



Canadian Red Cross / Croix-Rouge canadienne

**International Conference
Customary International Humanitarian Law: challenges, practices and debates**

**September 29, 30 and October 1, 2005
Montreal, Quebec, Canada**

This document is a comprehensive substantive report prepared by the Canadian Red Cross on the international conference *Customary International Humanitarian Law: challenges, practices and debates* held in Montreal, Canada from September 29 to October 1, 2005 and organized in partnership between the Canadian Red Cross and McGill University.¹

The framework for the panels and workshops was the study on Customary International Humanitarian Law undertaken by the International Committee of the Red Cross (ICRC) and rendered public through an approximate five thousand-page publication in March 2005,² which identifies 161 rules of customary international humanitarian law. The methodology, theoretical perspectives and practical application of the study animated the discussions between speakers, moderators, workshop leaders and participants.

The conference was a neutral and dynamic ground for conceptual debates that brought together professors, researchers and academics from Canada, United States and Europe; civil and criminal law practitioners; military personnel; representatives from the Canadian government; representatives from NGOs and university students.

The diverse theoretical and practical background from the speakers and participants and a multidisciplinary environment brought interesting insights to the themes discussed which comprised an overall view of the ICRC study; application of customary law in international humanitarian law, criminal prosecution and conduct of hostilities in non-international armed conflicts; guarantees for detainees under security reasons; cultural diversity in customary norms; customary law before national tribunals; human rights practice as a source of international humanitarian law; the importance of customary international law for international organizations and NGOs; and, the impact of the ICRC study on military training. Please refer to the conference program for detailed information.

Participants who were panellists or animated workshops did so in their individual capacity and not as representatives of their respective institutions.

The present report was prepared by the Canadian Red Cross based on its own understanding of the discussions. This report is therefore not indented to be cited or attributed to the facilitators, moderators or panellists of the conference, or the Canadian Red Cross Society.

¹ The Canadian Red Cross wishes to warmly thank Melissa Martins Casagrande, whose assistance was material in the creation of the present report, as well as all the volunteer reporters who took notes during the conference: Marlène Charron-Gedah, Pierre-Olivier Marcoux, Annie Guérard-Langlois, Caroline Walter, Benjamin Perrin, Valérie Simard, Delia Cristea, Ryan Anderson, Arnaud Meffre, Anna Matas, Blair McPherson, Gaele Missire, and Pierre Covo.

² Jean-Marie Henckaerts & Louise Doswald-Beck, *Customary International Humanitarian Law*, 2 vols., Volume I. Rules, Volume II. Practice, 2 parts (Cambridge: Cambridge University Press, 2005).

Panel 1

Origin and conclusions of the ICRC study on customary international humanitarian law

Moderator: Jerry S. T. Pitzul, *Major General, Q.C., Department of National Defence, Judge Advocate General of Canada (JAG)*

Panellists:

Jean-Marie Henckaerts, *Legal Advisor, ICRC; co-director of the ICRC study on Customary International Humanitarian Law*

Michael Bothe, *Professor, Faculty of Law, University of Frankfurt*

Claude Emanuelli, *Professor, Faculty of Law, University of Ottawa*

The themes addressed in this panel were the vision of customary law used in developing the ICRC study on customary international humanitarian law; the origin, approach, consultative process and methodology applied to the development of the study, and the study's main conclusions.

The study was mandated by the international community, in December 1995, when the 26th International Conference of the Red Cross and Red Crescent officially asked the ICRC to prepare a report on customary rules of international humanitarian law applicable to international armed conflicts (IAC) and non-international armed conflicts (NIAC).

International humanitarian law (IHL) and public international law in general have two main sources: treaty law and customary international law. Treaty law is well developed and covers many aspects of warfare affording protection to a range of persons during wartime and limiting permissible means and methods of warfare. There are, however, two serious impediments to the application of the several IHL treaties in current armed conflicts that justify the necessity and usefulness of a study on customary international humanitarian law. First, treaties apply only to the States that have ratified them, and second, IHL treaty law does not regulate in sufficient detail non-international armed conflicts, subject to far fewer treaty rules than international armed conflicts. The main purpose of the study was, therefore, to overcome some problems related to the application of international humanitarian treaty law. The second purpose was to determine whether customary IHL regulates non-international armed conflicts in more detail than treaty law and if so, to what extent.

The methodology used in the study was described as inductive and classical. Following the Statute³ and the jurisprudence⁴ of the International Court of Justice (ICJ), international custom is a body of legal norms that arises from the general and consistent practice of States⁵ (*usus*) motivated by a sense of legal obligation (*opinio iuris*). Through widespread consultation with experts in IHL representing a variety of geographical regions, legal systems, governments, and international organizations, ICRC researchers from nearly 50 States canvassed State practice and *opinio iuris* over the last 30 years. The practice of States was searched in military manuals, reports on military operations, legislation, jurisprudence, official statements, reservations, etc. with the belief that these documents reflect what is done in the field, acknowledging nonetheless that the practice is not always reflected at the time of the violation but assists its understanding.

The study reveals a widespread acceptance of certain rules and principles and identifies standards of behaviour applicable in all armed conflicts. The study also unravels areas in which the law is not clear and points to issues requiring further clarification (*e.g.* the concept of direct participation in hostilities, the

³ *Statute of the International Court of Justice*, art. 38.1(b).

⁴ *North Sea Continental Shelf cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Judgement, [1969] I.C.J. Rep. 3; *Case concerning Military and Paramilitary activities in and against Nicaragua (Nicaragua v. United States)*, Merits, Judgement, [1986] I.C.J. Rep. 14 at para. 186 [*Nicaragua case*] (in order to deduce the existence of customary rules, the Court deemed it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally be treated as breaches of that rule).

⁵ During the debates it has been highlighted that article 38(1)(b) of the ICJ Statute requires 'general practice', not limiting it to 'State practice', therefore, the practice of other institutions, such as the ICRC, have proven to be useful.

application of the principle of proportionality, and the definition of civilians in NIAC). The normative framework for NIAC has proven to be much more detailed in customary than treaty law. The study, however, should not be seen as the end but rather the beginning of a new process aimed at improving understanding and agreement on the principles and rules of IHL. The study can form the basis of a rich discussion and dialogue on the implementation, clarification and possible development of law.

During the debates that followed the panel, questions about the ICRC study were mainly related to the sources used in the widespread consultation. It has been clarified that statements made by States and other interested parties in negotiations of treaty law were taken into account.

The panel discussions that followed the overview of the study questioned the current function of international customary law and debated its application and legal nature, stressing flaws in customary practice as well as positive advancements brought by the ICRC study.

The application of customary law is not necessarily connected with the existence of an applicable treaty as there is no applicable treaty if the relevant treaty to a specific situation has not been ratified by the concerned parties, if questions that arise in the conflict are not solved by the relevant treaty or if the treaty has been derogated by one of the parties and no longer constitute the applicable law. The question is whether customary law has been remedying such deficiencies. The legal nature of customary law defines it as the sum of practice and *opinio iuris*. Yet, a question that arises is where is the practice? The classical understanding in international law points to State practice, but a renewed approach could lead to consider also the practice of international organizations and the fora they provide for States to present their views and evidence State practice. Arguably, this process consolidates practices of customary law as much as the enactment of a treaty.

When evaluating State practice and *opinio iuris*, the existence of general practice can be challenged when practice is lacking, contradictory or if there is persistent objection to customary rules. The reaction of States to the breach of customary rules can also measure the acceptance or not of certain rules. Customary international law develops through practice and addresses complex problems. Questions of adequacy are common to treaty and customary law but the latter can prove to be more concrete and provide virtually immediate answers as practice develops.

Customary international law was also debated as being a source in crisis and a controversial source on the basis of the weight attributed to particularly interested States in enouncing practice and on the motivation of the *opinio iuris* before the international community. The adoption of the ICJ Statute on the definition of international customary law was argued to reduce it to a technical and mechanical method of interpretation, considering that article 38 of the ICJ Statute is a procedural rule rather than a substantive rule. The consideration of social consensus on universal values instead of practice in qualifying *opinio iuris* could render the concepts more flexible and perhaps alter the results achieved. *Opinio iuris* can assume the form of a general consensus, a consensus between every State or a social consensus. If the *opinio iuris* depends on the consensus of the States it is voluntarist. A truly voluntarist approach that brings cohesive social consensus to the heterogeneous international community could be reached by considering values expressed in instruments of universal adherence such as the *United Nations Charter* and the *Universal Declaration of Human Rights*.

The debates stressed the need to review practice and *opinio iuris* in connection with each other. States rarely recognize the practice of actions that are widely condemned by the international community, therefore, both the official stand and the observed practice of States in the field count for the recognition of customary rules and the weight of each of them should be analysed on a case-by-case basis.⁶

⁶ The *Nicaragua case*, *supra* note 4 was reminded by the panellists as a hypothesis in which the practice of the State was disregarded by the ICJ.

Panel 2

Application of customary law in international humanitarian law

Moderator: Armand de Mestral, *Professor, Faculty of Law, McGill University*

Panelists:

Marco Sassòli, *Professor, Faculty of Law, University of Geneva*

Georges Abi-Saab, *Professor, Graduate Institute of International Studies, Geneva; Member of the Appellate Body of the WTO; Former Judge for the ICTY*

Frédéric Mégret, *Professor, Faculty of Law, University of Toronto*

This panel focused on issues related to the accessibility of customary IHL practice in the field, State and non-State actors and their respective weight in defining practice, and the importance of making IHL accessible to players in the field in both international and non-international armed conflicts.

The role of international customary law in bridging the gap between international and non-international armed conflicts was analysed, focusing on the transitional efforts to include non-international armed conflicts into the ambit of IHL. Historically, the gap between IAC and NIAC did not exist and the only possible way to apply IHL in internal armed conflicts was through the recognition of belligerence. The draft ICRC *Geneva Conventions* included an article that extended their applicability to NIAC but States were able to compromise universally only on common article three. The article provided very little and led to the negotiations for the *Additional Protocols* and although the original proposition foresaw a unique protocol applicable to all conflicts, at the end of the negotiations, protocols I and II refer to IAC and NIAC respectively. *Additional Protocol II*, however, imposes a very high threshold keeping out of the scope of the protocol an average of 90% of the real NIAC. A flaw common to both additional protocols is the absence of enforcement mechanisms. From an intended mandatory mechanism, the result is a voluntary mechanism of compliance. Under these circumstances, United Nations (UN) bodies assumed the task of applying the law or determining the applicability of the law, bridging the gap between IAC and NIAC.

The first step on the performance of this task by the UN was the ICJ decision in the *Nicaragua case* that stated that common article 3 is the quintessence of IHL and applies irrespectively to IAC and NIAC. In later instances there was a direct recognition of IHL violations followed by the creation of *ad hoc* commissions of inquiry, which eventually led to the creation of the *ad hoc* tribunals. The most significant step in bridging the gap between IAC and NIAC came with the *Tadic* decision before the International Criminal Tribunal for the Former Yugoslavia (ICTY). The question was whether the conflict constituted an IAC or a NIAC and neither the Tribunal's Statute nor general opinion in public international law were decisive, so, the Tribunal proceeded to examine whether war crimes existed in NIAC through customary law. The decision reviewed practice in the battlefield, military manuals and analysed previous NIAC situations in which the international community had determined the existence of war crimes. The legally significant practice, therefore, was not considered to be the material act but the material act and its acceptance by the international community.⁷ Taking these developments into account, customary IHL has extended some rules of the protocols to States that were not signatory parties and has gone further than the protocols providing an extension of the rules of *Additional Protocol I* to NIAC, highlighting that a recent example of the joint consideration of treaty and customary law is article 10 of the *Rome Statute of the International Criminal Court*.

The ICRC study was perceived in the panel as a genuine effort to go beyond the law in the book and as a comprehensive attempt to analyse customary international law. It was suggested that such effort, however, could have been better achieved if instead of using a classical and formalistic methodology, the study had been developed under a progressive method. A progressive method would enable an environment beyond the voluntarism of States, grounded on constantly trampled practice. The solution proposed is to boost the importance of practice and *opinio iuris* and look at both elements together. The study also represents the long-term effort to tie together the regimes of international and non-international armed conflict. The reasons for

⁷ *Prosecutor v. Dusko Tadic*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995. See also *infra* notes 12, 13 and 14 and accompanying text.

the separation were identified as issues related to State sovereignty, the practice of belligerents and non-belligerents and the participation and practice of non-State actors.

In 98% of the cases, the rules found in the ICRC study correspond to what most States and experts consider to be binding in armed conflicts independently of treaty bounds. The theory in which the study is based is a flexible and reasonable version of the traditional customary law theory and the application of the traditional theory demonstrates that it is outer limits and not sustainable. Some factors demonstrate its lack of sustainability: dissonance between the representation of official and actual practice, as States not always report their entire practice; lack of definition on the amount of practice required, in particular to make a rule customary in NIAC; the theoretically separate analysis of IAC and NIAC could be considered as an outdated perspective of analysis. Moreover, two questions arose building on the same critique, first, whether agreements constitute practice or derogate from customary law and second, whether the practice of armed groups count for the formation of customary law in NIAC. The second question could be answered positively, as it is considered to be necessary to observe the practice of all parties in armed conflicts to have a complete view of the general practice and to serve as a catalyst for the respect to customary IHL from all actors, including non-State actors.

Some specificities of the formation of customary IHL were considered, stressing its uniqueness when compared to other fields of law. Customary IHL is built upon elementary considerations of humanity and the requirements of public conscience as stated in the Martens clause.⁸ On the other hand, difficulties with the actual practice exist, for instance, only a few belligerents have actual practice; there is no specific definition to States ‘specially affected’ by a given rule; the importance of military manuals considering that only a few States have them and they could be merely declamatory or even secretive. Customary rules are vague, difficult to establish, controversial and in constant development although the ICRC study eliminates the difficulty of knowledge of the rules and reduces controversies. Observance of the actual practice suggests that the main need of war victims is not protection by the formulation of actual practice in war, but protection against actual practice in war by the enforcement of rules, obviously including the already existing black-letter treaty rules.

Panel 3

Customary law and criminal prosecution

Moderator: Terry Beitner, *Director and General Counsel, Crimes Against Humanity and War Crimes Section, Justice Canada*

Panelists:

Chile Eboe-Osuji, *lawyer; Former Senior Legal Officer, Chambers, ICTR*

Elise Groulx, *Co-President of the International Criminal Bar; President of the ICDA*

Louise Doswald-Beck, *Professor, Graduate Institute of International Studies, Geneva; Director, University Centre for International Humanitarian Law (UCIHL), Geneva; co-director of the ICRC study on Customary International Humanitarian Law*

The panel surveyed the role of customary international law in the pursuit of accountability for international crimes. Experts on the theory and practice of international criminal law discussed the findings of the study related to individual criminal responsibility, national and international jurisdiction for the prosecution of war crimes, and the right to a fair trial that affords all essential judicial guarantees.

⁸ According to Antonio Cassese, “The Martens Clause: Half a Loaf or Simply Pie in the Sky” (2000) 11 E.J.I.L. 187, the Martens clause was included in the 1899 and the 1907 Hague Conventions comprising a two-fold legal significance: first, it could operate at the interpretative level, in other words, in case of doubt rules of IHL should be construed in a manner consonant with standards of humanity and the demands of public conscience, secondly, the clause could serve to loosen requirements prescribed for *usus* whilst at the same time raising *opinio* to a rank higher than that normally admitted.

The extension of individual criminal responsibility for violations of IHL in NIAC⁹ was the main axis of the discussion. This issue has emerged during the 1990s but is still not widespread. The expansion in practice results from the effort of human rights organizations and the UN Security Council resolutions taking interest in the application of IHL in NIAC, and, a number of treaties and national jurisdictions that began to include individual criminal responsibility for war crimes and other serious violations in their statutes and practice. The *Rome Statute of the ICC* has greatly contributed to this process.

Although individual criminal responsibility in NIAC is not controversial, punctual issues related to it motivate extensive debate. Some theoretical controversies over the definition of war crimes were advanced with article 8 of the *Rome Statute of the ICC* that enumerates, not exhaustively, war crimes in relation to grave breaches of the *Geneva Conventions* and other serious violations of the laws and customs applicable in armed conflicts. The ICRC study looked at violations that are so serious that international tribunals treated them as war crimes and could draw two categories: one, dangerous behaviour that causes injury or damage, and the other, behaviour that has violated serious values. Nevertheless, previous practice does not actually show this restriction and this theoretical ideal is not reflected in State practice. Consolidated State practice's only defining criteria is the enumeration of certain violations committed during NIAC: use of prohibited weapons, launching indiscriminate attacks, attacks against non-defended localities, the use of human shields, enslavement and slave labour, collective punishments, and starvation of civilians as a method of warfare.

Other controversial issues discussed included first, the tendency in favour of requiring convicted war criminals to provide reparation to victims. Although a customary rule regarding reparation has not been established, the provision of reparation to victims directly from war criminals themselves is increasingly common. Second, particularly following the *Rome Statute*, a clear change has occurred and it is a consolidated customary rule that statutes of limitation or prescriptive periods for war crimes are unacceptable. Third, a permissive universal jurisdiction is emerging as a customary right and States can prosecute war criminals if they choose to do so. Fourth and finally, the evident tension in State practice between a soldier's duty to obey orders and his duty not to commit war crimes was discussed. The ICRC study identified a rule according to which a soldier has a duty to disobey a 'manifestly' unlawful order rather than any unlawful order. The authors of the study opted to look only at the defence of superior orders in the study rather than other possible defences mostly because this defence is specific to IHL. Such exclusions, however, do not mean that other mechanisms are not relevant.

The acceptance and practice of international criminal tribunals regarding customary international law were then assessed. The analysis was centred on the principles of *nullum crimen sine lege* and *nulla poena sine lege*¹⁰ and on the premise that customary international law has enjoyed a dominant role as an integrated source of law in the proceedings of the *ad hoc* tribunals.

The discussion was centred in two practical examples, a judgement before the International Criminal Tribunal for Rwanda (ICTR) and a decision on a defence motion before the ICTY. The ICTR example is the *Akayesu case*¹¹ in which despite the inexistence of real argument to the application of certain laws which offer minimum guarantees (common article 3 of the *Geneva Conventions* and art. 4(2) of *Additional Protocol II*) the Chamber reviewed whether or not customary international law applied in the established context of the NIAC that took place in Rwanda. On the matter of individual criminal responsibility envisaged for the proscribed violations, the Chamber ruled that the Nuremberg Trials' review of the enforcement of individual criminal responsibility for crimes applies and that this understanding should be maintained.

⁹ The discussion was based on Rule 102 of the ICRC study, Henckaerts & Doswald-Beck, *supra* note 2 (no one may be convicted of an offence except on the basis of individual criminal responsibility).

¹⁰ The remarks were made in light of Rule 101 of the ICRC study, Henckaerts & Doswald-Beck, *supra* note 2 (no one may be accused or convicted of a criminal offence on the account of any act or omission which did not constitute a criminal offence under national or international law at the time it was committed; nor may a heavier penalty be imposed than that which was applicable at the time the criminal offence was committed).

¹¹ *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgement, 2 Sept. 1998 at para. 611-637.

The ICTY example is part of the *Tadic* case¹² in which two questions were raised (i) the existence of customary international rules governing internal strife, and (ii) the question of whether the violation of such rules may entail individual criminal responsibility. The Appeals Chamber reviewed the practice of States fighting civil wars since the 1930s.¹³ Starting with the rules prevailing during the Spanish Civil War (1936-39) and the recognition of common article 3 of the Geneva Conventions as customary law regardless of the internal or international nature of the conflict by the ICJ in the *Nicaragua case*¹⁴, the Appeals Chamber also reviewed statements from the time of the civil war in the Congo (1960-68), the Biafran conflict in Nigeria (1967-70), the civil strife in Nicaragua (1981-90) and El Salvador (1980-93) and both questions were answered positively. Two UN General Assembly resolutions were also considered and corroborated with the understanding reached in previous NIACs.¹⁵

The two international tribunals, therefore, rebuilt the State practice in the context of civil war and noted that State's domestic criminal laws on the subject were and continue to be inspired by international law, thus, it is an important role of the tribunals to preserve the existing scope and developments of customary international law.

The ICRC study recognizes as customary IHL that no one may be convicted or sentenced, except pursuant to a fair trial affording all essential judicial guarantees.¹⁶ According to practitioners, principles such as presumption of innocence, *non bis in idem*, right to a public hearing and the right to be judged in reasonable delay have not been strictly applied historically and bias is perceived in the application of rules, which jeopardizes the legitimacy of the upraising system of international criminal law.

After setting out this critique, two solutions were proposed. First, the need for a more detailed codification to ensure that fair trial rights are properly spelled out with sufficient detail and second, to strengthen defence institutions. The two solutions ought to be seen as complementary as codification is tied to interpretation and the means to convey interpretation. This approach is exemplified by the *Elements of the Crimes* on the ICC system as they constitute an important step to ensure that the defence is aware of all elements relevant to the case.

Fair trial guarantees occupied most part of the discussion following the panel. The role of the International Criminal Bar¹⁷ and other similar initiatives were recognized as positive steps to ensure fair trial guarantees. The reaction to the new developments at the pre-indictment stage has also been seen as promising as the defence participates in the process of compilation of charges through lawyers that are appointed to be present during investigations. Vagueness of indictment has also been debated and has been identified as a problem not only for defence counsels but also to prosecutors. The ongoing debate on the adoption of middle ground solutions between the adversarial and inquisitorial criminal systems in international criminal law was raised. The effectiveness and timeliness of both systems were discussed and the adoption of a mixed system has been somewhat criticized as an obstacle to ensure expedite and impartial trials.

¹² *Tadic*, *supra* note 7 at paras. 94-114.

¹³ *Ibid.* Some States and the Assembly of the League of Nations stated throughout the 1930s on the subject of the Spanish Civil War (1936-39) and the Chinese-Japanese War (1931-37) that some general principles of international law were applicable disregarding the distinction between international and internal wars: the prohibition of intentional bombing of civilians, the rule forbidding attacks on non-military objectives and the rule regarding required precautions when attacking military objectives.

¹⁴ *Nicaragua case*, *supra* note 4 at para. 218.

¹⁵ G.A. Res. 2444, U.N. GAOR., 23rd Sess., Supp. No. 18 U.N. Doc. A/7218 (1968) and G.A. Res. 2675, U.N. GAOR., 25th Sess., Supp. No. 28 U.N. Doc. A/8028 (1970).

¹⁶ Henckaerts & Doswald-Beck, *supra* note 2, Rule 100.

¹⁷ The International Criminal Bar, founded in 2002, acts as the representative of counsel before the ICC.

Panel 4

Customary law with regards to conduct of hostilities in non-international armed conflicts

Moderator: Bernard Duhaime, *Professor, Department of Legal Sciences, UQAM*

Panelists:

Ken Watkin, *Colonel, Department of National Defence, office of the JAG*

William Fenrick, *Former Senior Legal Advisor, Office of the Prosecutor, ICTY*

Michel Veuthey, *Professor, University of Nice; Vice-President, International Institute of Humanitarian Law*

The ICRC study sought to determine whether customary international law regulates NIAC in more detail than treaty law, and if so, to what extent. The study found that both *Additional Protocols* had a profound impact on the practice of States in NIAC, finding that not only many provisions of *Additional Protocol II* were considered part of customary law but State practice has extended to fill gaps, leading to the creation of rules similar to those found in *Additional Protocol I* but applicable to NIAC. Considering this scenario, the objective of the panel was to discuss the role of customary law in enhancing the application of IHL to NIAC.

The panel started by considering that globalization has brought the possibility of spreading practices worldwide but unfortunately bad practices are diffused in a larger scale than good practices. Examples of good practice are the widespread recognition and application of the common article 3 of the *Geneva Conventions* that remains an essential tool in the protection of civilians, humanitarian workers and prisoners (*e.g.* prohibiting torture). One of the most relevant characteristics of common article 3 is its strictly humanitarian nature without legal-political implications. Another example of good practices and globalization is the still incipient possibility of use of high-technology monitoring devices (*e.g.* radio, satellite pictures) and human monitoring (*e.g.* observers from international, regional and non-governmental organizations, diplomats, refugees, victims, witnesses) to document, sustain and support the implementation IHL rules.

It has been noted that the practice regarding the use of customary IHL in NIAC has improved, for instance, while there is no ‘prisoner of war’ status in common article 3 or *Additional Protocol II* there is practice where the POW treatment was granted in NIAC (*e.g.* in some military manuals, and on the U.S. actions in South Vietnam, and France actions in Indochina and Algeria). Another example cited was the 2005 World Summit Outcome¹⁸ in which the responsibility of States to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity was enounced. Alongside State responsibility, the role of the United Nations and other international and regional organizations was set as complementary in the exercise of such responsibility by means of encouragement and support for States to fulfil their responsibilities.

The ICRC study is a very relevant tool for the implementation of customary IHL in NIAC. Statistics were presented to support this position: in 2005, there are 23 conflicts taking place and other 28 ‘hot spots’ where NIAC could emerge including conflicts related to the ‘war on terrorism’. NIAC have been historically classified as ‘small wars’ and today they are known as the ‘three block wars’ in which the first block is the actual fight in the armed conflict, the second is the stabilization period and the third is the act of delivering humanitarian assistance and reconstruction. Taking this context into account the important next step is to make the ICRC study operational.

Three challenges arise in the context of NIAC. One, the categorization or characterization of the conflict as NIAC or IAC and the limits imposed by both definitions; two, the legitimacy of the non-state actors; and three, the status of unlawful belligerents. The limitation on the use of force only when it is strictly necessary is an extremely controversial issue in IHL and to characterize an armed conflict as such is necessary on the effect of expanding the application and enforcement of IHL.

Regarding the characterization of the conflict, the question raised is whether the ICRC study fills the gaps in the treaty-defined types of armed conflict and avoids a mechanic transfer of the rules guiding IAC to NIAC

¹⁸ United Nations, 2005 World Summit Outcome, 14-15 September 2005, A/Res/60/1, 24 October 2005 at paras. 138-139.

without considering its particularities. It was also questioned whether it addresses smaller scale conflicts of transnational nature. On the legitimacy of non-State actors, opposition groups and their distinction from the civilian population is still not dealt with in detail in treaty or customary IHL on NIAC. The study offers a more complete regulation, however, the level of detail is not sufficient especially in areas such as whether police and paramilitary forces should be incorporated into the State for the purpose of NIAC regulation or if combatant immunity applies in NIAC. Finally, on the status of unlawful belligerents, the ICRC study adopts the *Additional Protocol I* approach to define ‘combatant’ and ‘civilian’, hence, not fully representing the reality in the battlefield.

It was also noted that international criminal law and IHL are parallel practices that require diverse skills but are complementary in their construction and implementation. There has been a robust approach to customary law in the *ad hoc* tribunals, regarding NIAC and it was observed that the ICRC study would have been extremely helpful in the early days of the ICTY for example.

The classification of the conflict in the former Yugoslavia as an IAC was challenging and was possible just in some cases, consequently, for uniformity, the same laws apply to all cases without distinction. The ICTY relied heavily upon customary international law applied to NIAC and some pertinent examples of this approach can be found in the *Tadic*, *Galic*, *Strugar* and *Hadzihasanovic* cases.

In the *Tadic* case individual criminal responsibility for violations of common article 3 of the *Geneva Conventions* and the applicability of customary IHL in NIAC was recognized.¹⁹ In the *Galic* indictment, the Prosecutor stated before claims on the basis of both treaty and customary law that law was essentially the same regardless the type of conflict especially in situations in which the categorization is hard to define (*e.g.* concepts of unlawful use of weapons or undefended towns).²⁰ Attacks on civilian population were ruled as prohibited in the *Strugar* judgement.²¹ In *Hadzihasanovic*, cited in the ICRC study, the destruction and devastation of religious objects was prohibited.²²

The debates that followed the panel addressed the legitimization of non-State actors in NIAC; the classification of conflicts and the nature of the offences; specific actions ruled by customary international law but also in other fields such as human rights legislation; enforcement mechanisms; and special agreements on status of persons in NIAC. In IAC, the dichotomy between combatants and non-combatants is clear, in NIAC it depends on the context. There is no agreement in an over-arching definition of combatant status as in NIAC the *de facto* combatant status²³ might exist and there is recognition that the ICRC study has been very efficient in outlining the scope of ‘direct participation’.

Panel 5

The legal guarantees for people detained under security reasons

Moderator: Sabine Nölke, *Deputy Director, United Nations, Human Rights and Humanitarian Law Section, Foreign Affairs Canada*

Panellists:

Jelena Pejic, *Legal Advisor, ICRC*

Stéphane Bourgon, *Defence Counsel, ICTY*

Geoffrey Corn, *Professor, South Texas College of Law*

The objective of this panel was to examine the applicability of customary IHL on the characterization and conditions of detention of individuals detained for security reasons.

¹⁹ *Tadic*, *supra* note 7.

²⁰ *Prosecutor v. Stanislav Galic*, Case No. IT-98-29-I, Indictment, 26 March 1999.

²¹ *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-T, Judgement, 31 January 2005 at para. 228.

²² *Prosecutor v. Enver Hadzihasanovic and Amir Kubura*, Case No. IT-01-47-AR73.3, Decision on Joint Defence Interlocutory Appeal of Trial Chamber Decision on Rule 98bis Motions for Acquittal, 11 March 2005 at para. 32.

²³ Observed and recognized previously in NIAC, *e.g.* Yemen in 1964 and Nigeria in 1969.

Security detention was the first focus of analysis in the panel, in other words, it did not address lawful pre-trial detention of a person held on criminal charges nor the internment of prisoners of war (POWs) in IAC. Internment or administrative detention were analysed as a measure of control that may be ordered for security reasons in armed conflict, or for the purpose of protecting State security of public order in non-conflict situations.

The ICRC study has proven to be a useful instrument for determining the legal regime applicable to people under internment in any situation²⁴ but the rules in the study are general and already accepted in customary international law and the discussion they motivate is not related to their existence or acceptance but to their substance and interpretation. The debate proposed was rooted in rule 99 of the ICRC study applicable to both IAC and NIAC and focused on procedural principles and safeguards that govern internment in armed conflict and in other situations of violence.

Departing from the premise that the regimes for IAC, NIAC and human rights law are complementary,²⁵ general principles applicable to internment or administrative detention and procedural (fairness) safeguards were enumerated. The five general principles are: one, detention for security reasons is one of the severest measures a State can enforce and consequently, should remain exceptional. Two, internment is a measure of the executive power and should not be a substitute to criminal proceedings. Three, it can only be ordered on an individual case-by-case basis and without discrimination of any kind. This does not mean that a detaining authority cannot intern a large number of persons, but that both the initial decision and any subsequent decision to maintain it, including the reasons for internment, must be taken with respect to each individual. Four, detention must cease as soon as the reasons for the detention cease to exist or at the end of the hostilities. Five, detention under security reasons must conform to the principle of legality, meaning that a person may be deprived of liberty only for reasons and in accordance with procedures that are provided for by domestic and international law.

The procedural safeguards are: persons detained have the right to be informed about the reasons for detention in a language they understand; the detainee must be held in a recognizable place of detention and registered; the detainee has the right to challenge, with the least possible delay, the lawfulness of his or her detention and such review must be carried out by an independent and impartial body. The ideal situation that prevails in peacetime, is the appeal or reconsideration to be analysed by judicial courts, within an armed conflict situation, the threshold is lower and the requirement is an independent and impartial body not necessarily within the judicial system. The internee has the right to periodical review of the lawfulness of continued detention. The internee should have legal assistance. Access should be granted to persons detained under security reasons to the ICRC, other visiting mechanisms established under human rights treaties, and non-treaty mechanisms created under the auspices of the UN Commission on Human Rights. Contact with family members and right to medical care are also considered procedural safeguards.

The idea of the necessity of clear IHL rules in general applicable to security detention was discussed. The identification of detainees as 'enemy combatants' or any other assimilated term was found not to be significant in characterizing their status, on the contrary, the mix of terms could cause problematic and ambiguous results in relation to criminal responsibility. Policy makers prefer the term enemy combatant for convenience, for the use of military necessity policy and the power that incurs from it. The use of vague terms could assist in avoiding to commit to regulations, rights and obligations. The ICRC study was highly endorsed for entitling the same substantial and procedural guarantees to any detainee on the grounds established by common article 3 of the Geneva Conventions that assure the right to be treated humanely when deprived of liberty.

²⁴ Hanckaerts & Doswald-Beck, *supra* note 2, Chapters 32 and 37.

²⁵ It was argued that art. 43 of the *Fourth Geneva Convention* and art. 75 of the *Additional Protocol I* are rules of customary international law applicable to both IAC and NIAC.

An essential question is how to define the right to humane treatment. It has substantive and procedural aspects and the latter, is relevant on a pragmatic aspect that if the State does not grant procedural guarantees it might have to deal with an excessive number of detainees, affecting the efficiency of detention. On the other hand, the substantive aspect is indelibly related to the definition of an armed conflict, which limits the authority to invoke the right to deprive persons of their liberty. A State cannot accept the authority granted by the laws of war without respecting the obligations related to them.

At this point, the panel discussion shifted to the enforcement of judicial guarantees for all detainees in any conflict or condition. IHL legislation is more detailed than human rights legislation with regard to persons deprived of their liberty without due process and although the study does not create but rather confirms existing law, customary law binds States and individuals regardless of any ratification process. The study confirms the idea that fair trial guarantees, before only included in derogable human rights law, have attained the status of non-derogable IHL customary rules.

However, it has been suggested that the study ought to be regarded as a picture of customary IHL today as the density of practice has recently changed in many aspects, specially in NIAC and will continue to change and challenge practitioners. A practical example illustrates this view. According to the ICRC study, the practice on rule 153, on command and superior responsibility is less extensive and more recent in NIAC but uncontroversial where found (the Statutes of the ICC, ICTY, ICTR, Special Court for Sierra Leone, UNTAET Regulation No. 2000/15 for East Timor and on the *ad hoc* tribunals case law). The uncontroversial applicability of the principle in NIAC is seen as a very recent practice as the Statutes in which it is recognized are fairly recent with the exception of the *ad hoc* tribunals which, by their turn, did not have the ICRC study at the time of certain decisions, including the *Hadzihasanovic* case,²⁶ to be used as reference.

In the discussion period the issues raised were the relation between the characterization of the conflict and the applicable rules for security detainees; the effects of rules on security detention on third States; and indefinite detention. On the nature of the conflict and the applicable regime, it was discussed that the characterization of the conflict is often a prerogative of the sovereign power to access and once a determination is made and a military unit is authorized to attack an enemy, even though the assessment might not be the most precise and efficient according to international law, the decision has been taken and the legal regime invoked must mirror the sovereign power's assessment. The role of third States on security detentions and the effects of the application of rules was exemplified by the case scenario in which one State is responsible for the interrogation of the detainee and another State's officials who are not present to the interrogation receive the transcripts and make use of them for administrative or judicial purposes. No specific rules of IHL cover the discussed situation and rules of international human rights may apply, bringing forth the question of extra-territorial application of human rights law especially in cases of extradition and deportation. Finally, indefinite detention for security reasons was questioned as whether any type of detention of long duration would not be a breach of international human rights law. In the case of indefinite detention during an armed conflict, the answer was that the applicable law was IHL, the *lex specialis*, applying preferentially to human rights law. Under these circumstances, the basic principle of IHL is that detention must end primarily once the reasons for the detention cease to exist or as a last resort, once the conflict ends. The detention is ultimately connected to the possibility of the war to develop and the decision on the duration of the detention is left to the governments engaged in the conflict.

²⁶ *Prosecutor v. Hadzihasanovic and Others*, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003 at para. 57.

Panel 6

Cultural diversity in customary norms

Moderator: Yves Le Bouthillier, *President, Law Commission of Canada*

Panellists:

René Provost, *Professor, Faculty of Law, McGill University*

Judith Gardam, *Professor, Faculty of Law, University of Adelaide*

Ted Itani, *Advisor, Humanitarian Issues Program, Canadian Red Cross*

The development of IHL has been heavily influenced by western culture; nevertheless, the fact that the respect for human dignity is entrenched in social structures around the world is cited in support of the claim that the norms embodied in IHL are universal. Cultural relativists argue that the heavy reliance on the 'rights' language and the conception of the individual as separate from, and set up in opposition to, the State and the community challenge this ideal of universality. This theoretical scenario set out the background for the discussion of topics in this panel on the practical implementation of IHL. Questions such as whether existing norms of customary IHL reflect universal values and whether cross-cultural legitimacy is possible or whether the parties' differing cultural backgrounds may influence how they perceive and understand IHL obligations and the impact of those different understandings on the implementation of IHL were debated.

The reaction to abuses committed in the battlefields can assume three forms. First, by the enforcement of norms through international repression of crimes by the creation of the *ad hoc* and hybrid tribunals and the ICC. Second, through compliance, by actions such as humanitarian aid and the production of reports to denounce crimes and alert the public opinion. Third, by establishing a clear normative framework reinforcing the existing law (*e.g.* ICRC study).

Those initiatives or reactions, however, address essentially States, a key actor in armed conflicts but not necessarily the only relevant actor. It is important that the practice of non-State actors, for instance national liberation movements, is also present in order to better encompass the real nature of the conflict and as an incentive to the appropriation of the law by non-State actors motivating them to declare their recognition and abide to it. This posture reflects an asymmetric law and process that maintains the rebel groups as 'the other'.

Legal attention is often given to States or non-State actors who commit actions reproachable by norms of IHL; however, the violation of a norm is first and foremost the result of individual action and it is the knowledge and understanding of IHL of each individual that is part in the conflict considering that neither the State nor non-State actors can act without human action. The result of the autonomous decisions taken by individuals during the course of war may trigger individual criminal responsibility once the accountability and reconstruction process that follows a conflict begins. The matter is how each individual perceives IHL and its application and how IHL norms are being transmitted and translated to the individual actors of armed conflicts as a preventive tool.

Cultural relativism intervenes exactly on the translation of IHL, on bridging the gap between legal norms and the practical experience of each individual that is part in the conflict. The contribution of the individual to IHL is not the translation but the production of norms as ordinary accounts between individuals, human interactions that lead to the creation of norms in which is implied a truly pluralistic approach.

Challenges, opportunities and breaches to the implementation of IHL in the field were then outlined, stressing that open and transparent dialogue in the field is the key to the prevention of breaches and implementation of customary and treaty IHL. A non-exhaustive list of sources of breaches of IHL in the field was proposed: ignorance of treaty obligations and customary practice; sense of impunity from accountability and prosecution; poor leadership and absence of discipline; lack of adequate training which should go beyond military techniques and include IHL theory and practice; moral disengagement and absence of moral leadership by States; and, the act of demonising the adverse party. The challenges are represented by the misconception that IHL represents an obstacle on the accomplishment of military missions; and that human practice is already guided by cultural and religious values, consequently, IHL is regarded as a set of imposed

foreign rules. In order to optimistically overcome the breaches and cope with the challenges by changing the role and image of IHL in the field some opportunities should be envisaged. Examples of opportunities are the use of the existing framework of rules of customary and treaty IHL, find linkages in practice, and take incremental steps, for example, by establishing programs of humanitarian law in schools as a vehicle for the personal compromise with humanitarian values.

Gender issues were also discussed within the framework of cultural diversity. It was suggested that IHL has been built on the basis of European conflicts and for this reason was developed under certain assumptions particular to those conflicts and their cultural and often gender oriented values and principles. It should also be noted that systematic discrimination against women happens in every society, often reinforced by national legislation and obviously expands to armed conflicts. In this context, it would not be the gender-based cultural differences that impede the successful application of IHL towards women but its discriminatory interpretation and application.

Cultural diversity in relation to gender can only be achieved if the international community is prepared for the application of customary and treaty IHL nationally and internationally considering women's gender specificities preferably by hearing the women involved in the conflict situations. Cultural organization should also be challenged to allow the application of IHL under its core principles of neutrality and impartiality in this case, of gender.

Workshop 1a

The importance of customary international law for international organizations and NGOs

Facilitator: Gionata Buzzini, *Associate Legal Advisor, Office of Legal Affairs, United Nations*

The core discussion proposed for this workshop was the obligation to respect and make IHL respected in IAC and NIAC. The duty has been undeniably attributed to States and some initial premises on the extension of this duty to international organizations (IOs) and non-governmental organizations (NGOs) have been proposed to guide the debates. Only States are parties to IHL treaties but this prerogative can be eventually transposable to IOs when they are directly implicated in an IAC or NIAC conflict, *e.g.* the status of NATO in Kosovo. Due to their composition and/or subjectivity under public international law, IOs have full obligations under international law that are only partially applicable to NGOs and both have a full set of guarantees under international law in general and IHL. Although IOs have obligations that derive from their active participation and legal nature within the international community, the ways in which IOs' rights and obligations are put into practice differ from the State practice and use. Certain IOs possess a special status and must fulfil obligations according to their particular nature, *e.g.* the neutrality of ICRC delegates was affirmed as customary by the ICTY in the *Simic case*.²⁷

The first topic brought to the discussion was the role of IOs and NGOs on the access to prisoners and verification of compliance of rules of detention or internment. The study highlights a common practice in IAC of granting accessibility to persons deprived of their liberty to impartial delegates, namely the ICRC, consisting of a treaty right established in the *Geneva Conventions*. However, due to difficulties in access and identification of the parties of the conflict in NIAC, accessibility to prisoners is not as consolidated in this context as it is in IAC, the role of IOs and NGOs is only dealt with in the study's commentaries and not as a rule. In a related discussion it was mentioned that customary IHL norms will not create IOs or NGOs but customary IHL can assist on the affirmation and development of their mandate. It is implicit that if the State confers a determined mandate to certain IOs, the international community and the international law enforcement system will allow and guarantee the IOs' mandate. This idea can be identified by the ICTY

²⁷ *Prosecutor v. Blagoje Simic, Miroslav Tadic and Simo Zaric*, Case No. IT-95-9-T, Judgement, 17 October 2003 at paras. 1152-1154 (a former ICRC delegate was exempted to offer testimony in the case on the basis of the principles that underlie the organization's activities, in particular the principles of neutrality, impartiality and independence).

opinion in the *Simic* case, in which a balance between the interests of justice and the preservation of the neutral, impartial and independent mandate of the ICRC was achieved.

The role of journalists was also brought to the discussion focusing on their vulnerability, sometimes shared by IOs and NGOs agents, of being taken hostages demonstrating the violation of IHL guarantees. The action was obviously classified as a breach of IHL rules, falling under the obligation of any part to the conflict to respect IHL in IAC and NIAC. The lack of inquiries or the lack of publicity of inquiries in these situations was observed as a factor that weakens the application of IHL.

Another issue brought to the debate was the historical shift on the space for creation and application of laws of war. Historically they were strictly military subjects and nowadays this terrain of discussion and deliberation was appropriated by IOs and NGOs. The reasoning for the shift was considered to be logical. Historically, the military was the agent most involved in the making and interpretation of the laws of war because their actions had little effect in the civilian population. Today, however, this reality has changed and civilians are severely affected by internal and international armed conflicts, explaining the necessary involvement of civil society in the making, interpretation and enforcement of IHL law. It also reflects the evolution of concepts and application of democratic ideals that redefined the relationship and relations of power between civilians and the military.

Workshop 1b

The impact of the ICRC study in military training

Facilitators: Kirby Abbott, *Lieutenant-Colonel, Legal Director of Training, Office of the JAG* and Geoffrey Corn, *Professor, South Texas College of Law*

The objective of the workshop was to survey methods by which the findings of the ICRC study can be integrated into military training programs and focused on the role of legal advisors to military commanders and instructors in Canada and the United States.

The use of customary IHL in military training in Canada and the United States was briefly outlined. Both countries have extensive instruction on the ‘law of armed combat’ and the principles of IHL at all levels of military training and with constant actualization training for the personnel. Instruction given is aiming the operational and tactical level, pre-deployment and during deployment seeking uniformity of policy and practice.

In contrast to Canada that teaches customary law, the United States teaches what it considers to be the ‘best practice’ or ‘best policy’. Although from a practical perspective the use of ‘practice’ is virtually identical to the use of ‘custom’ it was discussed that from a legal approach, because military instruction and manuals follow ‘best practice’ instead of custom, is not expressing *opinio iuris* concerning customary norms, thus not fully contributing to the affirmation of customary IHL. It has been added that this approach has been challenged as the students are becoming more informed about the law of war and the instructors must adapt their methodology in order to account for the various sources of information available and provide instruction that attains the most effective and coherent observation of IHL rules.

The impact of the ICRC study in military training and manuals was discussed. The ideas and language contained in the study are likely to start being used by manual writers and instructors and should motivate the updating of manuals and training materials. At a first stage, it is probable that the study will neither be integrated wholesale into military training nor disregarded outright and will certainly be an invaluable resource for assessing approaches to customary IHL of other States.

It has been noted, however, that a negative effect may be that States begin to be more cautious in developing progressive policies in military manuals and training as their work will be used as evidence of the State’s practice, leading to the discussion of the role of military manuals as evidence of State practice and *opinio*

iuris. Observations were made that not all military manuals constitute State practice, some are mere guidelines and the focus should be on the quality of the source rather than the quantity of information provided by the source, for instance, manuals of States which engage in armed conflict would probably offer a more accurate account of the practice.

The last question debated focused on the increasing academic interest and possible reliance on scholarly writing as potential evidence of customary IHL and the need to increase the dialogue between academia and the military legal community. Important initiatives, such as this conference were acknowledged for being essential steps for positive exchanges between academic and military communities as well as the involvement of military personnel in research institutes and the creation of opportunities for consultations with armed forces and civil society contributing to government policy decisions. Despite the agreement reached on the positive aspects of the interaction between academia and armed forces, two difficulties were raised. First the need to accommodate the strategic necessity of confidentiality of plans, means and methods of warfare and second, the lack of agreement on the meaning of general legal concepts (*e.g.* proportionality). In both cases the analysis cannot be oversimplified as a matter of legality and must be dealt with on a case-by-case basis.

Workshop 2a

Human rights practice as a source of international humanitarian law

Facilitator: François Crépeau, *Professor, Faculty of Law, Université de Montréal, Canada Research Chair in International Migration; Scientific Director of the Centre d'études et de recherches internationales de l'Université de Montréal*

The discussions focused on the contribution of the theory and practice of human rights law to the development of IHL and in the potential complementation between these two fields of international law. The initial premises that motivated the discussion were that IHL has taken human rights law into account in three different ways: by incorporation when provisions and instruments of human rights law have served as inspiration and included in IHL and vice-versa; by interpretation, *e.g.* an advisory opinion of the ICJ has defined a nexus between IHL and human rights law,²⁸ and common article 3 of the *Geneva Conventions* is often interpreted by the *ad hoc* and hybrid tribunals with reference to international human rights law; and, by implementation, *e.g.* human rights law possesses effective mechanisms of implementation recognizing every individual the right to challenge restrictions on his/her rights, while IHL does not count with such clearly defined mechanisms the application of IHL has been discussed in the Inter-American Commission of Human Rights and the European Court of Human Rights.²⁹

The debates seemed to find consensus on the fact that human rights law and IHL are distinct branches of international law but to look at them as waterproof fields is unrealistic. They indeed complement each other in themes of great impact such as the duty to protect and the enforcement of judicial guarantees but apparent clashes and competing logics arise in cases where definitions and limitations of general principles and concepts are susceptible to debate. To illustrate this hypothesis the example of targeted killings within the 'war on terror' was brought to the table – from a human rights perspective the practice corresponds to an extra-judicial execution while IHL may legitimize it under certain circumstances after the analysis of criteria such as the combatant status, the principle of proportionality, etc. Clash situations between human rights and IHL were widely acknowledged by the participants of the workshop as the exception to the rule of regular complementation between the two fields of law, all interveners agreed that the situation is not clear-cut and a

²⁸ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, [1996] I.C.J. Rep. 226 at para. 25.

²⁹ The Inter-American Commission of Human Rights endorses the application of IHL as a source of law. In *Judicial Guarantees in States of Emergency*, Inter-Am. Comm. H.R., Advisory Opinion OC-9/87, 6 October 1987 it held that every person is allowed to plead the determination of the legality of derogations of human rights in times of emergency. Discussions in the workshop suggested that the Commission favours an active approach of a unique jurisdictional institution to overlook all obligations of a State towards its citizens while the European Court of Human Rights does not follow the same approach and refrains from analysing IHL, it has acknowledged the need to take IHL obligations into account.

case-by-case approach is always recommended. There was an agreement that, at the present times, special attention is required to the discussions of the legal regime applicable to the 'war on terror'.

Workshop 2b

Customary law before national tribunals

Facilitator: Bruce Broomhall, *Professor, Department of Legal Sciences, UQÀM; Director of the Centre d'études sur le droit international et la mondialisation (CEDIM).*

The objective of this workshop was to observe the role of customary IHL pleaded before national tribunals and to survey the record of national tribunals in prosecuting violations of international norms, namely IHL rules. Decisions of national courts are very relevant to customary law as they are part of State practice. A short introduction on the two approaches for the application of customary law before national tribunals was proposed. The first one consists in the direct application of customary law³⁰ and the second on the application of customary law as an interpretative source to national law.³¹

The incorporation of customary IHL and international criminal law in national legislation is a fairly recent phenomenon motivated by the adoption of the *Rome Statute of the ICC* in 1998 and its provision on cooperation and complementary. Canada, Germany and Belgium are positive examples of prompt compliance with this provision. The Canadian legislation provides a unique mandate as it enables courts to look at actions committed outside Canada to support procedures before national courts. Belgium adopted the universal jurisdiction legislation in 1993, amended it a number of times and abrogated it even though some similar provisions were incorporated into the criminal code with requirements of residence or other connections to establish jurisdiction. In Germany the advantage of the legislation has been acknowledged mainly for defining war crimes in national written law facilitating the action of the prosecutor.

The adoption of national legislation was encouraged by the participants of the workshop as a positive factor contributing to the accountability for breaches in IHL and criminal law related to armed conflict being useful to the establishment of penalties to be applied when breaches in customary IHL occur and to provide guidelines for the emerging practice of compensation for victims of war crimes. Besides the European examples, slow developments have been identified in Latin America and Africa in terms of legislation drafting, and in Asia there is less activity in this regard due to the low ratification rates of the *Rome Statute of the ICC*.

Practical governmental considerations were presented that motivate a prosecutor to bring forward a case considering issues such as the evidence available and the fact that often investigations occur overseas. Taking those factors into account, the prosecution within the war crimes programs is foremost a matter of practicality and placing resources in the cases that will be most fruitful. Motivated by this subject, the ongoing debate about using immigration law to deal with international crimes was also brought to the discussion and again the principle of practicality was the most consensual answer. The immigration law is designed to prevent individuals who committed war crimes or crimes against humanity from entering the country and naturally an overlap between the legal regimes and circumstances will occur and shall be dealt with on a case-by-case basis.

An analysis on the complementary nature of the civilian and military judicial systems within each State on the accountability and enforcement of IHL and criminal offences related to armed conflict was also suggested

³⁰ Examples of this approach are the *Paquete Habana* case, 175 U.S. 677, 20 S. Ct. 290 (1900) and the final *Pinochet* case in which customary law was argued to be part of the common law, *R. v. Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet Ugarte (No. 3)* [1999] 2 W.L.R. 827.

³¹ Examples on this approach are much more common and widespread. The Canadian Supreme Court, for instance, considers customary international law as a source of value and principles that guides the court in its interpretation of Canadian law. This method of application, however, has drawn academic criticism for placing international law as an interpretive tool rather than a binding source of law.

during the debates. As well as the palliative solution offered by hybrid tribunals (*e.g.* East Timor, Sierra Leone, Cambodia) to bridge the impunity gap generated by the lack of international mechanisms suited to hold those responsible accountable and the lack of preparedness of national legal systems and tribunals to cope with the nature of the offences and their applicable law.