genocide, and crimes against humanity,⁷¹ and so does the Rome Statute.⁷² However, it is not certain whether the notion of “serious violations” is accepted by a majority of States; i.e. the number of States that have ratified the Rome Statute is still limited.⁷³ Therefore, it would be right to conclude that the notion has not obtained customary status.

Another issue is that both national and international judicial bodies are not always “fair”. With regard to domestic trials, they can become biased and partial because of antagonisms peculiar to civil conflict. For instance, although Rwandan courts conduct trials of crimes against humanity and genocide, they do not allow defence lawyers.⁷⁴ It may be too early to evaluate the Rwandan trials, but Akhavan considers their “practical significance” to be “very limited” because of the destruction of the justice system during

⁷⁰ See the Statute for Rwanda, Article 1. On the power of the Security Council, see the UN Charter, Article 25.

⁷¹ The Statute for Rwanda, Articles 2-4.

⁷² Article 8(2)(c) to (e)

⁷³ As of 30 April 2001, thirty States are parties to the Rome Statute. See “Rome Statute of the International Criminal Court: Ratification Status as of 30 April 2001” at [http:// www. un.org/law/icc/ statute/status.htm](http://www.un.org/law/icc/statute/status.htm).

⁷⁴ “Hutus sentenced to death”, *The Times*, Jan. 4, 1997, at 4.

its civil war.⁷⁵ International tribunals are also not immune from criticism concerning fairness. Best may be right to argue that the Military Tribunals in Nuremberg and Tokyo became completely one-sided, but that this situation was “historically unique”.⁷⁶ However, one-sidedness exists even in the Tribunal for Yugoslavia since the majority of those who are indicted are Bosnian Serbs.⁷⁷ In the 1970 General Assembly, the Government of Sri Lanka pointed out the danger that the justice to the defeated sought by the victor “seemed to be disproportionately [sic] weighted on one side”.⁷⁸ Furthermore, it is unforeseeable that an international tribunal could have jurisdiction over a civil conflict within one of the Great Powers, especially the permanent members of the Security Council.⁷⁹ The problem of fairness is highly political, and international humanitarian law alone may be vulnerable to political pressures.⁸⁰ However, it is at least possible for the State to introduce necessary legislatures and other measures to be well prepared in peacetime for fair trials of war crimes once conflict occurs.⁸¹

9.4.3. INTERNAL REPORTS⁸²

A government facing civil conflict may authorise its officials or other experts to investigate its own misconduct. Reports produced by such investigations may result in the application of international humanitarian law to civil conflict.⁸³ For instance, with

⁷⁵ See Payam Akhavan, “The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment”, 90 *AJIL* 501, 509-510 (1996).

⁷⁶ Best, *supra*. note 16, at 400. On the one-sidedness of the International Military Tribunals, see B.V.A.Röling, “The law of war and the national jurisdiction since 1945”, 100 *Recueil des Cours* 323, especially at 428-432 (1960-II).

⁷⁷ Michael Evans, “Nato plans snatch squad to hunt war criminals in Bosnia”, *The Times*, Dec. 19, 1996, at 9.

⁷⁸ Ceylon, U.N. GAOR, 25th Sess., 3rd Comm., 1780th mtg, para. 38, UN.Doc. A/C.3/1780 (5 Nov.1970).

⁷⁹ See Christopher Bellamy, *Knights in White Armour*, at 30 (1990) (stating that “[the UN] would never dare interfere in the internal affairs of a strong one - like Russia, in its internal operation against Chechnya in 1994-95, however appalling the abuses of human rights and however well publicised”).

⁸⁰ See Roberts, *supra*. note 9, at 72.

⁸¹ See *supra*. 9.2. Treaty Obligations; 9.3.1. Dissemination.

⁸² The present writer is indebted to valuable advice on this point given by Professor Roberts in a conversation in Warsaw. See also Roberts, *supra*. note 9, at 41.

⁸³ *Id.*

reference to British practice of illegal procedures of interrogation in Northern Ireland, Gardiner made a minority report in which he condemned these procedures, and within this report he also recommended that the Geneva Conventions be instructed to the military personnel in accordance with Article 144 of Geneva Convention IV.⁸⁴ On another occasion, Bennett made a number of recommendations on interrogation operations and supervision of the arrested.⁸⁵ Four years after this Bennet Report, Jellicoe stated that the recommendations which Bennett had made were “implemented fully and fairly”.⁸⁶ It may be that these internal reports are perhaps effective only in certain States, and most States which face civil war are unable to even authorise internal investigations. However, the British experience reveals that internal review can be valuable and its introduction should be positively considered in a situation where enforcement is not sufficient.

9.4.4. THE UNITED NATIONS

The UN’s attempt to undertake humanitarian intervention to protect the victims in non-international armed conflict is a recent phenomenon. Humanitarian intervention by the State may be contrary to both Article 2(4) of the UN Charter and State practice,⁸⁷ but Article 25 of the UN Charter provides obligations for the Member States to “accept and carry out” Security Council resolutions. Despite such legitimacy, UN humanitarian intervention is problematic. Having regarded “the magnitude of the human tragedy” in Somalia, the Security Council authorised the use of all necessary means by the Member States to “establish as soon as possible a secure environment for *humanitarian relief*

⁸⁴ *Report of the Committee of Privy Counsellors appointed to consider authorised procedures for the interrogation of persons suspected of terrorism. (Chairman: Lord Parker of Waddington)*, especially at 22, Cmnd. 4901 (1972), *discussed by Roberts, id.*

⁸⁵ *Report of the Committee of Inquiry into Police Interrogation Procedures In Northern Ireland (Chairman: H. G. Bennett)*, especially the summary of recommendations at 135-140, Cmnd. 7497 (1979).

⁸⁶ *Review of the Operation of the Prevention of Terrorism (Temporary Provisions) Act 1976 (by Earl Jellicoe)*, at 30, Cmnd. 8803 (1983).

⁸⁷ See Shaw, *supra*. note 7, at 802-803.

operations".⁸⁸ The UN campaign in Somalia, however, was not regarded in a favourable light by the belligerents, and this resulted in the withdrawal of the US-led forces.⁸⁹ Judging from these two cases, one could submit that the Security Council should realise that the cause of these humanitarian disasters is the existence of armed conflict and, therefore, its primary aim should be to bring conflict to an end, though humanitarian relief can be undertaken in parallel.

9.5. RECONCILIATION

In non-international armed conflict, the winning side always becomes, or continues to be the legitimate government, which usually undertakes harsh treatment against the defeated. The aftermath of the Spanish Civil War is a pertinent example; the end of the conflict was followed by the exile of Republican leaders and the violent repression of former low ranking Republican officials whose number is never to be calculated.⁹⁰ No provision on the cessation of the application of international humanitarian law is found either in Common Article 3 or in Protocol II, but it is appropriate to consider that the laws of war cease to be applied to civil conflict when hostilities no longer exist. However, the end of the hostilities in civil war should not be the end of the interest which the law of armed conflict shows, since as discussed, inhumane acts are not uncommon at the aftermath of conflict.

9.5.1. DIPLOMATIC CONFERENCE

Unlike other paragraphs of Article 6 of Protocol II which were adopted by consensus in the final stage of the Diplomatic Conference,⁹¹ the adoption of its paragraph 5 displayed

⁸⁸ S/RES/794 (1992), reproduced in U.N., *The United Nations and Somalia 1992-1996*, Doc. 35, at 214, U.N. Sales No. E.96.I.8 (1996). (Emphasis added).

⁸⁹ See *Keesing's*, May 1993, at 39451.

⁹⁰ On the aftermath of the Spanish Civil War, see Hugh Thomas, *The Spanish Civil War*, at 919-927 (3rd ed., rev. and enlarged, 1990).

⁹¹ See 7 *OR*, CDDH/SR.50, para. 78, at 94.

antagonism of States toward the stipulation, as a majority of delegates either voted against it or abstained.⁹² After the voting, Spain explained her opposition to Article 6(5), arguing that only States could decide to grant amnesty,⁹³ while Zaire expounded that she had voted for the paragraph on the understanding that it was not mandatory.⁹⁴ It can be maintained that the result of the voting alone is sufficient to indicate the innovative nature of the paragraph.⁹⁵

9.5.2. THE RECENT DEVELOPMENT OF RECONCILIATION

The difficulty of reconciliation having been discussed, recent developments in reconciliation movements are noticeable, and two of the latest efforts are focused on here. In Guatemala, a peace agreement between the government and rebel groups finally ended the civil war in December 1996 which had continued for more than three decades.⁹⁶ A law of reconciliation was passed in its parliament which provided for the admission of the rebels as a legal party; amnesty to both government soldiers and dissidents who violated human rights; and punishment for crimes against humanity.⁹⁷ In South Africa where the struggle against apartheid was waged, the Promotion of National Unity and Reconciliation Bill was enacted by the President in July 1996 which thus established the Truth and Reconciliation Commission.⁹⁸ Amnesty would be granted to a person who had committed political crimes on the condition that he or she would disclose the truth and that the crimes were not “gross violations of human rights”.⁹⁹ A surprising step was taken by the leaders of the African National Congress, Inkata

⁹² Adopted by 37/15/31. See 7 OR, CDDH/SR.50, para. 100, at 96.

⁹³ Spain, 7 OR, CDDH/SR.50, ANNEX, at 103. See also Nigeria, 7 OR, CDDH/SR.50, ANNEX, at 102.

⁹⁴ Zaire, 7 OR, CDDH/SR.50, ANNEX, at 104-105. See also Saudi Arabia, 7 OR, CDDH/SR.50, ANNEX, at 102-103.

⁹⁵ As to the mandatory nature of the paragraph, see *the ICRC's Commentary*, para. 4617, construed by Hilare McCoubrey and Nigel D. White, *International Organizations and Civil Wars*, at 26-27 (1995).

⁹⁶ Tunku Varadamajan, “Hardcore gunmen threaten Guatemalan peace accord”, *The Times*, Dec. 30, 1996, at 7.

⁹⁷ *Id.*

⁹⁸ *Keesing's*, Jul. 1995, at 40361.

Freedom Party and Nationalist Party who apologised for their violent conducts during apartheid before the Commission.¹⁰⁰

9.5.3. THE PROBLEMS OF RECONCILIATION

The aim of Article 6(5) is to promote reconciliation in order to assist the reconstruction of a war-torn State,¹⁰¹ but in practice “the authorities in power” are not always willing to execute it and the suppression of the defeated is not unusual. In Afghanistan,¹⁰² which is not a party to Protocol II, the former President was executed by hanging in public by the Taliban.¹⁰³ Though this civil war is not yet over, such intolerant attitude towards a former regime may not only prolong the conflict but also impede a course of reconciliation at the end of hostilities. In Liberia, it was agreed that amnesty would be granted to those who committed acts “while [in] actual combat or on authority of any of the Parties in the course of actual combat”.¹⁰⁴

Another difficulty is how to strike a balance between amnesty and prosecution of war criminals. On the one hand, amnesty would most likely benefit both military personnel and dissidents who have committed war crimes or crimes against humanity. On the other, the State is under obligation to take legal actions against those who have undertaken conducts contrary to humanitarian rules. Müllerson, *par exemple*, prefers to interpret Article 6(5) of Protocol II in such a way as to limit the personal scope of application to those who have not committed “war crimes or crimes against

⁹⁹ Inigo Gilmore, “De Klerk begs forgiveness for apartheid”, *The Times*, Aug. 22, 1996, at 1.

¹⁰⁰ Inigo Gilmore, “Mbeki apologises for ANC atrocities during struggle”, *The Times*, Aug. 23, 1996, at 11 (on African National Congress); Inigo Gilmore, “Buthelezi apologises to ANC for years of violence”, *The Times*, Sept. 6, 1996, at 15 (on Inkata Freedom Party); “De Klerk owns up to wrongs of the past”, *The Times*, Aug. 22, 1996, at 11 (on Nationalist Party).

¹⁰¹ *The ICRC's Commentary*, para. 4618.

¹⁰² Afghanistan voted for the adoption of Article 6(5) in the Diplomatic Conference, and explained her willingness to observe the whole Article. See Afghanistan, 7 *OR*, CDDH/SR.50, at 99.

¹⁰³ Christopher Thomas and Zahid Hussain, “Najibullah executed by rebels”, *The Times*, Sept. 28, 1996, at 1.

humanity”.¹⁰⁵ Nevertheless even he concedes that “different approaches” to justice and amnesty exist among States which experienced civil conflicts or internal disturbances and that “One could hardly recommend to do something that is simply impossible or too dangerous”.¹⁰⁶

It seems that Guatemala struck a balance to some degree by leaving room for repressing crimes against humanity, though it is reported that resentment exists against the law of amnesty which will pardon mostly army officers.¹⁰⁷ South Africa, where trials against crimes committed during the apartheid period are held, has the same dilemma as Guatemala. When the former Defence Minister and nine other suspects of murder and conspiracy to murder were acquitted, there was both praise for, and bitterness against the decision of the Durban Supreme Court, and President Mandela called for the people to respect the judgment.¹⁰⁸

9.5.4. THE PROSPECTS OF RECONCILIATION

One way to strike a balance would be to consider the severity of the crimes committed. Article 6(5) does not recommend general amnesty but “widest possible amnesty”, which could limit the ambit of application to those who have committed no crimes or lesser ones.¹⁰⁹ In civil conflict, especially ethnic ones, resentment against the enemy may help to prevent rational judgment, but such an unreasonable view of the enemy is dangerous since “not all the enemies are criminals”. Even if some of them are guilty of conduct incongruous to humanitarian provisions, their crimes are not always grave breaches of

¹⁰⁴ Security Council, *Letter dated 6 August 1993 from the representative of Benin to the Secretary-General*, Annex, Agreement, Section G, Article 19, UN SCOR 48th Sess., Supp. Jul., Aug. and Sept. 1993, at 158, 162 U.N. Doc. S/26272 (9 Aug. 1993).

¹⁰⁵ Rein Müllerson, “International Humanitarian Law in Internal Conflicts”, 2 *Journal of Armed Conflict Law* 109, 122 (1997).

¹⁰⁶ *Id.*, at 130.

¹⁰⁷ “Peace, maybe”, *The Economist*, January 4-10, 1997, 53, at 54.

¹⁰⁸ Inigo Gilmore, “Mandela defends judge’s acquittal of apartheid general”, *The Times*, Oct. 12, 1996, at 13.

humanitarian law. Protocol II failed to provide grave breaches, not to mention the enforcement mechanism.¹¹⁰ The Rome Statute provides “serious breaches” of international humanitarian law in civil conflicts, but whether such classification has achieved acceptance of a majority of States is in doubt. In short, it is important to firmly establish the definition of war crimes, especially grave breaches in non-international armed conflict, because a person should not be punished severely for a crime which is not in the scope of grave breaches.¹¹¹

The clear definition of war crimes is one solution, but it still leaves the problem of national implementation unsolved. Although programmes of reconciliation are today undertaken by a number of States that have faced civil conflict or internal disturbance, such as in South Africa and some Latin American States, it is not certain whether other States will follow this tendency. The horrifying consequence of the Taliban occupation of Kabul has already been mentioned. Although international and national tribunals for the Rwandan genocide have been much publicised, national reconciliation itself has not been smooth. One report describes worries of both Tutsis and Hutus; the former dread that Hutus might murder them in order to kill witnesses, while the latter hesitate to return to Rwanda in fear of vengeance¹¹² Although this problem is highly political, international humanitarian law can play a role in disseminating the importance of reconciliation incorporated in Article 6(5) of Protocol II. Hence, the ICRC initiative to disseminate international humanitarian law after conflict is an encouraging step towards

¹⁰⁹ See McCoubrey and White, *supra*. note 95, at 76.

¹¹⁰ See cf. Frits Kalshoven, in “Should the Laws of War Apply to Terrorists?”, 79 *Proceedings of ASIL* 109, 122 (1985) (stating that “the whole system of grave breaches applied only in international armed conflicts and never in situations of internal armed conflicts...”).

¹¹¹ See the detailed discussion in *supra*. 9.4.2. War Crimes.

¹¹² See “Welcome home”, *The Economist*, December 7-13, 1996, 74, at 74-75.

ensuring a better peace process.¹¹³ A suggestion made by McCoubrey and White is worth quoting:

The best that can be done is to urge the greatest measure of humanitarianism in the conduct of both sides and then to exhort, as article 6(5) of 1977 Additional Protocol II does, the widest possible amnesty thereafter.¹¹⁴

¹¹³ Regarding the ICRC's dissemination, see e.g. "Before, during and after crisis", *IRRC*, May-Jun. 1995, at 239.

¹¹⁴ McCoubrey and White, *supra*. note 95, at 76.

CHAPTER 10

CONCLUSIONS AND RECOMMENDATIONS

10.1. CONCLUSIONS

In Chapter 2, it is found that, before the end of the Second World War, the recognition of belligerency was of legal value particularly in the areas of neutrality and maritime rights, while such recognition, both in theory and practice, rarely governed the regulations concerning conduct of hostilities. Nevertheless, the general principles of the laws of war, which are moral obligations, have been applicable to civil war since the time of classical international law. Those general principles include the principles of humanity, military necessity, distinction and proportionality.

In Chapter 3, the Japanese Civil War, which has been rarely mentioned in textbooks of international law, is discussed. This civil war is unique in a sense that both sides of the war were recognised by Great Powers as belligerents. However, the protection of the wounded, sick, shipwrecked and foreigners was observed to a certain extent out of humanitarian, rather than out of legal obligation stemming from the recognition. Additionally, the granting of amnesty to defeated samurai is noticeable, some of whom became prominent in the establishment of modern Japan.

In Chapter 4, it is discussed that practice and *opinio juris* are the two indispensable elements for the establishment of customary law. Practice should be undertaken and *opinio juris* be expressed in a “virtually uniform” way by “specially affected States”. In international humanitarian law on non-international armed conflict, the practice and *opinio juris*, States, dissident groups and international organisations, such as the UN, contribute to forming custom, while those of the ICRC, may be of evidential

value. However, “individuals’ practice and *opinio juris*” cannot be taken into consideration.

The evidence of practice includes ratification; measures of national implementation; actual practice; abstention; and statement. The evidence of *opinio juris* consists of acceptance of international humanitarian law by belligerents; denial and justification by belligerents for their own conduct; recognition of belligerents’ conduct by third States; acquiescence of belligerents’ conduct by third States; protest against belligerents’ conduct by third States; and acceptance of international humanitarian law by States in peacetime.

The ascertainment of customary law is conducted by the ICJ, *ad hoc* international tribunals, the International Criminal Court, domestic courts and publicists. There are two exceptions for the formation of customary law, namely persistent objectors and new States.

In Chapters 5 to 8, the customary status of each provision of Protocol II is discussed. Article 1(2) is a customary provision as international humanitarian law has been applicable to armed conflicts. The provisions of Protocol II that are customary because of the already customary Common Article 3 are Article 2(1); part of Article 4(1), (2)(a), and (2)(e); Article 4 (2)(c); Article 5(1)(a); Article 6(1) and introduction of (2); part of Article 7; and part of Article 8. The customary rules that derive from the general principles of international law are Article 3 and Article 4(2)(f). Besides, the almost universal ratification of the Child Convention has transformed part of Article 4(3)(c) into custom. The rest of Protocol II is not customary.

In Chapter 9, this author discusses “implementation” which implies a whole process of implementation, enforcement and reconciliation. First, the Contracting Parties to

the Geneva Conventions and/or Protocol II are under obligation to “implement” these agreements. The main instruments of implementation are dissemination and the ICRC. Concerning enforcement, reciprocity is not justified today. Belligerent reprisal is, however, not completely prohibited by Common Article 3 and Protocol II. The recent development of international and national war crimes tribunals is significant, but it is necessary to define war crimes in civil conflict, and also to bring fairness to these tribunals. Another recent development of enforcement, namely UN humanitarian intervention, is not necessarily successful, and the UN should consider the purpose of its intervention.¹ Internal reports may be useful to rectify the wrongs which have been done. Finally, reconciliation is essential for the reconstruction of a State.

10.2. RECOMMENDATIONS

10.2.1. INTERNATIONAL HUMANITARIAN LAW IN DANGER

Before the adoption of the Protocols, Rubin expressed his concern over enhancing the rules of Article 3, because a rebelling party to a civil conflict would find it impossible to obey the strengthened prescriptions.² His prediction turned to be more or less true since dissident groups, as well as governments, have committed atrocities contrary to the enhanced regulations of Protocol II in civil conflicts that have occurred during the last decade of the twentieth century. The aim of this thesis is to examine the customary status of Protocol II by applying the theory of customary law, but this author finds that no provision of the Protocol has become a customary rule based on practice and *opinio juris*.

¹ Adam Roberts, “The Laws of War: Problems of Implementation in Contemporary Conflicts” in 1 European Commission, *Law in humanitarian crises* 14, 67 (1995).

It is found in Chapter 4 that Common Article 3 became customary because of the world-wide ratification of the Geneva Conventions. Indeed, universal ratification seems to be the easiest method to transform treaty rules into customary. However, ratification has a drawback. The Civil Conflicts in Chechnya, El Salvador, Liberia and Rwanda have been discussed throughout this thesis. A scathing irony of these conflicts is that the States concerned had ratified Protocol II before internal war occurred in their territories,³ but there were massive violations of international humanitarian law in these conflicts. Because of a lack of information, it is not possible to discern why these States ratified the treaty, but this author, having found the co-existence of ratification of Protocol II and violations of the law of armed conflict, wonders if the States decided to ratify the treaty only for niceness or if the States did not take into consideration future “implementation” of the Protocol.

“We must do something”, but only in a way that ensures the compliance of States and rebels with the law of armed conflict. In the following, this author makes recommendations for the future development of international humanitarian law in internal conflict.

10.2.2. THE IMPORTANCE OF DOMESTIC “IMPLEMENTATION”

First, domestic “implementation” should prevail over new codification. Confronted with humanitarian crises, one may be tempted to suggest that a new treaty that would bring the catastrophe to an end be innovated and ratified by a majority of States as soon as possible. For instance, the director general of the UNESCO called for new international rules on the protection of cultural properties after the Buddha statues in

² Alfred P Rubin, “The Status of Rebels under the Geneva Conventions of 1949”, 21 *ICLQ* 472, 485-486 (1972).

Afghanistan were destroyed.⁴ Nevertheless it must be remembered that, as mentioned above, many States recently in conflict were parties to Protocol II while wanton disregard of even fundamental principles of humanitarian law occurred in those States. The present author is of the opinion that there are already existing international rules that need to be incorporated in domestic law and it might be futile to codify more comprehensive international treaties when States could not “implement” even the existing conventions.⁵

The present writer would take a cautious approach to the recent trend toward the expansion of international jurisdiction over civil conflicts. The establishment of the two *ad hoc* International Tribunals and International Criminal Court is one of the most important recent developments in international humanitarian law. Moreover, in August 2000 the Security Council passed a resolution which “Requests the Secretary-General to negotiate an agreement with the Government of Sierra Leone to create an independent special court” with jurisdiction over “crimes against humanity, war crimes and other serious violations of international law”.⁶ As discussed in Chapter 9, punishing those who violate international humanitarian law is a salient part of enforcement, but it appears to the present writer that justice is done to some war criminals, but not all, and Müllerson for instance admits that punishing all those who commit war crimes would not be plausible.⁷ However, would it be just to take a firm stance towards suspected Bosnian Serb war criminals, while alleged war criminals in Somalia and Sri Lanka are less likely to be punished? If international jurisdiction is

³ The years of ratification as follows: El Salvador (1978); Liberia (1988); Russia (1989); Rwanda (1984). See the ICRC, *Annual Report 1999*, at 370-373.

⁴ “UNESCO demands international laws on cultural vandalism”, *Japan Times*, Mar. 15, 2001, at 4.

⁵ Rubin, *supra*. note 2, at 496; Hilare McCoubrey and Nigel D. White, *International Organizations and Civil Wars*, at 126 (1995).

⁶ S/RES/1315 (2000) at <http://www.un.org/Docs/scres/2000/res1315e.pdf/>.

⁷ See e.g. Rein Müllerson, “International Humanitarian Law in Internal Conflicts”, 2 *Journal of Armed Conflict Law* 109, 109, 131 (1997).

exercised over war crimes, this should be justly exercised; otherwise, this jurisdiction may be abused by certain influential States.

This author would not negate the legitimacy of international jurisdiction, but considering that there is no international enforcement mechanism similar to the police in every State, he emphasises the importance of domestic enforcement of IHL. It is true that, as examined in Chapter 9, States are legally responsible for the prosecution of war crimes according to Common Articles 1 and 3, but they do not introduce such measures accordingly. For instance, in the common law system, treaties need to be incorporated into domestic law through an act of Parliament,⁸ and many States in this legal system indeed have introduced Geneva Conventions Acts.⁹ One of the examples of the Geneva Conventions Acts is that of Australia,¹⁰ but the Act neither refers to Common Articles 1 and 3 nor Protocol II, even though Australia is a party to Protocol II. On the side of a rebel group, they too have to prosecute war crimes, as this author argued in this thesis, but there is only rudimentary evidence which indicates the existence of such prosecution by a dissident group.

Notwithstanding lack of enthusiasm on the part of both States and rebels, the ICRC could persuade them into adopting measures to enforce international humanitarian law. For instance, States are urged by the ICRC to “extend the scope of their Geneva Conventions Acts so that, in compliance with the principle of universal jurisdiction, they encompass serious violations of Common Article 3... and Protocol II... ”.¹¹ In relation to insurgents, there is no information on the ICRC’s corresponding activities, but the organisation often requests the insurgents to comply with international

⁸ International Committee of the Red Cross, Advisory Service on International Humanitarian Law, *National Implementation of International Humanitarian Law, Annual Report 1998*, at 53.

⁹ *Id.*, at 59-60.

¹⁰ *Reprinted in id.*, at 75-94.

humanitarian law, which would, if successful, result in the reduction in war crimes. In spite of the fact that there are so many international, regional, or non-governmental organisations in the world, the ICRC as a neutral organisation appears to be the only body trusted by both States and rebels to assume responsibilities for ensuring compliance with the law of armed conflict by parties to civil war.

Dissemination is another important tool of “implementation” to be seriously undertaken. The present writer is not so optimistic as to claim that, had the laws of war been disseminated adequately, there would have been less civil wars and less war crimes in the late twentieth century. The fact is that the sufficient dissemination of humanitarian law has been extremely difficult and that a number of civil wars have occurred in which acts of brutality have been rife. Despite such unfortunate circumstances, with the knowledge of the laws of war, it is likely that there would have been fewer violations. Dramatic action, e.g. banning all anti-personnel landmines, may be effective to educate the public about certain cruel aspects of war, but at the same time the wounded and sick must be cared for and the bodies collected and decently buried, the action of which hardly attracts the attention of the public. Therefore, the dissemination of humanitarian rules would be useful and essential in spreading knowledge of those rules, both well-known and less well-known. As examined in Chapter 9, States and rebels are usually reluctant to disseminate international humanitarian law, and therefore the ICRC and National Societies should be further encouraged to disseminate the law.

¹¹ *Id.*, at 65.

10.2.3. TOWARDS A UNIFIED AND PLAIN HUMANITARIAN LAW¹²

When one considers the problem of today's international humanitarian law and the long-term prospect of the law, he or she should consider the following hypothesis.¹³ Suppose there are rebel groups X, Y and Z in State A, which is a party to the Geneva Conventions and their Protocols. As regards fighting between the legitimate Government of State A and each rebel group, rebel group X does not satisfy the conditions of Article 1(1) of Protocol II, and therefore Common Article 3 is applicable. Rebel group Y, on the other hand, satisfies those requirements, and Protocol II applies. Rebel group Z is a national liberation front and, therefore, the Geneva Conventions and Protocol I apply. Furthermore, even if a specialist could ascertain the status of rebel groups X to Z, he or she may not be able to confirm the status of newly formed rebel groups P and Q! This hypothesis could be further complicated by the intervention of a third State in this conflict, even though this goes beyond the scope of this thesis.

This assumption reveals the undesirable state of law today, that is there are different laws between international and non-international wars, and even between civil conflicts.¹⁴ Soldiers of group X could benefit only from Common Article 3 upon capture; those of group Y have the benefit of partial protection afforded by Protocol II; those of group Z could enjoy the full protection of international humanitarian law. This is a strange phenomenon, considering the fact that the laws of armed conflict

¹² Regarding "a unified humanitarian law", the present author is indebted to useful suggestions given by Professor Adam Roberts in Warsaw.

¹³ Similar hypotheses can be observed in e.g. Wade S. Hooker, Jr. and David H. Savasten, "The Geneva Convention of 1949: Application in the Vietnamese Conflict", 5 *Virginia JIL* 243, 256-257 (1965).

¹⁴ See *id.*, at 257; Frits Kalshoven, "Applicability of Customary International Law in Non-International Armed Conflicts", in *Current Problems of International Law* 267, at 272 (Antonio Cassese ed., 1975); Esbjörn Rosenblad, *International Humanitarian Law of Armed Conflict*, at 102 (1979).

should be applicable equally. Even though Article 2 of Protocol II limits the personal field of application to situations provided by Article 1, the equal treatment enshrined in Article 2 sounds futile when there is discrimination in treatment among victims suffered from-international war, those from internal conflict provided by Protocol II, and those from civil war defined by Common Article 3.

Hence in the long run the revision of international humanitarian law should be achieved, and in the process of revision, the distinction between international and civil conflicts should be abolished. Among authorities on the laws of war who mention the problem of division between international and non-international wars, Schwarzenberger wrote in 1968 that “the distinction between international and internal armed conflicts becomes increasingly relative”.¹⁵ Pictet implicitly desired for a unified law, hoping that “one day the Powers will accord at all times and to all men the benefits they have already agreed to grant to their enemies in time of war”.¹⁶ During the Diplomatic Conference, States such as Norway¹⁷ and New Zealand¹⁸ were in favour of establishing a unified international humanitarian law applicable to all armed conflict, but such a view was regarded as unrealistic.¹⁹ Such a high ideal seems to have withered, but it may be time to at least consider the possibility of introducing the unified laws of war. It is, as a matter of course, desirable that

¹⁵ Georg Schwarzenberger, “From the Laws of War to the Law of Armed Conflict”, 21 *Current Legal Problems* 239, 255 (1968).

¹⁶ Jean S. Pictet, *Red Cross Principles*, at 29 n.1 (1956).

¹⁷ Norway, 5 *OR*, CDDH/SR.10, paras 1-6, at 91, noted and construed in Hans-Peter Gasser, “Internationalized Non-International Armed Conflicts: Case Studies of Afghanistan, Kampuchea, and Lebanon”, 33 *American University Law Journal* 145, at 146 and n.2 (1983).

¹⁸ New Zealand, 8 *OR*, CDDH/I/SR.4, para. 8, at 26.

¹⁹ See Georges Abi-Saab, “Non-International Armed Conflicts”, in UNESCO, *International Dimensions of Humanitarian Law* 217, 225-226 (1988). Gasser regarded the Norwegian proposal as “an extreme solution”. Gasser, *supra*. note 17, at 146.

Protocol II is applied to all parties to a civil conflict,²⁰ but it would be almost impossible because of proliferation of fighting groups in such struggles.

There are, however, difficulties in establishing a unified humanitarian treaty. For instance, the Rome Statute is one of the most recent humanitarian instruments and it contains more humanitarian rules to the victims of non-international armed conflicts. Furthermore, the Statute introduced the notion of “serious violations” in civil war, and this can be considered one of the most important changes which it brings to the law of armed conflict. Having said so, even the Rome Statute accords with the tradition that different rules apply to international and non-international armed conflicts, and it seems most unlikely, at least in the foreseeable future, that States would agree another humanitarian instrument which would abolish the traditional distinction. In addition, endeavours to produce a single convention applicable to all war would appear to States to be highly political because they would equate such efforts with the legitimisation of rebel forces which they would fear.²¹ Besides, the convention could create a gap between international and domestic laws. States usually prohibit offences against their own existence in their penal laws, and they would have to change their own laws to conform with the unified humanitarian rules. Such changes would make the legitimate government feel vulnerable, because they could contribute to threatening its own existence in the future.

Having mentioned the difficulties of adopting a unified humanitarian convention, such a treaty would, nonetheless, have certain advantages for States. First, the treaty would introduce more protection for *hors de combat* of governmental armed forces.

²⁰ See Rodney G. Allen et al, “Refining War: Civil Wars and Humanitarian Controls”, 18 *Human Rights Quarterly* 747, 764 (1996).

Needless to say, the protection would also extend to those of the rebel forces, but better protection of their own soldiers would be an advantage to the government. Second, the government could appeal to the public by stating that it treats captured fighters of the rebel group humanely in accordance with a humanitarian treaty, even though the actual “implementation” of the treaty would need to follow such a claim. Third, unlike the internationalisation of national liberation movements which only singles out struggles for self-determination, a unified treaty would not choose a particular category of conflict, which would reduce the difficulty in categorising the conflict.

Furthermore, the myth that there has always been a division between international and non-international wars should be openly challenged. The historical analyses in this thesis indicate the applicability of the general principles of the laws of war to civil war, and governmental insistence upon fears of legalisation of a rebel group does not necessarily stand in a historical perspective.

Today’s scholarly works as well as judicial judgments may not be ready for a move toward a unified treaty, as it is rare, among them, to support such proposal, if they ever consider it. At a glance, the jurisprudence of the ICTY appears to be one of them, but one could sense a sign of the proposal in it. One instance of it is the *Tadic* case, in which the Appeals Chamber in its decision stressed the importance of the Security Council’s position not to classify the armed conflicts in the former Yugoslavia.²² The Appeals Chamber further stated that, had the Security Council

²¹ The politicisation of the laws of war in a future revisioning conference is predicted by Borrowdale. See Andrew Borrowdale, “The law of war in Southern Africa: the growing debate”, 15 *CILSA* 41, 56 (1982).

²² *The Prosecutor v. Dusko Tadic, a/k/a “Dule”, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, Case No. IT-94-1-AR72, 2 Oct. 1995, paras 72-78, reprinted in 35 *ILM* 32 (1996) [hereinafter *Tadic* case].

decided to empower the Court to consider only international armed conflict, on the one hand, the Court could not have taken into considerations atrocities committed by the Bosnia-Herzegovina's government army against Bosnian Serb civilians since those civilians were nationals of Bosnia-Herzegovina and therefore not protected under Geneva Convention IV; on the other hand, the Court could have dealt with crimes committed by Bosnian Serbs against civilians of nationality of Bosnia-Herzegovina because Bosnian Serbs acted "as organs or agents of" the Federal Republic of Yugoslavia and therefore those civilians were regarded as protected persons under Geneva Convention IV.²³ The Appeals Chamber simply regarded such outcome as "absurd" since "it would place the Bosnian Serbs at a substantial legal disadvantage vis-à-vis the central authorities of Bosnia-Herzegovina".²⁴ The ICTY did not state that, because of such "absurdity", the difference between international and non-international armed conflicts should be abolished, but it at least found a defect in today's international humanitarian law, which would be in essence similar to this author's contention.

In the same case, moreover, the Appeals Chamber further found Article 3 of the Tribunal's Statute, which provides the prosecution of violations of the laws or customs of war, to be applicable to non-international armed conflict.²⁵ The article is mainly concerned with the "Hague law", which Common Article 3 and Protocol II rarely mention, and therefore the finding went beyond the scope of the treaty provisions. On the one hand, this author is in the opinion that the Court should have examined more State practice and *opinio juris* before reaching the conclusion²⁶, but

²³ *Id.*, para. 76.

²⁴ *Id.*

²⁵ *Id.*, paras. 87-93, particularly 89-91.

²⁶ *Id.*, para. 88 (the Court only referred to the statements made by the American, British, French and Hungarian delegates made at the Security Council.)

on the other hand the finding confirms the validity of the idea that the move toward a unified international humanitarian law is in progress.²⁷

Should there be a unified humanitarian law, Article 1 of a future convention should be:

This Convention shall be applicable to armed conflict.

The important point is that such a treaty does not internationalise civil conflict, but it sets rules applicable to all armed conflict irrespective of nature. The phrase such as “irrespective of whether it is international or non-international” should not be inserted because such qualification itself would cause the problem of interpretation. Having said so, it would be useful to consider which situation is not armed conflict and therefore to introduce the lowest threshold so that all the situations above the threshold would be governed by the unified humanitarian law. In this respect, Article 1(2) of Protocol II, which this author found customary in Chapter 5, would be of assistance. The provision states that Protocol II is not applicable to “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts”. The problem of interpretation of each situation would still remain, but this provision at least clearly indicates that Protocol II is not applicable to situation not amounting to armed conflicts. Therefore, if a similar provision would be introduced in the unified humanitarian law, it would become a useful tool to distinguish armed conflict from mere internal disturbances and tensions. Finally, it needs to be stressed that Article

²⁷ See Colin Warbrick and Peter Rowe, *The International Criminal Tribunal for Yugoslavia: the Decision of the Appeals Chamber on the Interlocutory Appeal on Jurisdiction in the Tadic Case*, 45 *ICLQ* 691, 701 (1996) (Rowe states that “[the Appeals Chamber’s] interpretation of Article 3 of the Statute sends a coach and four through the traditional distinctions between an international and non-international conflict”).

8(2)(f) of the Rome Statute is similarly worded, and this indicates the well-established, customary nature of this provision.

The unified humanitarian law should be as simple as possible.²⁸ It is a fact that the law of armed conflict has become more and more detailed and technical, and one pertinent example is the 1949 Geneva Conventions. The willingness of a government and a rebel group to comply with the full Geneva Conventions is often emphasised,²⁹ but the practical value of such willingness is doubtful. For instance, the FMLN declared the application of the full Geneva Conventions and Protocols,³⁰ but it is questionable that the dissident group could abide by more than five hundred provisions of the Geneva Conventions. Thus, it may be desirable that technicalities are left to domestic legislation and military manuals.³¹

Rosemary Abi-Saab describes the fear held by international lawyers:

... not all experts agree on the desirability of encouraging a search for “general principles” of humanitarian law, lest the Geneva Conventions be reduced to a few rules deemed essential, at the expense of others of equal importance, especially the rules of implementation; for fear, in other words, of reducing the whole body of international humanitarian law applicable to international conflicts to this minimum of principles, to the detriment of the numerous more specific rules of humanitarian law applying to conflicts of this type.³²

²⁸ As to the problem of specification of the laws of war, see Delbert D. Smith, “The Geneva Prisoner of War Convention: An Appraisal”, 42 *New York University Law Review* 880, 910-912 (1967)

²⁹ See *Tadic* case, para. 105-107.

³⁰ See *supra*. Ch. 5.

³¹ However, technicalities are unavoidable in conventions on certain weapons.

³² Rosemary Abi-Saab, ‘The “General Principles” of humanitarian law according to the International Court of Justice’, *IRRC*, Jan.-Feb. 1987, at 357, 371.

Having examined the importance of the general principles of the laws of war in Chapter 2, this author refutes the above concern for two reasons. First, it would not be scholarly to dissuade the study of the general principles of the laws of war, which, without legal obligations, have been invoked theoretically and practically in both international and civil conflict for centuries. Second, the 1949 Geneva Conventions and their Protocols exist not for their own sake, but for the sake of the victims of armed conflict. In other words, if the reduction of these instruments would be more helpful than their preservation as they are, let them be reduced to fewer provisions! Besides, if a State, which ratifies a new humanitarian law comprising of less detailed provisions, is confidently able to “implement” the law, the States would introduce domestic law and a military manual which provides more detailed provisions.

A unified and simplified law should be ratified only by those States that are willing to comply with it. As the present author has already written, the world-wide ratification would not necessarily result in the better “implementation” of humanitarian instruments, which would be dangerous to the legitimacy of international humanitarian law. A State must consider if she can “implement” a humanitarian treaty, and she should ratify it only when she is certain that the treaty will be “implemented”. For instance, it might be tempting to accuse the US Government of not having ratified the Convention on the Rights of the Child, which is almost universally ratified. However, according to the information of the UNICEF, the US Government has not ratified the treaty because she “undertakes an extensive examination and scrutiny of treaties before proceeding to ratify”.³³ Such attitude of

³³ UNICEF, “Convention on the Rights of the Child: Frequently asked questions” at [http:// www.unicef.org/crc/faq.htm](http://www.unicef.org/crc/faq.htm).

the US Government should not be condemned; rather it should be followed by other States.

10.2.4. APPROACH BASED ON MORALITY, TRADITION AND CULTURE³⁴

In the last part of this thesis, the present author considers the problem of the universal character of today's international humanitarian law. Recent humanitarian treaties, including the 1977 Protocols, have been adopted in international conferences where representatives from all over the world gathered. Abi-Saab prefers to regard such humanitarian conventions of universal character as "general international law", towards which many States have "a generalized feeling that [they are] legally bound or not".³⁵ The examination of State practice, however, indicates that Protocol II, comprising of provisions that, Abi-Saab claims, "were produced through a complex process of careful drafting and lengthy negotiations", has not been adequately applied, when the instrument is applicable. Common Article 3, part of the 1949 Geneva Conventions that are almost universally ratified, is often subject to gross violations.

There are a number of possible answers for violations of treaties concerning international humanitarian law, but the present writer considers that one important, yet unnoticed, reason may be the universal character of humanitarian conventions. International conferences may offer good opportunity for all States, whether small States or Great Powers, to express their views on particular issues. However, the examination of the *Official Records* of the Diplomatic Conference indicates that this is not always the case; some provisions of Protocol II were not adequately discussed,

³⁴ Regarding international humanitarian law and cultural relativism, see Marco Sassòli and Antoine A. Bouvier, *How Does Law Protect in War*, at 70-71 (1999).

³⁵ Georges Abi-Saab, "The 1977 Additional Protocols and General International Law: Some Preliminary Reflexions", in Astrid J.M. Delissen and Gerard J. Tanja (eds.), *Humanitarian Law of Armed Conflict Challenges Ahead: Essays in Honour of Frits Kalshoven* 115, 121-2 (1991).

and many articles were the result of compromise reached at the last stage of the Diplomatic Conference. “Something was done” by adopting Protocol II on the whole by consensus, but the study of the *Official Records* shows that many States were not convinced by approved articles.

A unified and simplified humanitarian convention might provide a clue to this problem, if not a solution. States would more easily accept the treaty for its simplicity, as the detailed “implementation” should be left to the States. Civil wars are atrocious, because they are often concerned with differences, such as culture, ethnicity, religion and ideology, and the legal instrument which was provided by an international conference may not appeal to the parties to the conflict. Rather, good domestic measures, which reflect the morality, tradition and culture of the people living in the State facing such conflict, would be more useful to prevent cruelties.³⁶ For instance, during the Japanese Civil War, it was not an international treaty but *Bushido*, ethics of the samurai, which contributed to ameliorating the conditions of victims. The same is true to the American Civil War, as it was Lieber’s Code, not an international instrument, which humanised the war.

The present author is not so optimistic as to suppose that States parties to a unified and simplified law would always “implement” the treaty, but as he has just written, the treaty should only be ratified by the State which is willing to “implement” it so that the treaty will become an effective tool when an armed conflict occurs. In addition, the better dissemination of the law of armed conflict, particularly in a way to appeal to the morality, tradition and culture of people would result in better

³⁶ Sassòli and Bouvier, *supra*. note 34, at 71 (stating that “These *international dimensions of IHL* should never be underestimated or forgotten: very often the respect and implementation of the rules will in fact depend on the establishment of a clear correspondence between the applicable treaties and local traditions or customs”).

“implementation”.³⁷ The laws of war can be construed in different ways, depending on each culture.³⁸ International humanitarian law may not function when hatred spreads, as recent conflict shows, but good domestic measures based on morality, tradition and culture would be easily understood and would prevent some atrocities, if not all.³⁹

For the time being, however, the possibility that such a unified and simplified treaty is adopted is remote, and therefore customary law can play a role in ameliorating the conditions of victims in non-international armed conflict. Study on customary law in this area needs to be much encouraged. Needless to say, an objective view is necessary for ascertainment of custom. It is therefore appropriate that the International Criminal Tribunal for Rwanda found in its judgment that “Additional Protocol II as a whole was not deemed by the Secretary-General to have been universally recognized as part of customary international law”.⁴⁰ The ICRC, the only organisation which has maintained its presence in almost all conflicts for more than a century, is conducting research into customary rules in international humanitarian law, and the publication of the work is much awaited.⁴¹ Of course, such study on custom would be futile without “implementation” of the custom, and this author concludes this thesis by emphasising the importance of “implementation”.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *The Prosecutor v. Jean-Paul Akayesu, Judgement, Case No. ICTR-96-4-T, 2 Sept., 1998, para. 609, at [http:// www. ictt.org/ENGLISH/cases/Akayesu/judgement/akay001.htm](http://www.ictt.org/ENGLISH/cases/Akayesu/judgement/akay001.htm).*

⁴¹ See the relevant argument in Ch. 1.

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