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CHAPTER 4

TREATIES FOR ARMED CONFLICT¹

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1 IMPORTANCE OF TREATIES IN THE LAW OF ARMED CONFLICT

WRITTEN law, and within that category, treaty law,² has traditionally been, and remains today, a particularly important source of the law of armed conflict

¹ This Chapter will not analyse the question of the effect of war or armed conflict on treaties, namely their suspension or termination because of the outbreak of hostilities. This topic has been considered by the International Law Commission. Moreover, that question concerns treaties concluded in peacetime and for the purposes of peacetime, whereas the focus of this Chapter is on treaties designed to apply specifically during armed conflicts, ie those treaties that essentially apply, *ratione materiae*, from the very moment an armed conflict breaks out.

² A treaty is defined as follows in the Vienna Convention on the Law of Treaties of 1969, 23 May 1969, entered into force on 27 January 1980, UNTS, vol 1155, 331 (VCLT): “Treaty” means an international agreement concluded between States in written form and governed by international law [...] whatever its particular designation. The VCLT only covers agreements between states and in written form. However, under customary international law or under other conventions (such as the VCLT of 1986 concerning treaties concluded by international organizations), the definitions of treaties may differ. Thus, under customary international law, the four essential and cumulative criteria for determining the existing of a binding agreement under international law are the following: (i) a meeting of minds

or international humanitarian law (IHL).³ There are several reasons for this preeminence.

First, questions of warfare are relatively detailed and technical matters. Apart from a body of broad principles and flexible general rules adaptable to the ever-changing circumstances of armed conflict, this area of the law is prescribed in a set of detailed rules of an 'administrative' rather than 'constitutional' legal character. The law of armed conflict is an area of international law most intimately characterized by the complex interplay of some general principles (necessity, proportionality, unnecessary suffering, distinctions, humanity, etc.) over which lies a web of detailed rules containing specific prescriptions of a procedural or substantive nature. Such specific rules can only reasonably be set out in a written form. The medium of treaties is their most natural form of expression.

Secondly, one has to bear in mind that IHL principally addresses itself to non-lawyers. IHL has to be applied mainly by soldiers and higher military officials; sometimes even by ordinary citizens in international armed conflicts,⁴ and more frequently in non-international armed conflicts.⁵ These individuals invariably have no formal legal training. They cannot be asked to undertake complex and nuanced tasks of interpretation. The law must tell them clearly and in detail what conduct is expected from them in a whole set of situations. Only treaty law allows for such detailed legal regulation. Alberico Gentili, one of the founding fathers of classical international law, wrote with some derision: 'In fact, a soldier ought to know arms and not the law, and it is proper that military men should be ignorant of the law. It is military custom to regard as ridiculous and silly the subtleties of the courts.'⁶ Moreover, since the creation of the International Committee of the Red Cross (ICRC), following the battle of Solferino in 1859, IHL advocates have been heavily involved in the dissemination of IHL rules to the general public. This in turn imperatively requires a set of precise and written norms.

Thirdly, the law of armed conflict is designed to apply in situations of great social and psychological stress, namely during warfare. In such situations, there is usually no time and no possibility to consult legal writings or to have complex discussions

on some object; (ii) the international legal personality of the subjects agreeing (*jus tractatus*), except for the individual who possesses no power of concluding treaties; (iii) the legal effect of the compact (if an agreement is not designed to have legal effects but is confined to be a political agreement or a gentlemen's agreement, it will not be a treaty); (iv) the fact of being governed by international law (states or other international subjects may conclude commercial and other contracts, which are not treaties).

³ On these terminological questions, see R. Kolb and R. Hyde, *An Introduction to the International Law of Armed Conflicts* (Oxford: Hart Publishing, 2008), 16–17.

⁴ For example, industrialists in whose factories prisoners of war may work: see for instance the *I.G. Farben* or *Krupp* cases, in: United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, vol X, London, 1949, 1ff, 69ff.

⁵ In non-international armed conflicts, a government may fight against armed factions comprised of its own citizens.

⁶ A. Gentili, *De iure belli, libri tres* (1598, reprinted: Oxford: Carnegie Classics, 1933), 204.

about how to balance general principles in order to shape a contextual rule. Of course, there is a place for such a process in armed conflicts. For instance, higher officials will undertake such an exercise in the targeting phase of a planned armed attack. But for most military and administrative operations of warfare, there must be ready-made and concrete rules at hand. These can, once again, only be provided in the written form of a treaty.

Fourthly, the law of armed conflict regulates not only the conduct of hostilities, but also situations where individuals are detained or are under the control of a party to the armed conflict. In such situations, there is a particularly high risk of such individuals being subjected to harsh and abusive treatment. Customary norms are not in these instances the most suitable rules to regulate such situations, as they are less easily discernible, less precise, and often more controversial. The written treaty law here has a fundamental role to perform: to set clear and detailed rules to constrain effectively the conduct of the military personnel with regard to the treatment of those detained or under its control.

Fifthly, treaties are also important devices for unifying the law. National legislation and military manuals could certainly satisfy all the requirements set out above, thereby providing soldiers with the detailed technical rules of the law of armed conflict that they must apply. But the law would inevitably differ considerably from one state to another. These differences would be highly problematic in the light of the paramount principle of reciprocity, or of equality of belligerents.⁷ To a large extent, the law of armed conflict can only practically function if it is premised on the equality and non-discrimination of the belligerents. A party to an armed conflict is unlikely to agree to be bound by rules to which its adversary will not pay heed. Such adverse discrimination would put it at a comparative military disadvantage. This is particularly true in international armed conflicts, where IHL applies equally to the sovereigns in question, regardless of their respective *jus ad bellum* motives. Treaties ratified by a large number of states (or indeed by all states) create a unique legal space by establishing uniformity in the applicable rules and consequently extending the scope of reciprocity and equality of belligerents. This function obviously could also be performed by customary international law, but its evolution would be longer, more burdensome, haphazard, and riddled with more uncertainties.

Sixthly, treaties allow for a more efficient and more rational modification of the law when some change is needed. This is frequently the case in IHL, which has to keep a pace with a highly complex and evolving field of human experience, namely warfare. It is a truism to affirm that the law of armed conflict always tends to be one war behind. Through the creation of a new protocol, or the modification of some treaty rules, change can sometimes be achieved relatively quickly through the conventional process. The same is true for minor or technical amendments, which may

⁷ On the importance of this principle, cf. H. Meyrowitz, *Le principe de l'égalité des belligérants devant le droit de la guerre* (Paris: A. Pedone, 1970).

be considered particularly pressing. For example, it was only through the creation of a new treaty, Additional Protocol III of 2005 to the four Geneva Conventions,⁸ that the new emblem of the red crystal could reasonably be adopted and the rules concerning its use clearly articulated.

All these reasons explain why the law of armed conflict is one of the branches of public international law that has been the most intensely codified through treaties.

2 TREATIES AND CUSTOMARY INTERNATIONAL LAW

This is not the place to dwell on the multiple issues that arise out of consideration of the relationship between treaty-based IHL rules and customary law.⁹ Only some aspects will be analysed here: first, the specific utility and functions of customary international law (CIL) in IHL alongside the many conventional sources; secondly, the extent to which the various conventional sources reflect CIL; thirdly, the seminal role of customary practice in some recent efforts to codify specific branches of IHL.

(a) If IHL is essentially governed by treaties, what is the role performed by CIL in this area of the law? What are the distinctive or comparative advantages of IHL rules that form part of CIL compared with those contained in IHL treaties? In particular, what can only be achieved by CIL and not by treaty law?

First, CIL provides for a minimum standard of universally applicable IHL rules, independent of the current state of ratifications or accessions to an IHL treaty. Treaty law is relative law: it applies only to states (or other subjects of international law) that have formally consented to be bound by the treaty obligations, ie through ratification or accession to a treaty. *Pacta tertiis nec nocent nec prosunt*. Some IHL treaties of primary importance are far from being universally ratified or acceded to.¹⁰ The most famous examples are the Additional Protocols I and II (1977) to the four Geneva Conventions of 1949. These treaties contain some rules of paramount importance, such as those concerning the protection of civilian populations from attack.¹¹

⁸ Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III), 8 December 2005, entered into force 14 January 2007.

⁹ See on this point the recent contribution of Y. Dinstein, 'The Interaction Between Customary International Law and Treaties', 322 *Recueil des cours de l'Académie de droit international de La Haye (RCADI)* (2006) 243–427; Paul Tavernier and Jean-Marie Henckaerts (eds), *Droit international humanitaire coutumier: enjeux et défis contemporains* (Brussels: Bruylant, 2008).

¹⁰ See (C) below.

¹¹ Articles 48ff of Additional Protocol I (AP I) (1977), and the weaker rules of Arts 13ff of Additional Protocol II (AP II), (1977).

To the extent that some of the rules contained in these multilaterally—but not universally—ratified conventions reflect customary law, evinced by general state practice and *opinio juris*,¹² they will be applicable to all the states in the world. General international law on treaties can thus be transformed into universal international law by CIL. This is an important function in a world composed of a growing number of states; in a world where new states emerge, which for a transient time will not be bound by the conventions; and in a world where armed conflicts are endemic. In other words, CIL ensures a common standard of rules applicable in all situations of armed conflict everywhere in the world independent of the acceptance of treaties by the states concerned. If one reflects upon the fact that the non-ratification of a treaty by one party to a conflict does not simply entail the non-application of that treaty to that state alone, but rather its non-application to all the relations between that state and other belligerent parties, then the importance of this residual unifying function of CIL is very apparent. Since the Korean war of 1950,¹³ where the Geneva Conventions were still widely non-ratified, through to the Ethiopia/Eritrea war of 1998–2000, where Eritrea had not acceded to the Geneva Conventions until August 2000, there has been a considerable need to apply CIL because of formally inapplicable treaty norms.

Secondly, CIL remains the paramount vehicle for binding different non-state subjects and entities to IHL. IHL treaties are open to accession only by states¹⁴ (or ‘Powers’,¹⁵ where this term is customarily interpreted as meaning states). Thus, if armed forces under the command of an international organization participate in hostilities—as occurred with UN blue helmets, dragged into an armed conflict in the Congo in 1960–63—CIL of the law of armed conflict applies to these individuals since the UN is not party (and under the current interpretation could not become a party) to the relevant IHL treaties.¹⁶ The same may also be the case for insurgents or other similar entities in the context of a non-international armed conflict. In such a case, treaty law is ordinarily held to be applicable because the conflict takes place on the territory of a state that has ratified the treaty. The idea is that the ratification or accession to a treaty and its incorporation into the municipal law of a state has as a corollary effect that all individuals on the territory will be bound by these rules,

¹² Statute of the International Court of Justice, annexed to the Charter of the United Nations, Art 38(1)(b); *North Sea Continental Shelf, Judgment* [1969], § 77.

¹³ Cf. D.W. Bowett, *United Nations Forces. A Legal Study of United Nations Practice* (London: Stevens & Sons, 1964), 53ff.

¹⁴ See eg Art 4 of the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, 10 October 1980, entered into force 2 December 1983, UNTS, vol 1342, 137.

¹⁵ See eg Art 6 of the Hague Convention IV Respecting the Laws and Customs of War on Land (The Hague Convention IV) (1907), Arts 60, 59, 139, and 155 respectively of Geneva Conventions I–IV.

¹⁶ On this question, see R. Kolb, *Droit humanitaire et opérations de paix internationales* (2nd edn, Geneva/Basel/Munich/Brussels: Helbing & Lichtenhahn, 2006), esp 21ff.

especially if they take up arms during an insurrection.¹⁷ In addition to this indirect reach of treaty law, CIL also applies to non-state actors, albeit only that branch of customary IHL applicable during non-international armed conflicts. This general reach of CIL *ratione personarum* was stressed by the Institute of International Law in its Resolution on 'The Application of International Humanitarian Law and Fundamental Human Rights in Armed Conflicts in Which Non-State Entities are Parties' (1999), in Articles II and IV.¹⁸

Thirdly, CIL can be seen as a subsidiary source of the law of armed conflict. It may in some circumstances fill gaps and/or remove uncertainties lurking in the interstices of treaty law. Such gaps are particularly numerous in lesser developed areas of IHL and in rapidly evolving areas. The best example is the branch of IHL applicable to non-international armed conflicts. To a tiny set of treaty rules, namely Common Article 3 to the four 1949 Geneva Conventions and Additional Protocol II of 1977, there is today the complement of a whole series of CIL rules that have progressively emerged through case law, as well as through institutional and state practice.¹⁹

In a similar vein, specific treaty-based norms may benefit from some clarification found in unwritten practice. CIL can thus also develop conventional rules by adding precision to them. In this process, customary practice may derogate from

¹⁷ On this construction, see Commentary AP I and II, 1345: 'The question is often raised how the insurgent party can be bound by a treaty to which it is not a High Contracting Party. It may therefore be appropriate to recall here the explanation given in 1949: the commitment made by a State not only applies to the government but also to any established authorities and private individuals within the national territory of that State and certain obligations are therefore imposed upon them. The extent of rights and duties of private individuals is therefore the same as that of the rights and duties of the State. Although this argument has occasionally been questioned in legal literature, the validity of the obligation imposed upon insurgents has never been contested'. See also J. Pictet, *Le droit humanitaire et la protection des victimes de la guerre* (Leiden: Brill, 1973), 58: 'On a d'ailleurs fait remarquer que lorsqu'un Etat ratifie les Conventions, il le fait au nom de tous ses ressortissants, y compris ceux qui s'insurgent contre l'ordre établi, bien que ces derniers aient tendance, par définition, à répudier tous les actes de l'Etat'; J. Pictet (ed), *Geneva Convention II, Commentary* (Geneva: ICRC, 1960), 34: 'On the other hand, what justification is there for the obligation on the adverse Party in revolt against the established authority? Some doubt has been expressed as to whether insurgents can be legally bound by a Convention which they have not themselves signed. The answer is provided in most national legislations; by the fact of ratification, an international Convention becomes part of law and is therefore binding upon all the individuals of that country'; D. Fleck (ed), *The Handbook of International Humanitarian Law* (2nd edn, Oxford: Oxford University Press, 2008), 620. For other authors, it is precisely the customary nature of the minimum rules contained in Common Article 3 (or in AP II) that command their application by any government and rebels, independently from any state of ratifications: see F. Bugnion, *Le Comité international de la Croix-Rouge et la protection des victimes de la guerre* (Geneva: ICRC, 1994), 381-4.

¹⁸ The text of this resolution is available on the website of the Institute of International Law at <http://www.idi-iiil.org/idiE/resolutionsE/1999_ber_03_en.PDF>. See also D. Schindler and J. Toman, *The Law of Armed Conflicts* (Leiden/Boston: Hotell Publishing, 2004), 1206-7.

¹⁹ See T. Meron, 'International Law in the Age of Human Rights', 301 *RCADI* (2003) 24ff. See also the ICRC study on CIL, J.M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, vols I-III (Cambridge: Cambridge University Press, 2005).

a written norm, which in turn it complements. An example of the former is the application of Article 118, paragraph 1, of Geneva Convention III requiring that prisoners of war (POWs) shall be released and repatriated without delay after the cessation of active hostilities. This Article has today to be interpreted in light of the customary practice according to which repatriation (ie return to the country of origin) shall not be undertaken against the express wish of the POW. The concern of Geneva Convention III was to impede delay and excuses for the non-repatriation of POWs as witnessed after World War I, and also, specifically, to stop persons being unwillingly sent to a place other than their country of origin. It thus provided for mandatory return to the country of origin of the prisoner. However, since the Korean War of 1950, the concern has shifted to the case of POWs who do not wish to be sent back by force to their country of origin, because of well-founded fears of being persecuted upon return.²⁰ The relevant state practice—not then reflected in the text of Geneva Convention III—eventually changed under the pressure of refugee and human rights law. Consequently, the ICRC now conducts individual interviews with POWs to determine if a POW wishes to return to his or her country of origin, in order to avoid unwelcome pressure to return home being placed on these individuals by the detaining power. If the POW does not wish to return to his or her country of origin, another destination for return that corresponds with the wishes of the POW is sought. The Permanent Court of Arbitration in 2003 implicitly ruled that this practice amounted to a customary rule.²¹ Thus, CIL has modified a treaty rule contained in Geneva Convention III or filled a justice gap within that rule (*rechtspolitische Lücke*). This is also an example of the influence of human rights law on IHL. Another example demonstrates how CIL can complement a treaty norm by providing it with more contextual precision. Article 30 of Geneva Convention I stipulates that medical and religious personnel, whose retention is not indispensable for the care of POWs of their country, shall be returned to the party to the conflict to whom they belong as soon as military requirements permit. In the practice of states, and initiated by the ICRC, these release operations are usually linked with the repatriation of seriously wounded and sick POWs, who must be sent back to their state of origin as quickly as circumstances allow according to Article 109 of Geneva Convention III. This solution avoids multiple repatriation flights or convoys and also ensures the care of seriously injured POWs during transit. The inter-relationship between these two provisions can only be understood in the light of customary practice.²²

²⁰ Cf C. Shields Delessert, *Release and Repatriation of Prisoners of War at the End of Active Hostilities* (Zurich: Schulthess Polygraphischer Verlag, 1977).

²¹ Arbitral Award of 1 July 2003, *Prisoners of War, Eritrea's Claim 17*, § 147: '[T]here must be adequate procedures to ensure that individuals are not repatriated against their will.'

²² Cf F. Bugnion, *Le Comité international de la Croix-Rouge et la protection des victimes de la guerre* (Geneva: ICRC, 1994), 790.

CIL shaped by military practice can moreover sometimes be used fruitfully in order to interpret general principles contained in treaties, which need to be concretized. Thus, for example, in the context of 'military necessity', it is indispensable for an IHL lawyer to have some intimate knowledge of field practice in order to assess, for example, when the destruction of an enemy's property is normally considered to be 'imperatively demanded' (Article 23(d), of The Hague Regulations, 1907).²³

In sum, CIL presents the advantage of offering a minimum standard of rules applicable in all circumstances of armed conflicts to all actors effectively participating therein. CIL is free of the loopholes and inequalities flowing from the different status of ratifications of treaties, which exclude non-state entities from becoming parties, or which suffer from other limitations (denunciations, reservations, etc). CIL thus provides a minimum yardstick of IHL rules that apply to international peace operations of the UN where, quite apart from the applicable military Rules of Engagement (ROE), the treaty law applicable to the different national contingents may greatly differ because of unequal ratification/accession to treaties by the respective states. In Somalia, during the phase of UNOSOM II in 1992, there were 23 national contingents participating in the operation, with *prima facie* different IHL rules applying to each contingent.

(b) Which rules of conventional IHL reflect CIL? Which rules of treaty-based IHL have shaped new CIL? These two questions relate to the codification of preexisting CIL and to the progressive development of CIL. A great deal of rules in IHL treaties codify preexisting CIL. After all, treaty-based IHL seeks to reflect military and humanitarian practice. Thus, the provisions on the right of humanitarian initiative by the ICRC (Common Article 3 and Articles 9, 9, 9, and 10, respectively of Geneva Conventions I-IV) codify an ancient practice dating to the formative stage of the 1860s. Conversely, Article 54 of Additional Protocol I on the protection of objects indispensable to the survival of the civilian population during the hostilities phase was not reflective of CIL in 1977. However, the PCA in the *Eritrea/Ethiopia Western Front, Aerial Bombardment and Related Claims* case (Eritrea's Claims 1, 3, 5, 9-13, 14, 21, 25, and 26, Award of 19 December 2005), found that the provision had since crystallized into CIL, even without any compelling state practice to that effect.²⁴

Overall, what rules of conventional IHL are to be considered CIL? The rule of thumb today is that the substantive rules (as opposed to procedural provisions) contained in the many multilateral treaties on IHL represent CIL. This tendency to harmonize and to equalize these two sources of international law stems from the fact that military and state practice can only be one and the same; practice cannot be split according to the sources. If the treaties are expressive of, and seek to

²³ Regulations Respecting the Laws and Customs of War on Land, annexed to the Convention Respecting the Laws and Customs of War on Land (The Hague Convention IV), 18 October 1907, entered into force 26 January 1910.

²⁴ At § 96ff.

influence, the actual practice of warfare, they perforce must reflect what states and other international actors consider to be the law during armed conflict. But that is also roughly the test for CIL. If the two sources contained significant differences, a legal schizophrenia would result: international subjects would be bound by CIL, reflective of their practice and *opinio juris*, whereas the treaty-based law would largely be irrelevant or modified by subsequent practice.²⁵ Thus, as in the *Nicaragua* (1986) case,²⁶ we are confronted with two sets of largely (albeit not completely) identical rules of behaviour in conventional international law and CIL.

However, clear evidence of actual military practice is exceedingly difficult to obtain, especially if it is based not only on the activities of some selected states, but on a universal approach confronting the practice of all states in the world. Consequently, there is a strong temptation to find a proper expression of *opinio juris* (which in turn is supposed to underlie the true practice) in norms contained in IHL treaties. This presumptive approach has a long standing. The International Military Tribunal of Nuremberg stated that the Hague Regulations of 1907 (Convention IV) completely reflected CIL.²⁷ The ICJ has affirmed in a more general way that the great majority of substantive rules of conventional IHL reflect CIL. In the *Legality of the Threat or Use of Nuclear Weapons* Advisory Opinion (1996), the Court stated as follows:

The extensive codification of humanitarian law and the extent of the accession to the resultant treaties, as well as the fact that the denunciation clauses that existed in the codification instruments have never been used, have provided the international community with a corpus of treaty rules the great majority of which had already become customary and which reflected the most universally recognized humanitarian principles. These rules indicate the normal conduct and behaviour expected of States.²⁸

The ICTY in the *Tadić* case (1995) affirmed that many rules contained in Additional Protocol II and concerning non-international armed conflicts are reflective of CIL.²⁹ More recently, and in the same vein, the PCA in its *Eritrea/Ethiopia* cases, affirmed in a more balanced way that the great majority (but not all) of the rules contained in the four Geneva Conventions and Additional Protocol I reflected CIL.³⁰ Whereas

²⁵ If the conventional law was held to prevail by virtue of the *lex specialis* rule, there would be an enormous number of violations of the law, which is an impractical solution.

²⁶ In this case, the rules at stake were those on the use of force under the Charter and under CIL (*ius ad bellum*): ICJ Rep 1986, 92ff.

²⁷ *Nuremberg Judgment of the IMT, 1947*: 41 *American Journal of International Law*, (1947) 248–9. For the customary nature of Art 42 of the Regulations, see also the *Armed Activities case (DRC v Uganda)*, ICJ Rep 2005, § 172.

²⁸ ICJ Rep 1996-I, 258, § 82.

²⁹ At § 117. The judgment is published in 35 *ILM* (1996) 32ff.

³⁰ See *Central Front*, Ethiopia's Claim 2, decision of 28 April 2004, §§ 13ss; *Central Front*, Eritrea's Claims 2, 4, 6, 7, 8, 22, decision of 28 April 2004, §§ 21ss; *Prisoners of War*, Ethiopia's Claim 4, decision of 1 July 2003, §§ 22ss; *Prisoners of War*, Eritrea's Claim 17, decision of 1 July 2003, §§ 31ss; *Civilians Claims*, Ethiopia's Claim 5, decision of 17 December 2004, §§ 22ss; *Civilians Claims*, Eritrea's Claims 15, 16, 23, and 27–32, decision of 17 December 2004, §§ 26ss; *Western and Eastern Fronts*, Ethiopia's Claims

the Geneva Conventions have consistently been considered to reflect CIL, the PCA underscored that most of the provisions in Additional Protocol I reflect CIL, but not all of them, some consisting rather in progressive development of the law. According to the PCA, the provisions concerning the conduct of hostilities and correlative protection of the civilian population (Articles 48ff) nowadays reflect CIL without exception. In relation to Protocol II to the Conventional Arms Treaty of 1980, on mines, booby-traps, and other devices, the PCA held that the conclusion of this treaty was too recent,³¹ and state practice still too uncertain to affirm the customary nature of its provisions. The Court, however, adds that some of these provisions represent accepted general principles of IHL and thus reflect CIL, eg the provisions on the registration of mines and the localities where they are placed, and the prohibition of their indiscriminate use. Finally, the PCA asserts the presumption whereby the substantive provisions of treaty-based IHL in the *codification treaties* reflect CIL. There is thus a shift in the burden of proof: the party contesting the customary status of IHL rules bears the onus in demonstrating otherwise.

Thus, according to the recent case law, there is a considerable tendency to merge treaty-based IHL and customary IHL. The equation seems roughly to be: written (codified) IHL = customary IHL. This same conclusion was reached by the above-mentioned ICRC study on the subject matter.³² This view, based on a large harmonization of the treaty-based and customary sources, is today challenged only by states not having ratified or acceded to some important treaties, as is the case of the United States, Israel, or India, which are not parties to Additional Protocol I. These states thereby seek to cling to what they may consider an 'advantage' of not being bound by this Protocol and other instruments, in order consequently also not to be bound by CIL creeping through the backdoor of these treaties.

(c) In some areas of IHL, there is still no codification of the relevant rules; CIL governs alone. To the extent efforts of codification are undertaken, CIL will guide the work of the drafters of relevant future treaties. This is the case, for example, in the context of aerial warfare, especially with regard to air-to-air combat.³³ An effort of 'codification' is taking place in this area with the drafting of a 'Third Draft Manual

1 and 3, decision of 19 December 2005, §§ 14ss; *Western Front, Aerial Bombardement and Related Claims, Eritrea's Claims* 1, 3, 5, 9–13, 14, 21, 25, and 26, decision of 19 December 2005, §§ 10ss. The arbitral awards are available online at the website of the PCA <<http://www.pca-cpa.org>>.

³¹ This Protocol was adopted in 1980, with amendments in 1996.

³² Cf J.M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, vols I–III (Cambridge: ICRC, 2005). For the somewhat reserved reaction by the United States to that study, see 46 *ILM* (2007) 511ff. The study is concentrated on the two Additional Protocols of 1977, which are more controversial, whereas the rules of the Geneva Conventions are recognized today to reflect CIL. On this ICRC study, see also M. Bothe, 'Customary IHL: Some Reflections on the ICRC Study', 8 *Yearbook on International Humanitarian Law* (2005) 143ff.

³³ On air warfare, see A. Bouvier and M. Sassoli, *How Does Law Protect in War?*, vol I (2nd edn, Geneva: ICRC, 2006), 241ff. The air-to-land combat is covered in other treaties, such as Additional Protocol I.

on Air and Missile Warfare' for the use of professional armies.³⁴ On such topics, a rather particular relationship exists between CIL and treaty-based law: the former makes an original and unilateral contribution to the latter; and the latter grows in a legislative way in the shadow of the former.

3 MAIN TREATIES

There are today a great number of treaties dealing with armed conflict or related matters, such as human rights treaties which apply in times of peace, internal disturbance and in times of armed conflict.³⁵ This is not the place to give an exhaustive list of all the treaties relevant to armed conflict.³⁶ The main treaties codifying general rules of the law of armed conflict are the following:

- *St Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight* (1868) (Declaration of St Petersburg).³⁷ This text remains important today with respect to the general principles stated in its Preamble and those parts that deal with the legitimate aims of war and the principle of the limitation of means.
- *The Hague Conventions I–XIV of 1907*,³⁸ in particular Convention IV respecting the Laws and Customs of War on Land with its annexed Regulations on

³⁴ Program on Humanitarian Policy and Conflict Research, Harvard University, *Manual on International Humanitarian Law Applicable to Air and Missile Warfare, including Commentary*, 15 May 2009.

³⁵ On this aspect, see R. Kolb, 'Relationship between International Humanitarian Law and Human Rights Law', in *Encyclopaedia of Public International Law*, <<http://www.mpepil.com>>.

³⁶ A complete overview is available on the website of the ICRC: <<http://www.icrc.org/ihl.nsf/INTRO?OpenView>>. See also D. Schindler and J. Toman, *The Law of Armed Conflicts* (Leiden/Boston: Martinus Nijhoff Publishers, 2004). For an overview of the main instruments and some commentaries to them, see C. Greenwood, 'Legal Sources', in D. Fleck (ed), *The Handbook of International Humanitarian Law* (Oxford: Oxford University Press, 2008), 27ff.

³⁷ 29 November and 11 December 1868, entered into force 11 December 1868, currently (as of May 2012) 20 states parties.

³⁸ Convention for the Pacific Settlement of International Disputes (The Hague Convention I), 18 October 1907; Convention Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts (The Hague Convention II), 18 October 1907, entered into force 26 January 1910; Convention Relative to the Opening of Hostilities (The Hague Convention III), 18 October 1907, entered into force 26 January 1910, currently (as of May 2012) 34 states parties; for The Hague Convention IV and its annexed Regulations, see n 23 above, currently 35 states parties; Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (The Hague Convention V), 18 October 1907, entered into force 26 January 1910, currently 32 states parties; Convention Relating to the Status of Enemy Merchant Ships at the Outbreak of Hostilities (The Hague Convention VI),

Land Warfare, and Convention V respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land. The Hague Convention IV with its Regulations remains very relevant today in a great array of situations, namely with respect to prohibited means and methods of warfare (see especially Article 23 of the Regulations) and in the context of occupied territories (see Articles 42ff of the Regulations). Those rules of The Hague Convention V concerning rules on the law of neutrality in land warfare, are also still important.

- *The Geneva Conventions I-IV of 1949.*³⁹ These treaties are currently the major IHL conventions. They are universal in scope, having been ratified by all existing states. They reflect an ideological shift with respect to Hague Law of 1907 in three respects. First, Hague Law is essentially based on a military and administrative approach to warfare: it contains primarily rules for the military branch, spelling out their rights during warfare and their powers in certain situations such as occupied territories. In contrast, Geneva Law is based on the protection of individuals, namely the so-called victims of war or persons in need of protection since they are *hors de combat*. A military approach has thus given way to a humanitarian one. Secondly, Hague Law is formulated in a series of short provisions containing general rules, with an important number of gaps or uncertainties lurking under the surface. States in 1899 and 1907 were not ready to limit significantly their sovereignty in wartime. After the appalling experiences of World War II, the Geneva Conventions mark a shift towards a much more detailed and complete codification of the applicable rules. The norms of Geneva Law are much more numerous, much more detailed, and much more comprehensive. Thirdly, Hague Law does not make clear to what extent it can be derogated from by way of special agreements. Geneva Law, on the contrary, contains specific rules ensuring that its provisions will not be displaced by all sorts of ingenious devices invented by the state parties: Articles 6/6/6/7, 7/7/7/8 respectively of Geneva Conventions I-IV,

18 October 1907, entered into force 26 January 1910, currently 29 states parties; Convention Relating to the Conversion of Merchant Ships into War-Ships (The Hague Convention VII), 18 October 1907, entered into force 26 January 1910, currently 32 states parties; Convention Relative to the Laying of Automatic Submarine Contact Mines (The Hague Convention VIII), 18 October 1907, entered into force 26 January 1910, currently 27 states parties; Convention Concerning Bombardment by Naval Forces in Time of War (The Hague Convention IX), 18 October 1907, entered into force 26 January 1910, currently 35 states parties; Convention for the Adaptation to Maritime War of the Principles of the Geneva Convention (The Hague Convention X), 18 October 1907, entered into force 26 January 1910, currently 33 states parties; Convention Relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War (The Hague Convention XI), 18 October 1907, entered into force 26 January 1910, currently 31 states parties; Convention relative to the Creation of an International Prize Court (The Hague Convention XII), 18 October 1907, has not entered into force, currently 1 state party; Convention Concerning the Rights and Duties of Neutral Powers in Naval War (The Hague Convention XIII), 18 October 1907, entered into force 26 January 1910, currently 28 states parties; Declaration Prohibiting the Discharge of Projectiles and Explosives from Balloons (The Hague Convention XIV), 18 October 1907, entered into force 27 November 1909, currently 20 states parties.

³⁹ See n 15 above.

- and Article 47 of Geneva Convention IV. Thus, Geneva Law is a public order or public policy law, not to be derogated from under any circumstances.
- *The Convention for the Protection of Cultural Property in the Event of Armed Conflict* (Hague Convention on Cultural Property in Case of Armed Conflict 1954), with its two Additional Protocols of 1954 and of 1999.⁴⁰ This Convention deals with the protection of monuments and works of art, ie buildings, libraries as well as other objects of cultural interest or deposits of protected objects. A definition of protected cultural property can be found in Article 1 of the Convention. States parties drew up lists of these objects and communicated them to the other parties. The lists of world cultural heritage of the UNESCO contribute to the definition of such sites and objects. Finally, there is a distinctive emblem with which the protected objects are marked during armed conflicts.⁴¹
 - *Additional Protocols I, II and III to the Geneva Conventions of 1949* (1977 and 2005). Additional Protocol I (1977) is an important update to the Geneva Conventions, developing the rules of the Geneva Conventions on the protection of persons, but also inserting new rules on means and methods of warfare, such as those governing attacks against military objectives and the correlative immunity of civilian objects and persons from attacks (Articles 48ff). Additional Protocol II (1977) is the first treaty relating to the law of armed conflict dedicated exclusively to non-international armed conflicts (roughly speaking to 'civil wars'). In 2005 Additional Protocol III was adopted adding a further protective emblem (the red crystal) to the former ones. Additional Protocol I was first applied in the Kosovo War of 1999, between the Federal Republic of Yugoslavia and those NATO states that were at that time parties to the Protocol. Additional Protocol II was first applied, by special agreement, to the civil war in El Salvador during the 1980s.
 - *Rome Statute of the International Criminal Court*, adopted at Rome (1998).⁴² This treaty does not deal directly with the law of armed conflict; it rather deals with international criminal law in the specific institutional context of the International Criminal Court (ICC). However, as the violation of the law of armed conflict may entail individual criminal responsibility, the Statute is interesting for the scholar specialized in IHL. Although it is not a codification of international criminal law, the provisions that address the *ratione materiae* of the ICC, and in particular the

⁴⁰ 14 May 1954, entered into force on 7 August 1956, currently (as of May 2012) 123 states parties; Protocol for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954, entered into force 7 August 1956, currently (as of May 2012) 100 states parties; Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, 26 March 1999, entered into force 9 March 2004, currently 53 states parties.

⁴¹ According to Art 16 of the Convention the emblem takes the form of a shield, pointed below, per saltire blue and white (a shield consisting of a royal-blue square, one of the angles of which forms the point of the shield, and of a royal-blue triangle above the square, the space on either side being taken up by a white triangle).

⁴² 17 July 1998, entered into force 1 July 2002, UN Doc A/CONF.183/9.

long enumerated list of war crimes under Article 8, indirectly touch upon and develop the law of armed conflict.

Furthermore, there are a series of treaties limiting the production or use of particular weapons. Again, only some prominent examples will be given:

- *Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare* (Geneva, 1925).⁴³ This Gas Protocol is widely ratified and remains important. The Protocol places a ban only on the use, not the production or possession of such arms. This was due to the fact that many states in 1925 insisted—through relevant reservations—that they remained free to use prohibited gases to the extent that such weapons were first used against them or their allies (reprisals). Thus, it remained necessary to adopt further instruments limiting the production and possession of biological and chemical weapons. The Protocol of 1925 covers both chemical weapons and biological (bacteriological) ones, ie weapons based on non-organic poisonous substances or on organic (living) poisonous substances.⁴⁴
- *Convention on the Prohibition of Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction* (London, Moscow, Washington, 1972).⁴⁵ This agreement was limited to biological weapons as no agreement on the international supervision of a prohibition on chemical weapons could be agreed upon (the Vietnam War was still fresh in people's minds). With regard to biological weapons, the problem of supervision was thought to be dispensable since the use of such weapons no longer presented, by that time, any direct military advantage. Article 1 of the Convention defines the type of substances covered by the treaty.
- *Convention on the Prohibition of Military or Other Hostile Use of Environmental Modification Techniques* (New York, 1976).⁴⁶ This Convention does not protect the environment in general terms but merely seeks to prohibit the deliberate and large-scale misuse of the environment for military purposes.
- *Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which may be Deemed to be Excessively Injurious or to Have Indiscriminate Effects* (Geneva, 1980), with its Protocols I–V: on non-detectable fragments (Protocol I);⁴⁷ on mines, booby-traps and other devices (Protocol II);⁴⁸

⁴³ 17 June 1925, entered into force 8 February 1928, currently (as of May 2012) 133 states parties.

⁴⁴ See § 1 of the Preamble and § 1 of the text. The latter reads: '[The High Contracting Parties accept such prohibition, i.e. that on chemical weapons and] agree to extend this prohibition to the use of bacteriological methods of warfare...'

⁴⁵ 10 April 1972, entered into force 26 March 1975, currently (as of May 2012) 164 states parties.

⁴⁶ 10 December 1976, entered into force on 5 October 1976, currently (as of May 2012) 73 states parties.

⁴⁷ 10 October 1980, entered into force 2 December 1983, currently (as of May 2012) 107 states parties.

⁴⁸ 10 October 1980, entered into force 2 December 1983, currently (as of May 2012) 92 states parties.

on incendiary weapons (Protocol III);⁴⁹ on blinding laser weapons (Protocol IV);⁵⁰ and on explosive remnants of war (Protocol V).⁵¹ This is the most important modern treaty that restricts the use of conventional weapons. It is an umbrella treaty, which is concretized through successive Protocols on the prohibition of specific weapons. It was drafted as a by-product of the negotiations leading to the creation in 1977 of Additional Protocols I and II. There, glaring opposition to weapons of mass destruction had overshadowed the whole quest for the prohibition of weapons more generally. The ICRC was finally able to make some progress after the Conference of 1977, once the controversial problem of the weapons of mass destruction had been eliminated from the discussions. Focus was placed on conventional weapons and the result was the 1980 Convention.

- *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction* (Paris, 1993).⁵² The 1972 Convention on biological weapons had left open the possibility of lawfully using chemical weapons. The question of prohibiting chemical weapons came to the fore during the Iraq–Iran War in the 1980s. There was now readiness, following the end of the Cold War, to eliminate completely chemical weapons. The Convention was finally adopted through the channeling efforts of the UN General Assembly. Article 2 of the Convention contains a definition of the prohibited substances and devices. A detailed mechanism of control was agreed upon.
- *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction* (Oslo, 1997).⁵³ The amended Protocol II on prohibitions and restrictions on the use of mines, booby-traps and other devices (1996) annexed to the 1980 Weapons Convention did not satisfy all those in the international community, in particular NGOs that wanted to place a general ban on anti-personnel mines. It is estimated that more than 100 million such mines are scattered throughout the world. These mines kill and injure thousands of people every month. This Convention seeks to fill the gap by imposing a total ban. However, it has not been ratified by some important mine-producing states.

⁴⁹ 10 October 1980, entered into force 2 December 1983, currently (as of May 2012) 103 states parties.

⁵⁰ 13 October 1995, entered into force 30 July 1998, currently (as of May 2012) 94 states parties.

⁵¹ 28 November 2003, entered into force 12 November 2006, currently (as of May 2012) 59 states parties.

⁵² 13 January 1993, entered into force 29 April 1997, currently (as of May 2012) 188 states parties.

⁵³ 18 September 1997, entered into force 1 March 1999, currently 156 states parties.

4 PROBLEMS OF RATIFICATION OF IHL TREATIES

Treaties on IHL have, until now, only been open for ratification or accession by states. The term 'Powers' contained in the accession clauses of the Geneva Conventions and of other IHL instruments have consistently been interpreted as allowing only states to become parties to these instruments.⁵⁴ This position was implicitly reaffirmed with regard to Palestine in 1989. Having received a letter declaring that the Palestine Liberation Organization (PLO) wanted to accede to the four Geneva Conventions, the depositary Switzerland sent a notification to the states parties noting that 'due to uncertainty within the international community as to existence or non-existence of a State of Palestine' it was not in a position to decide whether the communication of the PLO could be treated as an instrument of accession.⁵⁵ In 1960, the '*Gouvernement provisoire de la République algérienne*' (GPRA) decided to accede to the Geneva Conventions. This was done in the name of Algeria. Thus, the accession became effective at the moment of independence. When the Geneva Conventions were drafted, it was believed that only states possessed armies and made war. Thus only states should be able to become parties to these Conventions, since only they could fulfil all the obligations contained in them. That is also one of the reasons why international organizations, such as the UN, never acceded to any IHL Conventions. This conception has not changed. Consequently, as far as IHL Conventions are concerned, there is still a 'states-only' rule on ratification or accession.

However, this does not mean that entities other than states cannot be subjected to IHL treaty law, as distinct from customary IHL. Thus, states not parties to specific treaties, rebels within a territory torn by insurrection, provisional governments in exile, and a series of other non-state entities, can by unilateral declaration subject themselves to one or more IHL treaties, either in totality or in part. There are three legal devices by which this can be achieved:

- *Article 2, paragraph 3, GC I-IV, for international armed conflicts.* If some belligerent states in an armed conflict are parties to the Geneva Conventions but others are not, the Conventions—even where they formally apply—would be jeopardized. Indeed, reciprocity remains an essential element of the practical working of the law of armed conflict; and it is precisely this reciprocity that would be undermined by the gaps in application generated by the involvement of states

⁵⁴ See eg J. Pictet, *Geneva Convention I, Commentary* (Geneva: ICRC, 1952), 408: 'The invitation [to accede to the convention] is addressed to all States...'

⁵⁵ D. Schindler and J. Toman, *The Law of Armed Conflicts* (Leiden/Boston: Martinus Nijhoff Publishers, 2004), 649.

which are non-parties. For this reason Article 2, paragraph 3, common to the Geneva Conventions, tries to extend as much as possible the reach of these treaties. It provides, '[the Contracting states] be bound by the Convention in relation to the said Power [not being a party to the Convention], if the latter accepts and applies the provisions thereof'. This acceptance can be express or tacit, made by way of declaration or by way of effective application. An example of a comprehensive acceptance of the Geneva Conventions is found in the declarations of the United Kingdom during the Suez war of 1956. An example of a partial acceptance of the Geneva Conventions can be found in the Korean War of 1950.⁵⁶ There, South Korea declared that it would apply Common Article 3; North Korea said it would apply Geneva Convention III on prisoners of war; the United States said that it would apply the 'humanitarian principles' of the Conventions; the UN said that it would respect these 'humanitarian principles' and Geneva Convention III.⁵⁷ With the universal acceptance of the Geneva Conventions today, this provision, albeit not obsolete, is rarely applicable. In some rare cases, a treaty not yet in force may be applied in advance by special agreement. Thus, during the 1973 Middle East War, there was an agreement to apply the draft provisions on the protection of the civilian population of Additional Protocol I.⁵⁸

- *Article 3, paragraph 3, GCI-IV, for non-international armed conflicts (or beyond).* It was felt by the drafters of the Geneva Conventions in 1949 that the law on non-international armed conflicts remained underdeveloped, and that the parties to such conflicts should accept to apply more IHL rules than those strictly applicable to non-international armed conflicts, possibly even the entirety of the Geneva Conventions, by way of a special agreement. This ad hoc means of rendering applicable IHL conventions has been extensively relied upon. Thus, for example, the Geneva Conventions have, by agreement between the warring parties, been integrally applied in Yemen (1964) and in Nigeria (1969). Further, one may recall the important special agreement concluded on 22 May 1992 by the belligerents in the former Yugoslavia.⁵⁹ In that agreement, they recognized the applicability to their conflict of a series of sources of the law of armed conflict.⁶⁰

⁵⁶ The Geneva Conventions were not at that time in force for the belligerents. Thus, Art 2, § 3, was at best applied by analogy.

⁵⁷ See F. Seyersted, *United Nations Forces in the Law of Peace and War* (Leyden: A.W. Sijthoff, 1966), 182ff.

⁵⁸ See F. Bugnion, *Le Comité international de la Croix-Rouge et la protection des victimes de la guerre* (Geneva: ICRC, 1994), 472.

⁵⁹ Agreement concluded under the auspices of the ICRC by the representatives of the Republic of Bosnia-Herzegovina, the Serbian Democratic Party, and the Croatian Democratic Community, signed in Geneva on 22 May 1992.

⁶⁰ For example, under para 2.3. of the Agreement, the Parties agreed to apply Arts 13 to 34 of the Fourth Geneva Convention.

This agreement became one of the bases for the prosecution for war crimes by the ICTY.⁶¹

- *Unilateral Declarations of Application.* For entities that are not states, or in relation to IHL treaties that do not contain clauses such as the aforementioned provisions of the Geneva Conventions, the possibility remains for a non-state actor to accept unilaterally to be bound by all or some of the rules contained in an IHL treaty by making a declaration to this effect. This will often be done in the hope that the opposing belligerent will find good reasons, particularly on the basis of reciprocity or humanity, to apply treaty-based IHL rules. Thus, the UN declared in the Korean War of 1950 that it would respect Geneva Convention III. Moreover, the Palestinian Liberation Organization unilaterally accepted, in a declaration made in 1982, to respect the provisions of the four 1949 Geneva Conventions and of Additional Protocol I of 1977. Whilst refusing to recognize a particular entity as a state, some states have nevertheless expressly acknowledged the willingness of non-state actors to apply the rules contained in an IHL treaty.

The common aim of all these devices is to extend the reach of IHL to situations where it would not formally apply. By filling such gaps in the scope of IHL rules through the use of liberally construed ad hoc devices, it is thought that the belligerents will find a common framework of rules for fighting a limited war. Such limitations will be more beneficial to them than a progressive escalation into a total war. There is, moreover, a chance that humanitarian concerns will be properly respected.

5 RESERVATIONS TO IHL TREATIES

Much ink has been spilt on examining reservations to treaties in general and human rights treaties in particular. Less attention has been paid to reservations to IHL treaties, which have a special humanitarian character, yet must be distinguished

⁶¹ In the case of *Prosecutor v Stanislav Galić*, the ICTY Trial Chamber held that 'by virtue of the 22 May 1992 Agreement the parties to the conflict clearly agreed to abide by the relevant provisions of Additional Protocol I protecting civilians from hostilities. Therefore, Article 51, along with Articles 35 to 42 and 48 to 48 of Additional Protocol I, undoubtedly applied as conventional law between the parties to the conflict'. ICTY (Trial Chamber I), *Prosecutor v Stanislav Galić*, Case No IT-98-29-T, Judgment and Opinion, 5 December 2003, § 25. On appeal, the Appeals Chamber did not consider it necessary to address the argument that the Agreement of 22 May 1992 was not binding on the parties and did not give rise to individual criminal responsibility, because it was satisfied that the prohibition of terror against the civilian population, set out in Art 51(2) of Additional Protocol I, was part of customary international law at the relevant time: ICTY (Appeals Chamber), *Prosecutor v Stanislav Galić*, Case No IT-98-29-A, Judgment, 30 November 2006, § 86.

from human rights treaties because they comprise inter-state obligations applicable among states. This section will briefly address the following aspects of this complex and evolving topic of reservations, currently under examination by the International Law Commission: first, the permissibility of reservations to IHL treaties; secondly, the formulation of such reservations; thirdly, the compatibility of these reservations with the IHL treaties to which they are attached; fourthly, the legal effects of the said reservations; and fifthly, the withdrawal of reservations to IHL treaties.

Permissibility of Reservations to IHL treaties. A reservation to a treaty is 'a unilateral statement, however phrased, made by a state, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State'.⁶² In the absence of an express prohibition of reservations to an IHL treaty, states may make reservations purporting to modify the legal effect of certain IHL treaty provisions.⁶³ Not all IHL treaties allow for reservations. For example, the Rome Statute of the ICC (if we consider it an IHL treaty for present purposes) must be accepted as a whole by states parties;⁶⁴ states cannot pick and choose the rules in the Rome Statute that best suit them, and make reservations concerning rules that they find less attractive.⁶⁵ Indeed, as the Rome Statute is a treaty containing rules both governing the functioning of a judicial institution and setting out the law that this institution must apply, it is difficult to see how reservations could work in practice. In contrast, most IHL treaties allow for reservations. The logic behind allowing for reservations is to encourage as many states as possible to become parties to these important instruments. States that may not wish to be bound by one or a number of provisions in an IHL treaty are not therefore discouraged from becoming parties and therefore from being bound by the bulk of the important rules contained therein, as they can attach reservations to the specific provisions to which they do not wish to be bound.

This wide degree of participation by states in IHL treaties is particularly important for IHL where the rationale of reciprocity between warring parties is omnipresent. It is highly desirable that IHL rules that do not form part of CIL apply equally among parties to an armed conflict, and that human suffering during armed conflicts is consequently mitigated as much as possible under international law. If this were not the case, a party to a conflict may not wish to adhere to IHL rules to which the other party was not legally bound, even if such rules mitigate suffering during war, as these additional obligations may place the adhering party at a comparative military disadvantage. It is thus desirable to encourage states to take on additional IHL treaty obligations and to become parties to these treaties by allowing them to make reservations to certain provisions they may not agree with. In addition to

⁶² Article 2, § 1(d) of the VCLT, n 2 above. ⁶³ See Art 19 of the VCLT.

⁶⁴ Article 120 of the Rome Statute of the ICC provides '[n]o reservations may be made to this Statute'.

⁶⁵ Although one should note the effect of Art 124.

enlarging the scope of application of IHL treaties, a high degree of participation in IHL treaties is also important because it strengthens 'the authority of the moral and humanitarian principles which are [their] basis'.⁶⁶

Although reservations to some IHL treaties are permissible, no reservations have ever been made to a number of them. This is the case with the Declaration of St Petersburg, and The Hague Conventions III, V, VII, XI, XII (indeed, this last treaty has only one ratification), and XIV, and arguably the 1976 Convention on the Prohibition of Military or any Hostile Use of Environmental Modification Techniques to which only one state (Turkey) has attached an interpretative declaration, rather than a reservation. A whole series of examples may, however, be furnished concerning reservations made with respect to other IHL treaties. Small numbers of states made reservations to Hague Conventions IV, VI, VIII, IX, X, and XIII. For example, four states made reservations to Article 44 of Hague Convention IV, which prohibits a belligerent from forcing the inhabitants of an occupied territory to furnish information about the army of the other belligerent or its means of defence. A large number of states have made various reservations to the universally ratified Geneva Conventions, and to the widely ratified Additional Protocols I and II. Unlike earlier IHL treaties, reservations made by some states to Articles in these treaties met with objections from other states. We deal with an example below.

Formulation of Reservations to IHL Treaties. Reservations must be made by a state when signing, ratifying, accepting, approving, or acceding to a treaty. Not all unilateral statements made by states when consenting to be bound by a treaty are reservations. Some statements do not purport to modify the legal effect of provisions of the IHL treaty to which they attach; they are simply statements concerning a state's understanding of the treaty, or certain provisions contained therein, and are called 'interpretative declarations'. Indeed, some unilateral statements do not even purport to interpret part of the IHL treaty to which they are attached. An example is the declaration made by the United Kingdom to Hague Convention VIII, which provides that '[b]y signing this Convention the British Plenipotentiaries declare that the only fact that said Convention does not prohibit such a deed or such a proceeding must not be considered as depriving the Government of His Majesty of the right to contest the legality of said deed or proceeding'.⁶⁷

It is not important whether a statement is called a reservation or an interpretative declaration in order to determine whether it constitutes the former or the latter. The United Kingdom made a 'reservation' upon ratification of Additional Protocol I, which provided that under Article 44, § 3, the term 'deployment' in the sentence 'while he is engaged in a military deployment preceding the launching of an attack' includes 'any movement towards a place from which an armed attack is to

⁶⁶ *Reservations to the Convention on Genocide, Advisory Opinion*, ICJ Rep 1951, 15 at 24.

⁶⁷ Statement by the United Kingdom made at signature and maintained at ratification of The Hague Convention (VIII), reproduced in the IHL treaty database available on the website of the ICRC.

be launched'. According to Professor Shearer, '[i]t is arguable that this is not really a reservation, but an interpretative statement, and that the word deployment is capable of this wider meaning'.⁶⁸ It is often difficult to distinguish interpretative declarations from reservations. This is particularly the case where some statements purport to 'interpret' certain provisions, but in so doing attach a wider or narrower meaning to a provision than otherwise exists on its plain reading. Roughly speaking, when a unilateral statement made by a state provides an interpretation of a provision or a term included in an IHL treaty that may be later proven incorrect, it is more likely that the statement will be considered an interpretative declaration rather than a reservation. In contrast, a statement containing an 'interpretation' which cannot be proven incorrect, meaning that the state making the interpretation is in effect asking other states parties to accept it, will more likely be a reservation. However, if states wish to go beyond the scope of a treaty provision, and undertake more onerous obligations to, for example, extend the protection afforded to some individuals under IHL to others not otherwise covered, then this 'humanitarian' extension will not constitute a reservation as the legal effect of the treaty provisions are not being excluded or modified, only extended.

Compatibility of Reservations with IHL Treaties. Even though reservations are permissible for some IHL treaties, states are not at liberty to make reservations to just any rule contained in the respective treaty. An IHL treaty may of course specify to which articles states may attach reservations.⁶⁹ However, in the absence of such a provision, the freedom of states to make reservations is limited under customary international law. The rationale behind this limitation is that although states wish to encourage a very high level of participation in some treaties, and thus allow states to make reservations, this participation does not come at the cost of undermining the most fundamental provisions of the treaty in question. The most important parts of IHL treaties are thus protected from reservations, and any attempts to modify the legal effect of these parts of the treaty will be invalid. The difficulty is of course identifying these parts, and consequently the invalid reservations that are attached. The test articulated by the International Court of Justice in 1950,⁷⁰ now customary in nature and codified in Article 19(c) of the 1969 Vienna Convention on the Law of Treaties (VCLT),⁷¹ is the 'object and purpose' test.⁷² If a reservation is incompatible with the object and purpose of the treaty, it will be invalid.

⁶⁸ I.A. Shearer, 'Commentary on Paper Presented by K J Keith', 9 *Australian Year Book of International Law* (1980) 41–5 at 44.

⁶⁹ Article 19(b) of the VCLT, n 2 above.

⁷⁰ *Reservations to the Convention on Genocide, Advisory Opinion*, ICJ Rep 1951, 15 at 24.

⁷¹ Article 19 of the VCLT, n 2 above, provides '[a] State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless [...] (c) [...] the reservation is incompatible with the object and purpose of the treaty'.

⁷² For a discussion concerning the object and purpose of a treaty, see Alain Pellet, 'Article 19—Convention de Vienne de 1969', in Olivier Corten and Pierre Klein (eds), *Les Conventions de Vienne sur le Droit des Traités. Commentaire article par article*, vol I (Brussels: Bruylant, 2006), 641–796.

It is up to each state party to an IHL treaty individually to determine if a reservation made by another state party to the treaty is invalid. In appraising a reservation each state is 'to be guided in their judgment by the compatibility or incompatibility of the reservation with the object and purpose of the [IHL treaty]; and in undertaking this appraisal states must exercise good faith for '[i]t must clearly be assumed that the contracting states are desirous of preserving intact at least what is essential to the object of the [IHL treaty]'.⁷³ Following its individual evaluation of a reservation, a state party may thus accept or object to another state's reservation. For example, Germany objected to reservations made by Guinea-Bissau to Geneva Conventions I, II, and III. It stated that the reservations 'exceed, in the opinion of the Government of the Federal Republic of Germany, the purpose and intent of these Conventions and are therefore unacceptable to it. This declaration shall not otherwise affect the validity of the said Geneva Conventions under international law as between the Federal Republic of Germany and the Republic of Guinea-Bissau'.⁷⁴ There may of course be divergent views concerning the validity of some reservations, and this will alter the legal effect of these reservations on a bilateral basis, discussed below. However, these divergent views will not affect the ability of the state making the reservation to become a party to the IHL treaty.

It is important at this juncture to make a distinction between reservations to IHL treaties, and reservations to human rights treaties in relation to two aspects: the 'object and purpose' test, and the role of objections to reservations. It has been argued in the context of human rights treaties, that the object and purpose of these treaties is extremely broad and covers all the provisions contained in a treaty. Consequently, it is argued, because a reservation purports to change the legal effect of conventional human rights obligations, and that each right secures the objectives of the human rights treaty, most reservations are not permissible. The treaty body to the International Covenant on Civil and Political Rights (ICCPR), the Human Rights Committee, thus stipulated in its General Comment No 24 that '[i]n an instrument which articulates very many civil and political rights, each of the many articles, and indeed their interplay, secures the objectives of the [ICCPR]'.⁷⁵ The same is not the case for IHL treaties. Although a certain number of important provisions interrelate, and reservations to these provisions would be *prima facie* impermissible, there are other stand-alone provisions, reservations to which would not be contrary to the object and purpose of the respective IHL treaty. An example is Article 28 of Geneva Convention III, which provides, inter alia, that prisoners of war shall be able to procure tobacco for daily use. Rather than being contrary to the object and

⁷³ *Reservations to the Convention on Genocide, Advisory Opinion*, ICJ Rep 1951, 15 at 26-7.

⁷⁴ UNTS, vol 970, 1975, 367, also reproduced in the IHL treaty database available on the website of the ICRC.

⁷⁵ Human Rights Committee, 'General Comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Opinion Protocols thereto, or in relation to declarations under article 41 of the Covenant', 4 November 1994, CCRP/C/21/Rev.1/Add.6, 7.

purpose of Geneva Convention III, a reservation to this outdated rule would be in keeping with current international health standards.

In the context of human rights treaties, it has also been argued that objections by states parties to a human rights treaty simply do not fit within the normative framework of these treaties. The Human Rights Committee stated that '[human rights treaties] are not a web of inter-State exchanges of mutual obligations. They concern the endowment of individuals with rights. The principle of inter-State reciprocity has no place'.⁷⁶ In the view of the Committee, it alone was the appropriate entity to evaluate reservations to the ICCPR, and objections by states to reservations only served to 'provide some guidance to the Committee'.⁷⁷ The position is different for IHL treaties, which create inter-state obligations. Unlike human rights treaties, IHL treaties continue to be based on the notion of reciprocity. Objections by states parties to an IHL treaty thus remain the means by which the legal effects of reservations to IHL treaties are determined. Furthermore, IHL treaties have no treaty body attached to them, like some human rights treaties. There is thus no possibility for a third party to be the sole evaluator of reservations to IHL treaties. This role continues to be played by states.

Legal Effects of Reservations. There are two schools of thought for determining the legal effects of reservations: the 'permissibility school' and the 'opposability school'. According to the former approach, a reservation must be objectively considered compatible with the object and purpose of the treaty, and only those reservations which are objectively compatible may be either accepted or objected to by other states parties. In contrast, according to the 'opposability school', the validity of a reservation turns on whether it is either accepted or objected to by other states parties, which may be guided in making such an assessment by the object and purpose test. Once a state party accepts or objects to a reservation made by another, then the legal effects must be understood in terms of the bilateral relationship between these two states. If a reservation made by state A is expressly or implicitly accepted by state B,⁷⁸ then the IHL treaty enters into force between these two states, with the exception of the provision(s) or parts thereof excluded from applying as a result of state A's reservation.⁷⁹ Thus, even though state B has not made the same reservations as state A (or even any reservations), state B may nevertheless avail itself of state A's reservations on the basis of reciprocity. Consequently, those parts of the treaty to which the reservations of state A attach, will not apply between state A and state B.

⁷⁶ Human Rights Committee, 'General Comment No. 24', 17.

⁷⁷ Human Rights Committee, 'General Comment No. 24', 17.

⁷⁸ A state is considered to have 'implicitly' accepted another state's reservation if its conduct evinces acceptance (Art 45 1969 VCLT, n 2 above), and in any event if after a 12-month period it has not objected to the reservation (Art 20(5) 1969 VCLT).

⁷⁹ Article 21(1) 1969 VCLT, n 2.

That reservations operate in this reciprocal manner even when they are accepted by other states may itself provide an incentive for states not to make reservations to IHL treaties. As Mr Duffy, the Attorney-General of Australia, noted with respect to the prospect of Australia making a reservation on the prohibition of reprisals in Additional Protocol I, '[a] reservation would operate reciprocally between Australia and a future enemy also party to the protocol. If we [made a reservation on the prohibition on reprisals], it would reduce the level of protection afforded by the protocol to Australian civilians and civilian objects.'⁸⁰ However, reciprocity in relation to some reservations made by states to IHL treaties is not always tenable. This was the case, for example, when Israel made a reservation to three of the four 1949 Geneva Conventions stating that 'while respecting the inviolability of the distinctive signs and emblems of the Convention, Israel will use the Red Shield of David as the emblem and distinctive sign.'⁸¹ Even the acceptance of this reservation by other states parties to the Geneva Conventions would not have entitled them to depart from the requirements set out in the Geneva Conventions concerning their use of distinctive signs and emblems.⁸² To do so they would have to make their own respective reservations. The situation regarding Israel's use of the emblem has now changed following its ratification of Additional Protocol III on 22 November 2007.

A state may wish to object to a reservation and in such a case the legal effects will depend on the wording of its objection. A 'simple objection' to an IHL treaty, where a state party objects to the reservation, but does not oppose the entry into force of the treaty between itself and the reserving state, will result in the IHL treaty applying between the reserving state and the objecting state. However, if the reservation excluded a treaty provision, or the reservation purported to modify a treaty provision, then the excluded or the modified parts of a treaty will not apply between the reserving state and the objecting state. The legal effect of a 'simple objection' in such a case is thus much the same as the legal effect of an acceptance of a reservation. A straightforward example of a 'simple objection' is the statement made by Germany, quoted above.⁸³

Even though a state may reject a reservation made by another state, the reserving state may nevertheless purport to apply its legally invalid reservation in practice, creating a situation with serious humanitarian consequences. An example is the reservation to Article 85 of Geneva Convention III made by the Democratic Republic of Vietnam (North Vietnam). This reservation provided that '[t]he

⁸⁰ Comment made on 22 August 1990, reprinted in 13 *Australian Year Book of International Law* (1990–91) 421 at 445.

⁸¹ Final Record of the Diplomatic Conference of Geneva of 1949, vol I, Federal Political Department, Bern, 348, reproduced in the IHL treaty database available on the website of the ICRC.

⁸² This point is made by D.W. Greig, 'Reservations: Equity as a Balancing Factor?', 16 *Australian Year Book of International Law* (1995) 21 at 140.

⁸³ See p 71 above.

Democratic Republic of Vietnam declares that prisoners of war tried and convicted of war crimes or crimes against humanity, in accordance with the principles laid down by the Nuremberg Judicial Tribunal, shall not benefit from the provisions of the present Convention as is specified in Article 85.⁸⁴ It is uncontroversial that this reservation is contrary to the object and purpose of the Geneva Conventions which are to promote IHL and to extend its protection to all those falling into the hands of an adverse party. The United States, among other states, objected to this reservation, stipulating that it was '[r]ejecting the reservations which States have made with respect to the Geneva Convention relative to the treatment of prisoners of war, the United States accepts treaty relations with all parties to that Convention, except as to the changes proposed by such reservations.'⁸⁵ However, during the international armed conflict in Vietnam, North Vietnam unlawfully applied its reservation and refused to grant prisoner of war status to captured pilots of the US armed forces on the basis that all were categorically 'war criminals' who were not entitled to the protection afforded under Geneva Convention III. The disastrous result was that US armed servicemen were mistreated whilst being detained by North Vietnam. As the Deputy Legal Advisor of the US Department of State, George Aldrich, remarked at the time, '[a]lthough [the North Vietnamese] excuse was untenable, neither the convention nor general international law has provided any effective remedy for this flagrant disregard of international obligations, and our persistent efforts to bring about some type of impartial inspection of detention conditions continued to be rebuffed.'⁸⁶ The importance of the work of the ICRC cannot be underestimated in this context, as with many situations involving violations of IHL.

If a state makes a 'radical objection' to a reservation, and opposes the entry into force of the IHL treaty between itself and the reserving state, then the treaty will not enter into force between the reserving state and the objecting state. Regardless of the problematic content of a reservation, to radically object to it would entail very serious consequences for both the reserving state and the objecting state, as none of the conventional obligations contained in the IHL treaty would apply between these two states if ever they were both parties to the same international armed conflict. This situation would not affect treaty relations with other states parties to the IHL treaty if these states have either accepted the reservation, or only made a simple objection to it. It must also be stressed that the rules of IHL that form part of customary international law would continue to apply between the reserving state and the radically objecting state.

⁸⁴ Notification by the depositary addressed to the ICRC on 23 July 1957, reproduced in the IHL treaty database on the website of the ICRC.

⁸⁵ Text of the United States of America reservations/declarations to the Geneva Conventions is contained in UNTS, vol 213, 1955, 379–84, reproduced in the IHL treaty database on the website of the ICRC.

⁸⁶ 67 *American Society of International Law Proceedings* (1973) 143.

Withdrawal of Reservations to IHL Treaties. States' attitudes towards IHL rules change over time. For example, a state may wish to withdraw a reservation that it once made allowing it to behave in a certain way that it now considers unacceptable. In addition, it may not want to leave open the possibility for it to behave in a certain way any more than it may want other states to be allowed to behave in this way. Under customary international law, codified under Article 22(2) of the VCLT, a state may withdraw a reservation at any time, unless the treaty in question provides otherwise. For example, following Iraq's use of chemical weapons in the Gulf War, Australia made clear that 'the Australian Government did not consider the use of chemical weapons justified under any circumstances.'⁸⁷ Australia subsequently withdrew its reservation to the 1925 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, which had left open the possibility for Australia to use chemical weapons in certain circumstances. A withdrawal of a reservation will only take effect once the other states parties to the IHL treaty have been duly notified, in accordance with Article 22 3(a) of the VCLT. Notification is a requirement that derives from the principle of legal security.⁸⁸ It is thus not sufficient that a state merely withdraws its reservation to a multilateral treaty in domestic law; it must also be accompanied by a notification at the international level in order for such a withdrawal to take effect.⁸⁹

6 LEGAL RELATIONSHIPS BETWEEN IHL TREATIES

Succession of treaties which contain rules on the same or similar subject matters raises the problem of the relationship between these different IHL (or related) instruments. Broadly speaking, three types of relations may be distinguished:

- *Lex posterior 'derogat' vel 'abrogat' legi priori.* Sometimes, a posterior IHL treaty is concluded on the same subject matter and is intended by the states adopting it to replace, ie to supersede completely, an older IHL treaty on the same object. Thus,

⁸⁷ Comment made by Mr Hayden on behalf of the Government of Australia, reprinted in 11 *Australian Year Book of International Law* (1984-87) 577 at 623.

⁸⁸ *Armed Activities on the Territory on the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda)*, Jurisdiction of the Court, Judgment, ICJ Rep 2006, 6, 25, § 41.

⁸⁹ ICJ Rep 2006, 6, 26, § 42.

for example, in the context of the amelioration of the condition of the wounded and sick members of armies during warfare, there have been a series of conventions, each one improving on previously concluded treaties and which were designed to take their place. Hence, the Convention of 1864 for the Amelioration of the Condition of the Wounded in Armies in the Field⁹⁰ was replaced by the 1906 Convention for the Amelioration of the Condition of the Wounded and Sick in the Armies in Field.⁹¹ Article 31 of the latter reads: '[t]he present convention, when duly ratified, shall supersede the Convention of August 22, 1864, in the relations between the contracting states'. The same derogatory relations exist between the aforementioned Convention of 1906 and the 1929 Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field;⁹² and later between the aforementioned 1929 Convention and the Geneva Convention I of 1949 on the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field.⁹³ If all the parties to the earlier treaty become parties to the later one, the former treaty is extinguished (abrogated) *erga omnes*; if some but not all of the parties to the older treaty also become parties to the new treaty, then this new treaty will apply between parties to it (and will derogate in their relationships the older one), whereas the older treaty will continue to apply between states only parties to the old convention, or between these states and states also parties to the new treaty. Even in cases of extinction of an older treaty by a wholesale replacement through a new treaty, this will not mean that the older text is deprived of any legal meaning whatsoever under the new regime. It can still be used for the interpretation of provisions contained in the new treaty. This may happen where the older provision was clearer or in relation to which some practice had developed, which may be relevant for the application of the new rule.

- *Lex posterior 'amplificat' legi priori*. It is frequently the case that a newly concluded IHL treaty does not replace an older IHL convention but rather builds upon it. That may mean, on the one hand, that the new convention includes new rules not contained in the older one. Both treaties then remain applicable in their respective material and other scopes of application. It may also mean, on the other hand, that the new convention in part derogates from the older one and in part develops the law of armed conflict. This latter case, where the elements of amendment

⁹⁰ D. Schindler and J. Toman, *The Law of Armed Conflicts* (Leiden/Boston: Martinus Nijhoff Publishers, 2004), 365ff.

⁹¹ Schindler and Toman, *The Law of Armed Conflicts*, 385ff.

⁹² Schindler and Toman, *The Law of Armed Conflicts*, 409ff. See Art 34 of the 1929 Convention: 'The present Convention shall replace the Conventions [of 1864 and 1906] between the High Contracting Parties'.

⁹³ Schindler and Toman, *The Law of Armed Conflicts*, 459ff. See Art 59 of Geneva Convention I: 'The present Convention replaces the Conventions of [1864, 1906, and 1929] in relations between the High Contracting Parties'.

and addition are inextricably interwoven, is most frequent. Three examples may briefly be mentioned.

- In relation to a *simple addition* to an older convention, one may invoke the case of the Gas Protocol of 1925, which prohibits only the *use* of certain chemical and biological agents, and the Biological (1972) and Chemical (1993) Weapons Conventions,⁹⁴ which concern only the *production* and *possession* of such weapons. The latter texts do not deal at all with the use of such arms (that aspect being covered already by the Gas Protocol), but only with the development, production and stockpiling of them.⁹⁵
- With respect to a *partial amendment and partial development* of the law, one can mention the Regulations of Hague Convention IV (1907) with respect to Geneva Conventions III and IV. Thus, Article 154 of Geneva Convention IV⁹⁶ reads as follows: '[i]n the relations between the Powers who are bound by the Hague Conventions [...] and who are parties to the present Convention, this last Convention shall be supplementary to [the] above-mentioned Convention of the Hague'. Thus, for example, Geneva Convention IV builds on the law of occupation of the Hague Regulations of 1907, the two texts must therefore be read in conjunction with one another.⁹⁷ As far as the establishment and definition of occupation is concerned, the matter remains regulated by Article 42 of the Hague Regulations. Geneva Convention IV is silent on that point because it implicitly operates a *renvoi* to the older text. As far as respect for the local legislation and institutions is concerned, Article 43 of the Hague Regulations is supplemented by some more details provided in Article 64 of Geneva Convention IV. This is evident insofar as it permits (or even mandates) suspension or abrogation of local legislation if that legislation is oppressive, ie if it contravenes the humanitarian standards guaranteed in Geneva Convention IV itself. A further example of such an interaction between the old and the new norms can be found in Article 4 of Geneva Convention III and in Articles 43–44 of Additional Protocol I. These treaties deal with the definition of a combatant, ie those individuals entitled to fight and to attain POW status upon capture.

⁹⁴ See (C) above.

⁹⁵ Thus, Art VIII of the 1972 Biological Weapons Convention reads: 'Nothing in this Convention shall be interpreted as in any way limiting or detracting from the obligations assumed by any State under the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare...'. See also Art XIII of the 1993 Chemical Weapons Convention.

⁹⁶ There are no analogous provisions in the first two Conventions: Geneva Conventions I and II supersede older Conventions. Geneva Convention III contains an analogous 'complementation' clause in Art 135.

⁹⁷ For more details on this quite complex relationship, see R. Kolb and S. Vité, *La protection des populations civiles soumises au pouvoir d'une armée étrangère—La complémentarité du droit de l'occupation militaire et des droits de l'homme à la lumière des interventions en Afghanistan et en Irak* (Brussels: Bruylant, 2008).

- *Lex posterior 'compleat' legi priori*. Finally, a newer body of law can complement the older one without being formally an addition or a revision of it. We may here consider some relationships going beyond purely IHL–IHL relations and of purposed revision of older conventions. Thus, human rights law (HRL) today complements IHL in many ways without being itself a body of IHL subject to the same conditions of applicability or destined to revise older IHL laws.⁹⁸ Hence, for example, HRL may serve as a yardstick of interpretation of IHL, for example in such areas as detention of persons or rules governing the fair trial of protected persons. HRL here provides not only more detailed textual rules,⁹⁹ but also offers a rich network of adjudicatory organs, which have given flesh to most of these norms by a further detailed body of jurisprudence. Thus, for example, when IHL provides for the detention of persons,¹⁰⁰ HRL may assist concretizing the rights and duties involved by offering its own rich experience. In some cases, the interplay of both sources is even more apparent: in the case of belligerent occupation of territories, the fundamental guarantees of civilians are a mix of IHL and HRL. In some areas, HRL may even provide a sort of derogatory *lex specialis* to IHL. This is the case, for example, in the context of Article 43 of Geneva Convention IV. That provision reads as follows: '[a]ny protected person who has been interned or placed in assigned residence shall be entitled to have such action reconsidered as soon as possible by an appropriate court or administrative board designated by the detaining power [...]'. The Geneva Conventions consequently allow for a review by an executive body. However, if HRL is applicable to such internment of enemy civilians (as it is), its own rules on fair trial conclusively require adjudication of the matter by an independent and impartial court.¹⁰¹ The two obligations under IHL and HRL are here partly incompatible. To the extent both bodies of the law apply, the stronger obligations under HRL will have to prevail over the weaker ones in IHL. A state must respect *all* its obligations under international law. If it sets up an administrative board for adjudicating on our question, it would respect its obligations under IHL but violate those rules under HRL. The consequence is that it must respect the stricter obligation under HRL in order not to violate that applicable body of law. All these aspects can be analysed as relationships between different conventions and between treaties and CIL.

⁹⁸ For details, see R. Kolb, 'Relationship between International Humanitarian Law and Human Rights Law', in *Encyclopaedia of Public International Law*, <<http://www.mpepil.com>>.

⁹⁹ For example, Art 6 of the European Convention on Human Rights or Art 14 of the ICCPR in fair trial matters.

¹⁰⁰ See Geneva Convention III, Arts 21ff; and Geneva Convention IV, Arts 76, 78, 79ff.

¹⁰¹ Except if use has been made of a suspension or derogation clause in times of national emergency, and to the extent that this use is allowed.

7 INTERPRETATION OF IHL TREATIES

The interpretation of IHL treaties is to be performed within the general framework of rules on treaty interpretation as they exist in CIL and are codified in Articles 31–33 of VCLT.¹⁰² Is there some specificity for IHL treaties? Roughly, it can be said that there were two historical phases eliciting quite different approaches to the question of interpretation:

- *First phase (1899–1949): narrow interpretation, residual rule of state freedom.* In the Hague phase of the law of armed conflict (1899–1949), the tendency was to interpret norms of that branch of the law restrictively. War consisted in a struggle for survival or in the pursuit of vital interests of sovereign states. Limitations on state freedom in such a crucial matter could not be easily presumed or imposed. The maxim '*Kriegsräson geht vor Kriegsmanier*' was refuted as a general rule, since 'laws' of war are binding and cannot be compared to 'usages' of war.¹⁰³ But it was also understood that limitations on a state's freedom to pursue its vital interests through belligerency could only be construed in a restrictive way. The polar star of interpretation in this '*Lotus*' or state-centred phase of international law¹⁰⁴ was the so-called *Lotus* principle: 'What is not prohibited is permitted in the law'.¹⁰⁵ This expressed not only a substantive rule for the handling of gaps; it informed also the interpretation of the texts, enjoining the interpreter to look for a narrow construction of state duties. In other words, the Martens Clause¹⁰⁶ contained in the preamble of the 1899 and 1907 Hague Convention IV was not yet taken seriously as a binding norm of IHL.

¹⁰² On these rules, see A. Aust, *Modern Treaty Law and Practice* (2nd edn, Cambridge: Cambridge University Press, 2007), 230ff. For more details, see O. Corten and P. Klein (eds), *Les Conventions de Vienne sur le droit des traités, Commentaire article par article*, vol II (Brussels: Bruylant, 2006), 1289ff; and R. Kolb, *Interprétation et création du droit international* (Brussels: Bruylant, 2006).

¹⁰³ See R.F. Roxburgh (ed), L. Oppenheim, *International Law*, vol II (3rd edn, London: Longmans, Green & Co, 1921), 91–2.

¹⁰⁴ On this phase of international law more generally, see the illuminating passages in P.M. Dupuy, 'Unité de l'ordre juridique international, Cours général de droit international public', 297 *RCADI* (2002) 93ff.

¹⁰⁵ See the references in P.A. Pillitu, *Lo stato di necessità nel diritto internazionale*, (Perugia: Pubblicazioni della Facoltà di giurisprudenza, Università di Perugia. Facoltà di giurisprudenza, 1981), 359.

¹⁰⁶ On this clause, see R. Kolb and R. Hyde, *An Introduction to the International Law of Armed Conflicts* (Oxford: Hart Publishing, 2008), 61ff; H. Strebler, 'Martens Clause', in R. Bernhardt (ed), *Encyclopaedia of Public International Law*, vol 3, 252–3. F. Münch, 'Die Martens'sche Klausel und die Grundlagen des Völkerrechts', 36 *ZaöRV* (1976) 347ff; S. Miyazaki, 'The Martens Clause and International Humanitarian Law', *Essays in Honour of J. Pictet* (Geneva: ICRC, 1984), 433ff; V.V. Pustogarov, 'The Martens Clause in International Law', 1 *Journal of the History of International Law* (1999) 125ff; A. Cassese, 'The Martens Clause: Half a Loaf or Simply Pie in the Sky?', 11 *EJIL* (2000) 187ff; T. Meron, 'The Martens Clause, Principles of Humanity, and Dictates of Public Conscience', 94 *AJIL* (2000) 78ff; R. Ticehurst, 'The

- *Second phase (1949 onwards): broad interpretation, active rule of humanity.* In the Geneva phase of IHL (1949–today, and especially since 1993), the law of armed conflict centred on military concerns progressively became also a ‘humanitarian law’, ie a body of law furthering humanitarian concerns. The old principle of limitations of means and methods of warfare informing the Hague Law was now amplified by the new principle of humanity informing the Geneva Law. Thus, the interpretation of IHL provisions progressively became more liberal and more expansive. HRL equally pushed in that direction. The polar star of the new layer of the law was the humanitarian protection of war victims, and a broad and not a literal construction was felt to be necessary in order to better serve that fundamental civilizing purpose. Moreover, if it is held that IHL contains a great number of public order, public policy or *jus cogens* norms,¹⁰⁷ it seems quite understandable that the interpretation of such texts has to be expansive rather than narrow. This new orientation represents a shift from a ‘state-centred’ view of the law of armed conflict to a ‘human-centred’ view of IHL. It has sometimes been called the ‘humanization’ of IHL. The recent state and especially judicial practice is replete with examples of such broad interpretations.¹⁰⁸

A particularly bold (and not unproblematic) example of such a line of reasoning can be found in the context of armed reprisals during warfare. The ICTY, in the *Kupreškić* case (2000),¹⁰⁹ considered that under CIL all civilians are protected against belligerent reprisals in all circumstances. The ICTY Trial Chamber relied on a series of arguments to conclude that there is such a general prohibition. The Chamber invoked the principle of humanity and the Martens Clause; the *jus cogens* character of the protective rules and the Kantian imperative; the absence of reciprocity in the fundamental protections of IHL, which must be respected in all circumstances independently from performance by the other parties; the underlying logic of Common Article 3 to the GC, which must be applicable *a fortiori* in an international armed conflict; the modern tendencies of state practice, that many states abstain from claiming such reprisals; and the negative reactions of the UN General Assembly to cases of such reprisals. These statements go somewhat beyond the actual state of the law,¹¹⁰ but they provide a good example of the type of argument often underlying modern interpretations of IHL norms. The point is obviously to find an interpretation which takes into account military and humanitarian needs in a balanced way.

Martens Clause and the Laws of Armed Conflict’, in N. Sanjaoba (ed), *A Manual of International Humanitarian Laws* (New Delhi: Regency Publications, 2004), 312ff.

¹⁰⁷ Cf E. David, *Principes du droit des conflits armés* (4th edn, Brussels: Bruylant, 2008), 106–14.

¹⁰⁸ See T. Meron, ‘International Law in the Age of Human Rights’, 301 *RCAD* (2003) 24ff.

¹⁰⁹ At §§ 515ff, 527ff of the judgment of 14 January 2000.

¹¹⁰ See J.M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, vol I (Cambridge: ICRC, 2005), 513ff.

8 SPECIAL AGREEMENTS

There are a series of cases, where the applicability of IHL may be in doubt. There are moreover situations where only a limited number of rules would normally apply. In both cases there may be a need for additional protective rules.

Thus, for example, certain conventional rules may be applicable due to the fact that a state participating in a conflict is not a party to a specific IHL convention. This was the case, for example, of the 1929 Geneva Convention on prisoners of war, not ratified by the Soviet Union, during World War II. Moreover, there may be gaps in the law of armed conflict. For a long time, codification was rather piecemeal: first it covered only wounded and sick combatants in land warfare; then these protections were extended to the sea; then protection was extended to combatants in captivity (prisoners of war); then the law started to contain rules on the protection of civilians, in the beginning in a rather limited way, then the law was extended to non-international armed conflicts. In all these phases, there remained gaps in protection. For example, in the case of a non-international armed conflict, the applicable rules are less numerous. During the Spanish Civil War (1936–39), the two belligerents, the Madrid Government and the Burgos Junta, agreed to treat certain prisoners as having POW status by way of analogy. Further, it might sometimes be wise to apply at least some rules from the law of armed conflict by analogy to a situation of internal disturbance not as such being an armed conflict.

Furthermore, there may be situations where there is a gap due to the particular circumstances. Thus, for example, certain weapons are not clearly prohibited. One may mention the discussions with regard to weapons containing uranium. If customary international law applies, its precise content may be doubtful. To all these cases, one must add that often a state may deny the existence of an international or non-international armed conflict, or a situation of occupation as defined by the Geneva Conventions. The Israeli occupied territories or the Western Sahara under Moroccan rule spring to mind. Finally, an armed conflict may be of a mixed international and non-international character. In cases of a mixed conflict, it may be difficult to establish exactly what law applies to what precise situation, since there may be a highly complex merging of belligerent activities.

All the situations described above—to which others could be added—have one point in common: the application of the law is rendered difficult or stymied by a controversy over its applicability or by an insufficient reach of the rules. In such cases, a simple device may overcome the above-mentioned difficulties. If the parties agree, they may conclude one or more 'special agreements' in which they explicitly recognize that certain rules apply in a given situation, even if these rules might otherwise not be applicable. These special agreements may be concluded in written form, but they may also be concluded informally, orally, or by actual conduct.

The Geneva Conventions of 1949, in Article 3, paragraph 3 and Articles 6/6/6/7, respectively, encourage the conclusion of such 'special agreements'. However, the parties ultimately remain free to accept such agreements or not. If such a special agreement is concluded, the reach of the law of armed conflict is increased. Apart from the rules of IHL that non-controversially apply by virtue of either treaty law or CIL, there will be an additional layer of the rules contained in the special agreement. Such special agreements are practically speaking very important. They help to solve many doubts and quarrels on the applicability or application of rules of IHL. Hundreds of such special agreements have been concluded between belligerents: some are of minor importance, simply organizing the execution of conventional and undisputed duties; others are of great importance, putting beyond doubt, and giving precision to, the rules applicable in a particular armed conflict.

The belligerents themselves are often on such hostile terms with one another that they are unable to take the initiative of proposing such an agreement, or negotiating its conclusion. There is normally the need for the mediation of a third party. In practice, the ICRC most frequently takes such initiatives. Some examples of categories or of particular agreements can be given here:

- (1) Article 3, paragraph 3, deals formally with non-international armed conflicts, but the special agreements it provides for have been concluded also outside this narrow compass. The drafters of the Geneva Conventions were aware that only very few rules applied to non-international armed conflicts. Thus, they inserted a provision encouraging the parties to accept further obligations. In practice, this provision has been very important.
- (2) Articles 6/6/6/7, respectively, of Geneva Conventions I–IV deal with open-ended special agreements. Article 6 of Geneva Convention I reads as follows: 'In addition to the agreements expressly provided for in Articles 10, 15, 23, 28, 31, 36, 37 and 52, the High Contracting Parties may conclude other special agreements for all matters concerning which they may deem it suitable to make separate provision. No special agreement shall adversely affect the situation of the wounded and sick, of members of the medical personnel or of chaplains, as defined by the present Convention, nor restrict the rights which it confers upon them.' Many such special agreements have been concluded, be it under Article 6, or, for parties not yet bound by the Geneva Conventions, under CIL. Hence, for example, in the civil war of Yemen (1962), the belligerents undertook the obligation to respect the essential provisions of the Geneva Conventions, including Common Article 3, where Yemen had not yet ratified the Geneva Conventions.

What can be said on the legal status of such agreements?

- First, it must be noted that they will *apply only circumstantially*: to the parties concluding them; for the conflict at stake; and under the conditions stipulated in

the agreements. Hence, such special agreements do not add objective rules to the corpus of the law of armed conflict. They simply allow gaps and weaknesses in the law to be filled in the context of a specific conflict or situation by way of specific obligations. The special agreements terminate at the end of the armed conflict at issue.

- Secondly, such special agreements may have *two different aims*. Some special agreements are purely executory. They will not add new obligations nor will they clarify the law applicable. Rather, their aim is to execute the obligations contained in IHL treaties in a particular context. Thus, for example, Articles 109ff of Geneva Convention III stipulate that POWs who are seriously wounded or seriously sick shall be repatriated as soon as possible, without having to wait until there is a cessation of hostilities. In order to put into effect this provision, there must be a handing over of these prisoners to the adverse belligerent. To that effect, an agreement on the conditions of this transfer will be necessary. Other special agreements may be comprised of fresh obligations. Thus, for example, they may undertake to respect a treaty which is not formally applicable.
- Thirdly, it must be stressed that the *law limits the content* of such special agreements. These must be either agreements in order to execute obligations or rights contained in the law of armed conflict (and hence by definition compatible with it) or agreements which will give additional protections and do not, in the context of the Convention I, 'adversely affect the situation of the wounded and sick, of members of the medical personnel or of chaplains, as defined by the present Convention, nor restrict the rights which it confers upon them.'¹¹¹ The Geneva Conventions thus allow for an increase in the protection already enjoyed by protected persons through special agreements; they conversely do not allow special agreements to restrict or deny the enjoyment of any of the conventional rules protecting such persons. As to this last aspect, an example from World War II may be recalled. By agreements between the Vichy Government and Germany, the position of French POWs in Germany had been jeopardized, with the POWs losing their POW status. They in fact became civil workers in the German industry. By this device, they no longer enjoyed the protection afforded them by the Geneva Convention on POWs of 1929. Such an agreement would not be in conformity with the Geneva Conventions of 1949 as it would restrict the rights of protected persons.

¹¹¹ Geneva Convention I, Art 6.

9 DENUNCIATION OF IHL TREATIES

Most IHL treaties contain denunciation clauses.¹²² Geneva Conventions I–IV contain a typical denunciation clause. It is a reproduction of the denunciation clauses found in older treaties, especially the Hague Conventions. It is contained in Articles 63/62/142/158 of Geneva Conventions I–IV, and reads as follows:

Each of the High Contracting Parties shall be at liberty to denounce the present Convention.

The denunciation shall be notified in writing to the Swiss Federal Council, which shall transmit it to the Governments of all the High Contracting Parties.

The denunciation shall take effect one year after the notification thereof has been made to the Swiss Federal Council. However, a denunciation of which notification has been made at a time when the denouncing Power is involved in a conflict shall not take effect until peace has been concluded, and until after operations connected with the release, repatriation and re-establishment of the persons protected by the present Convention have been terminated.

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

This typical clause shows that if denunciation is not prohibited, it is subjected to severe limitations. First, it takes effect only one year after its notification to the depositary. Secondly, in any event, a denunciation produces no effects for an armed conflict already underway at the time of denunciation. Even one year after notification, it would be inappropriate to allow a party to take a military advantage in war by denouncing the treaty after hostilities have commenced. The humanitarian purpose of IHL treaties could then easily be thwarted. Hence, a denunciation during an armed conflict can only take effect after the end of the armed conflict for all relevant purposes (ie end of active hostilities for the law on means and methods of warfare; and release of all the protected persons for the law on humanitarian protection of war victims). Thirdly, the clause underscores that a denunciation will not liberate the non-denouncing parties in their dealings among themselves: these other treaty parties remain bound by the convention *inter se*. They will be freed from its application only towards the denouncing party. This rule mirrors the rejection of the *si omnes* clause in Article 2, paragraph 1, of the 1949 Geneva Conventions. Fourthly, the provision recalls that CIL and the Martens Clause remain applicable to the denouncing state. To the extent that today most of the substantive obligations of IHL are considered to be of a customary nature, there is little to be gained legally, but much to be lost politically, by a denunciation

¹²² The *jus cogens* character of many of their norms must not induce one to think dogmatically that such denunciation is impossible. In any event, in the case of such denunciation, the applicability of the norms of *jus cogens* would remain unaffected because and to the extent they reflect CIL.

of an IHL treaty. It is therefore not surprising that since 1945 no state has attempted to denounce an IHL convention.

If an IHL convention does not contain a denunciation clause, Article 56 of the Vienna Convention on the Law of Treaties applies as a reflection of CIL. This provision reads as follows:

A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless: (a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or (b) a right of denunciation or withdrawal may be implied by the nature of the treaty.¹¹³

The general rule is thus that a treaty cannot be denounced. Otherwise, it would be too easy to escape unwelcome treaty obligations at will. As for (a), if an intention of the drafters to allow denunciation can be shown, possibly through the *travaux préparatoires*, then denunciation must be admitted (such was the case, for example, for the UN Charter). As for (b), it could be argued that IHL treaties can be denounced by their 'nature': the argument would be buttressed by the many denunciation clauses in most IHL treaties by way of analogy. However, on the other hand, it could be held that the drafters must have intended to protect their particular treaty from denunciation if they did not insert a denunciation clause. The rich conventional IHL practice, which they invariably take advantage of in the process of drafting a new treaty, clearly puts them on notice of the possibility of inserting such a clause. If they have chosen not to insert such a clause, this must be considered a 'qualified silence' which *a contrario* excludes any denunciation.

In regard to the absence of any denunciation practice, this point remains somewhat theoretical. In view of the essential civilizing and public order character ascribed today to IHL treaties (as to the ICCPR), the better position is probably that they should not be denounceable unless they specifically provide otherwise. Moreover, the general presumption of Article 56 against denunciation, as well as the protective object and purpose of these treaties, also militates in favour of excluding denunciation in the absence of particular clauses allowing otherwise.

A last question could be asked: if the denunciation clauses have never been invoked in the last 50 years, has subsequent practice not rendered them obsolete? The answer to this question is that such desuetude can obviously intervene. However, the simple non-use of a provision does not entail its obsolescence. There must moreover be a general *opinio juris* that the provision at stake shall be regarded as no longer applicable in the future.¹¹⁴ In our context, such an *opinio juris* cannot

¹¹³ See A. Aust, *Modern Treaty Law and Practice* (2nd edn, Cambridge: Cambridge University Press, 2007), 289ff. For more details, see O. Corten and P. Klein (eds), *Les Conventions de Vienne sur le droit des traités, Commentaire article par article*, vol III (Brussels: Bruylant, 2006), 1951ff.

¹¹⁴ M. Kohen, 'Article 42', in O. Corten and P. Klein (eds), *Les Conventions de Vienne sur le droit des traités, Commentaire article par article* (Brussels: Bruylant, 2006), 1593–1614 at 1606: '[U]n Etat peut, pour des raisons politiques ou autres, décider de ne pas se prévaloir d'un traité, sans que cela

be shown. The states parties have not given up in an unambiguous or indeed in any way their exceptional right to denounce; they just considered that no circumstances arose making the use of such a right necessary. Thus, no desuetude can be implied.

10 LEGAL EFFECTS OF A BREACH OF AN IHL TREATY

If the provisions of an IHL treaty are breached, remedies for the aggrieved state may flow from the rules of IHL itself (such as rules concerning Protecting Powers, the ICRC in its role as a substitute or acting in its own right, or from the commissions of inquiry), and from general international law (for example, the law of state responsibility). Can a state aggrieved by a material breach by another state party avail itself of the possibility of suspending or terminating the breached treaty according to the Vienna VCLT? Article 60(5), VCLT responds in the negative: 'Paragraphs 1 to 3 [on termination and suspension] do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties'.¹⁵⁵

Article 60(5), was inserted at the Vienna Conference on the suggestion of the Swiss Government, which is the depositary of the Geneva Conventions. The point is precisely to rule out a termination or suspension of certain treaties containing 'absolute' or 'public order' provisions for the protection of individuals. Such treaties are not subjected to the ordinary reciprocity (*do ut des*) of inter-state treaties: 'you violate, I suspend or terminate'. They are to some extent stipulations in favour of a third beneficiary, the protected human being, and have moreover a fundamentally civilizing nature. Therefore such treaties have to be respected even if breached by the other party. The wounded and sick; POWs; the civilians, from the other side always have the right to be humanely treated, regardless of the extent to which IHL

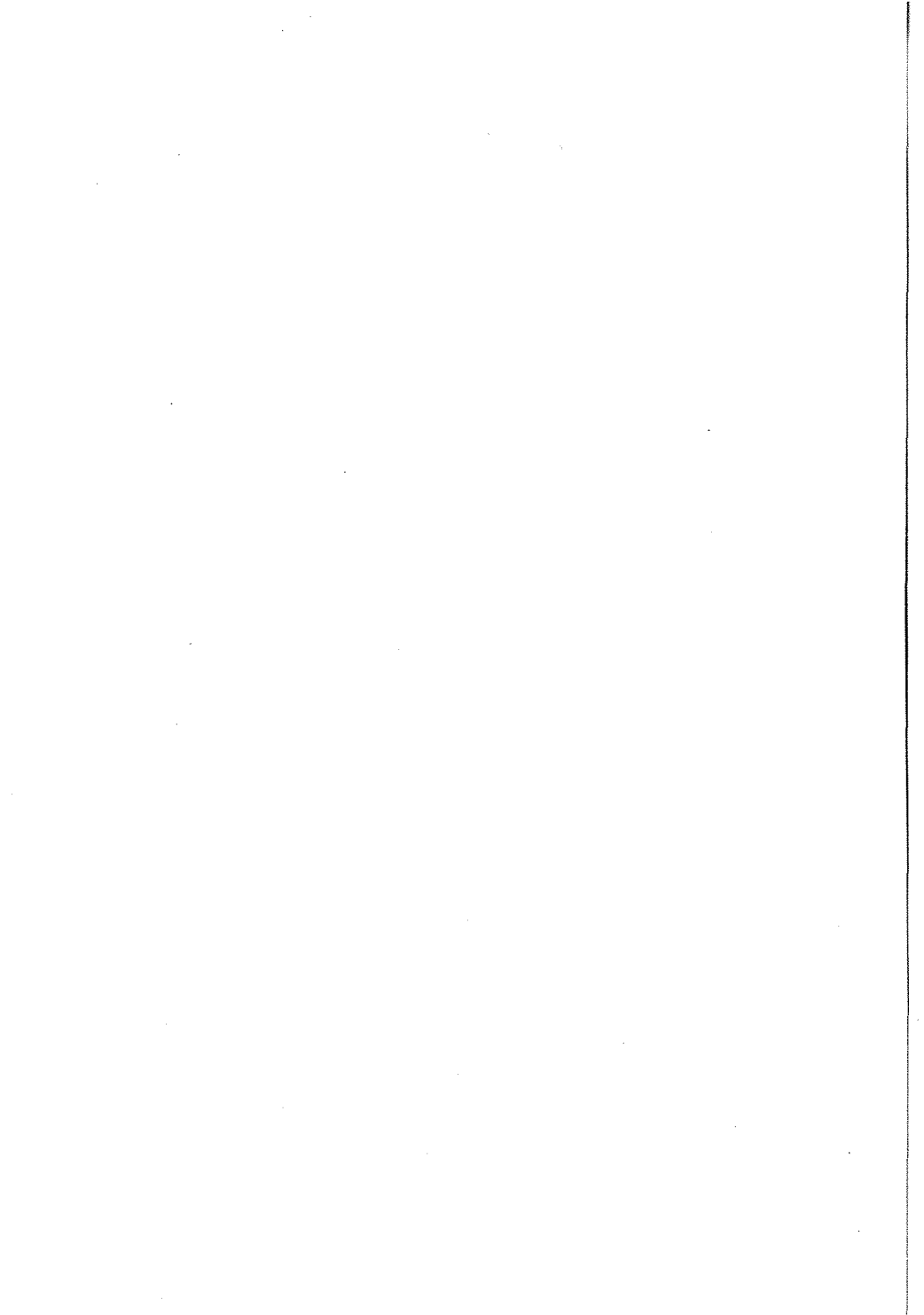
signifie qu'il y renonce à l'avenir. Enfin, le simple fait de ne pas appliquer un traité peut témoigner d'une volonté de le suspendre durant un certain temps et non nécessairement d'y mettre fin'. See also the European Communities case (*Commission v France*), no 7/71, 1971, in: 48 *ILR* 223. On the concept, see also R. Kolb, 'La désuétude en droit international public', 111 *RGDIP* (2007) 577ff; G. Le Floch, 'La désuétude en droit international public', 111 *RGDIP* (2007) 609ff.

¹⁵⁵ For a detailed commentary of this provision, see B. Simma and C. Tams, 'Article 60', in O. Corten and P. Klein (eds), *Les Conventions de Vienne sur le droit des traités. Commentaire article par article* (Brussels: Bruylant, 2006), 2129–79 at 2157ff.

rules are respected by other belligerents in an armed conflict. The rationale behind this is that even if violations do occur, they should not spread to further violations due to the suspension or termination of treaty commitments. A distinction must be made with reprisals, which form part of customary IHL, the effects of which do not amount to treaty suspension or termination. In modern IHL, the rule is that reprisals are prohibited against protected persons and some protected objects.¹¹⁶ Both branches of the law, treaty law and general IHL on reprisals, thus reflect the same basic concern for maintaining a minimum standard of civilization and of humanity.

¹¹⁶ Belligerent (armed) reprisals are prohibited against the following persons and objects:

- against the wounded, sick or shipwrecked combatants, and all other persons covered under Geneva Conventions I and II: Art 46 GC I, Art 47 GC II;
- against prisoners of war under Geneva Convention III, Art 13, paragraph 3;
- against civilians who find themselves in the hands of a party to the conflict of which they are not nationals, ie protected civilians outside warfare situations: Geneva Convention IV, Art 33, paragraph 3;
- against the wounded, sick, or shipwrecked military persons or civilians covered by Part II of Additional Protocol I of 1977, Art 20;
- against civilians during hostilities, ie in the context of targeting: Protocol I, Art 51(6). This is a most important limitation: it means that all the limitations on targeting flowing from the principle of distinction are not any more subject to the exception of reprisals;
- against civilian objects during hostilities, ie in the context of targeting: Protocol I, Art 52(1);
- against historic monuments, works of art, or places of worship which constitute the cultural or spiritual heritage of peoples: Protocol I, Art 53(c);
- against objects indispensable to the survival of the civilian population: Protocol I, Art 54(4);
- against the natural environment: Protocol I, Art 55(2);
- against works and installations containing dangerous forces: Protocol I, Art 56(4).



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