The Underlying Principles of International Humanitarian Law

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The events of the decade which ended with the Second World War in 1945 had a number of important consequences for the development of Human Rights in general and for International Humanitarian Law in particular. Some of the influences were obvious and immediate. The UN Charter commenced with a statement that its first purpose was "to maintain international peace and security", which was based upon the determination, enunciated in the Preamble of that instrument, "to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind". In addition, the Charter was an expression of the philosophy that, if human beings could live in freedom and respect under their own laws, they would provide a barrier to the waging of war by the State in which they lived: aggression was the behaviour of the totalitarian regime not of a democratic society. Hence the purposes of the United Nations included both the development of "friendly relations among nations based on respect for the principle of equal rights" and the achievement of "international co-operation . . . in promoting and encouraging respect for human rights and for fundamental freedoms", based upon the determination, also expressed in the Preamble, "to reaffirm faith in fundamental human rights [and] the dignity and worth of the human person".

While these sentiments were an obvious reaction to the brutality of the previous decade, the other consequence of that period was less immediately apparent, or at least its effects were less apparent. The Nazi regime was based ultimately upon legal positivism in its most extreme form: that the sovereign could make (or unmake) any law whatsoever, however repugnant the new law might be to standards of morality. This philosophy was rejected by the victorious allies. The Charter of the International Military Tribunal, in Article 6, defined as Crimes against Humanity "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of domestic law of the country where perpetrated." As the Tribunal itself said,[1] "the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorising action moves outside its competence under international law."

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1. *Trial of the Major War Criminals* (hereinafter referred to as IMT), Vol I, 223.

This principle was more clearly spelt out in subsequent war crimes judgments. In the so-called *Justice Trial*,[2] the U.S. Military Tribunal acknowledged that "German courts under the Third Reich were required to follow German law", but no such limitation applied to that Tribunal which was required to apply "the paramount substantive law": the "very essence of the prosecution case is that the law, the Hitler decrees and the Draconic, corrupt, and perverted Nazi judicial system themselves constituted the substance of war crimes and crimes against humanity". In practice, the defence of legality under the local law was treated along the same lines as the defence of obedience to superior orders. In the *Sawada Trial*,[3] the U.S. Military Commission in Shanghai expressed the following view in a case arising out of the summary court martial and punishment by the Japanese of a number of American airmen who were captured after a bombing raid on Tokyo: "The offences of each of the accused resulted largely from obedience to the laws and instructions of their government and their Military Superiors . . . The preponderance of evidence shows beyond reasonable doubt that other officers, including high governmental and military officials, were responsible for the enactment of the *Ex post Facto* 'Enemy Airman's Law' and the issuance of special instructions as to how those American prisoners were to be treated, tried, sentenced and punished. The circumstances . . . do not entirely absolve the accused from guilt. However, they do compel unusually strong mitigating consideration, applicable to each accused in varying degrees."

However, the revulsion at the barbarity of the Nazi regime and its so-called legal system was not confined in time or place to the vengeance of a victorious war-time coalition. The Nazi atrocities have remained a by-word and, in that way, have contributed to the renaissance of what, if the theories had been advanced in past centuries, would be regarded as constituting part of a naturalist philosophy.

The reluctance to express such ideas in those terms can be explained on the ground that naturalist views of law, even of international law, scarcely survived the nineteenth century. Battered by Austinian notions of law as the command of a sovereign, international law had to be distinguished from positive morality if it was to lay any claim to respectability. Hence it had to be fitted into the constraints of consensual theory with respect to which respectability was achieved only by acknowledging that international law was dependent upon the consent of States.

To this bleak ideology, the Laws of War remained a shadowy exception. They were shadowy first, because they retained a humanitarian (or naturalist) vein, and, secondly, because their very existence was thus less appropriately tested by reference to positivist doctrine alone.

As far as the first aspect was concerned, all the early codes gave expression to certain humanitarian ideals. For example, Article 12 of the Brussels Declaration

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2. *Trial of Josef Altstotter et al* (1947) 6 LRWCT 1 at 49.
3. (1946) 5 LRWCT 1 at 7, and also at 23; the *Belsen Trial* (1945) 2 LRWCT 1 at 107-8; First Report on the Draft Code of Offences against the Peace and Security of Mankind of 26 April 1950, A/CN. 4/25, Yb ILC 1950, Vol.II, 253 at 270; Second Report of 12 April 1951, A/CN. 4/44, Yb ILC 1951, Vol II, 43 at 60.

1874[4] stated that the "laws of war do not recognise in belligerents an unlimited power in the adoption of means of injuring the enemy", and Article 13(c) and (d) proscribed the killing of prisoners of war or the giving of no quarter, while Article 23 required that they be "humanely treated". Similar provisions were adopted by the Institute of International Law in the Oxford Manual of 1880:[5] Article 4 was in almost identical terms to Article 12 of the earlier instrument; and Articles 9(b) and 63 were essentially the same as Articles 13 and 23 mentioned above. Not surprisingly the same provisions reappeared in the two Hague Conventions of 1899 and 1907 on the Laws and Customs of War on Land,[6] as Article 22[7] and Articles 23(c) and (d)[8] and 4.[9]

The Brussels Declaration contained an appeal to "ideas of humanity", while the proposals in the Oxford Manual were prefaced by reference to the need to prevent "the unchaining of passion and savage instincts" by keeping soldiers "within the limits of respect due to the rights of humanity". Similar sentiments were expressed in the preambles to the two Hague Conventions which referred to the desire to serve "the interests of humanity". However, far more significant from a legal point of view was the adoption as part of those preambles of the famous de Martens clause which in the reformulated version in the 1907 Convention read:

> "Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilised peoples, from the laws of humanity, and the dictates of the public conscience."

This pronouncement has a number of important features, which are worth considering in relation to the other aspect of the laws of war referred to above — their survival in the face of prevailing legal ideology. At a time when nineteenth century positivism was still a predominant force in legal thinking and was a harmful influence on the role and perceived significance of international law in the relations between States, the invocation of "usages established among

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4. The Brussels Conference, called on the initiative of Tsar Alexander II, adopted a declaration which stated inter alia that the task of the representatives was to ascertain what portion of the draft text before them (entitled "Project of an International Declaration Concerning the Laws and Customs of War") might form "the object of an agreement, and what portion requires still further examination": text in Schindler and Toman, *The Law of Armed Conflicts*, 2nd rev ed (1981), 25–34.
5. Text in Schindler and Toman, op cit, 35–48.
6. The two Conventions were in very similar terms, but a number of States became parties to the earlier, but not to the later. The texts of the two are given in comparative form side by side in Schindler and Toman, op cit, 58–87.
7. Both Conventions employ identical wording: "The right of belligerents to adopt means of injuring the enemy is not unlimited."
8. Both Conventions have the identical provision: "In addition to the prohibitions provided by special Conventions, it is especially forbidden — . . .
   (c) to kill or wound an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at discretion;
   (d) to declare that no quarter will be given".
9. Again the Conventions employ identical wording: "Prisoners of war . . . must be humanely treated . . . ."

civilised peoples'', ''the laws of humanity'' and ''the dictates of the public conscience'' to *regulate* the treatment of individuals was a startling innovation. In positivist doctrine, it was the consent of States to the specific terms of the Convention which created obligations out of those rules. The wording of the de Martens clause was a recognition that there were wider principles behind the specific rules, principles which were in no sense detracted from by the spelling out of the rules in question. Put in another way, it did not follow from the fact that certain conduct was proscribed that all conduct not covered by the proscription was allowed. In other words, many of the proscriptions were but specific applications of more general principles prohibiting inhumane or underhand conduct towards those involved in the conflict.

Surprisingly enough, neither the Nuremberg nor the Tokyo Judgments made use of the clause nor did they pay much attention to the humanitarian principles underpinning the law to which the clause referred. However, the Nuremberg Judgment did refer to the concept of general principles as a basis for the imposition of individual criminal responsibility for breaches of international law. In the first place, in the context of whether the Kellogg-Briand Pact 1928 established the planning and waging of aggressive war as a crime, the Tribunal had this to say:[10]

> ''But it is argued that the Pact does not expressly enact that such wars are crimes, or set up courts to try those who make such wars. To that extent the same is true with regard to the laws of war contained in the Hague Convention. The Hague Convention of 1907 prohibited resort to certain methods of waging war. These included the inhumane treatment of prisoners, the employment of poisoned weapons, the improper use of flags of truce, and similar matters. Many of these prohibitions had been enforced long before the date of the Convention; but since 1907 they have certainly been crimes, punishable as offences against the law of war; yet the Hague Convention nowhere designates such practices as criminal, nor is any sentence prescribed, nor any mention made of a court to try and punish offenders. For many years past, however, military tribunals have tried and punished individuals guilty of violating the rules of land warfare laid down by this Convention. In the opinion of the Tribunal, those who wage aggressive war are doing that which is equally illegal, and of much greater moment than a breach of one of the rules of the Hague Convention. In interpreting the words of the Pact, it must be remembered that international law is not the product of an international legislature, and that such international agreements as the Pact of Paris have to deal with general principles of law, and not with administrative matters of procedure. The law of war is to be found not only in treaties, but in the customs and practices of states which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practised by military courts. This law is not static, but by continual adaptation follows the needs of a changing world. Indeed, in many cases treaties do no more than express and define for more accurate reference the principles of law already existing''.

Later, it went on to hold that, although the rules contained in the 1907

10. IMT, Vol I, 220–1.

Convention might not have been applicable as treaty obligations in the 1939-45 War because of the "general participation clause",[11] nevertheless they had by 1939 become "recognised by all civilised nations, and were regarded as being declaratory of the laws and customs of war".[12]

It follows that a State cannot escape from the application of generally recognised principles of law, nor from already existing rules of customary international law, by arguing either that the parties had never been bound by a Convention based upon such principles or setting out such rules, or that, though once bound, one or other of the parties had denounced the Convention and therefore ceased to be bound by it.

In the course of his concurring opinion in the trial of *Milch*,[13] Judge Musmanno referred to the particular example of the enforced use of Russian prisoners of war on German anti-aircraft installations, conduct which was in breach of Article 31 of the 1929 Geneva Convention relative to the Treatment of Prisoners of War.[14] It had been argued on behalf of the defence that, since Russia was not a party to that Convention, Germany was not constrained by its provisions in the way it treated Russian prisoners. The judge made reference to the following passage in a memorandum of 15 September 1941 in which the German Admiral Canaris had expressed the view that such prisoners were protected quite apart from the terms of the Convention:

> "The Geneva Convention for the treatment of prisoners of war is not binding in the relationship between Germany and the USSR. Therefore only the principles of general international law on the treatment of prisoners of war apply. Since the 18th Century these have gradually been established along the lines that war captivity is neither revenge nor punishment, but solely protective custody, the only purpose of which is to prevent the prisoners of war from further participation in the war. This principle was developed in accordance with the view held by all armies that it is contrary to military tradition to kill or injure helpless people . . . The decrees for the treatment of Soviet prisoners of war enclosed are based on a fundamentally different viewpoint."

In the judge's opinion, the Admiral's "position was entirely correct and in accordance with accepted international law."[15]

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11. By Article 2 of the Convention:
> "The provisions contained in the Regulations referred to in Article 1, as well as in the present Convention, do not apply except between Contracting Powers and then only if all the belligerents are parties to the Convention."

12. IMT, Vol.I, 253–4.
13. U.S. Military Tribunal Nuremberg (1947) 7 LRTWC 27 at 43–4.
14. The first paragraph of Article 31 reads:
> "Work done by prisoners of war shall have no direct connection with the operations of the war. In particular, it is forbidden to employ prisoners in the manufacture or transport of arms or munitions of any kind, or on the transport of material destined for combatant units."

15. The quotation from the Admiral's memorandum was also used in the Nuremberg Judgment (IMT, Vol.I, 232) to refute a similar defence argument in relation to the murder and ill-treatment of Russian prisoners of war. Keitel, one of the defendants, had rejected the memoradum on the ground that it was based on "the military concept of chivalrous warfare", whereas this was "the destruction of an ideology". The original order, to which Canaris had objected, had stated that

The issue of how far underlying principles or customary rules contained in a treaty can operate in the absence of a treaty nexus will be considered further later, but it is worth mentioning at this stage that it would follow *a fortiori* from what has just been said that a subsequent denunciation of a treaty will not release the denouncing State from principles or rules which have already become established as part of customary international law. The Vienna Convention on the Law of Treaties 1969 later expressed this principle in two ways. First, in general terms, Article 43 laid down that the "invalidity, termination or denunciation of a treaty, the withdrawal of a party from it, or the suspension of its operation . . . shall not in any way impair the duty of any State to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of the treaty." Then, more specifically, a Swiss amendment was introduced at, and approved by, the Vienna Conference to add Article 60.5. Article 60 dealt with the consequences of a material breach of a treaty by one party and the rights of other parties to suspend or terminate the treaty, However, paragraph 5 makes clear that the paragraphs relating to suspension and termination in such circumstances are not to "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." In the *Namibia* advisory opinion, the International Court referred with approval to the "general principle of law that a right of termination on account of breach must be presumed to exist in respect of all treaties, except as regard provisions relating to the protection of the human person contained in treaties of a humanitarian character (as indicated in Article 60, paragraph 5, of the Vienna Convention)."[16] Moreover, as the treaty under consideration was a Mandate agreement made with the League of Nations, it is clear that the Court regarded the principle as pre-dating the Vienna Convention by at least half a century.

Principles and rules

1. *Problems of definition*

Before considering the significance of the material mentioned so far in relation to the changes introduced by the 1977 Protocols into the law estabished by the 1949 Conventions, there is a question of terminology which must be tackled.

Hitherto we have employed two contrasting terms, "principles" and "rules", without explaining what is meant by either word. To an extent the distinction is a matter of the level of abstraction at which a legal norm is stated: a principle is general, a rule is particular. However, it may also be true that rules can themselves be stated at different levels of abstraction. As far as principles are concerned, there can also be a confusion of meaning between principles in the sense of the moral underpinning of legal prescriptions and general (legal)

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the "Bolshevist soldier has . . . lost all claim to treatment as an honourable opponent, in accordance with the Geneva Convention . . . Insubordination, active or passive, must be broken immediately by force of arms . . . Anyone carrying out the order who does not use his weapons, or does so with insufficient energy, is punishable . . ." (regulations issued on 8 September 1941: ibid, 229).

16. ICJ Rep 1971, p 16 at 47.

principles from which specific rules might be deduced. In addition, a distinction might have to be drawn between these general (legal) principles, and the general principles of law which are referred to in the Statute of both the former Permanent Court and the present International Court.

To explain the difficulties, a few illustrations might assist. The de Martens clause referred to inhabitants and belligerents remaining under the protection "of the principles of the law of nations, as they result from the usages established among individual peoples, from the laws of humanity, and the dictates of the public conscience." What it was apparently purporting to say was that, in the absence of the application of the specific rules spelt out in the Regulations appended to the Convention, certain legal principles would nevertheless operate. However the wording of the clause could be misleading. Some of the "principles" would almost certainly be what are herein designated as "rules". The reference to usages established between nations is broad enough to include quite specific rules based upon State practice (which would include the formulation of those rules in the texts of the various Conventions). For example, reference has already been made to the issue of the mistreatment of Russian prisoners by Germany during the Second World War. The Canaris memorandum referred to the "principles of general international law" among which was a general prescription that "war captivity is neither revenge nor punishment, but solely protective custody . . . to prevent the prisoners of war from further participation in the war". Although the detailed provisions of the Convention were not applicable as such, that proscribing certain types of work to which prisoners could be set was but a logical and practical inference from the general principle recognized by Canaris.

A similar conclusion could be reached in another way. It has already been pointed out that Article 4 of the regulations attached to both the 1899 and 1907 Hague Conventions required prisoners to be "humanely treated", and a similar statement appears in Article 2 of the 1929 Geneva Convention. These provisions were simply declaratory of a pre-existing (legal) principle, stemming in turn from the humanitarian (non-legal) ideal that prisoners should not be the object of vengeance. Viewed in terms of the de Martens clause, the (general) principle had become established as part of the law of nations as a result of frequent reiteration by those nations, a usage in turn based upon the (moral) dictates of the public conscience which required that advantage should not be taken of a person who had laid down his arms. It would follow from the requirement of humane treatment that their use in military-connected work which would render them open to attack by their own side would be illegal.

2. *Conflict with military necessity*

There are limits to the value of principles (even those having legal content). At a high level of abstraction, some of them are well recognised, though their application to specific situations might be controversial, particularly where they come into conflict with other equally well established principles. Traditionally, the freedom of the seas denoted freedom of navigation and fishing, but it was limited spatially by the claims of coastal states to bring areas of the marginal seas within their control. In other words there has been a continuing conflict on the maritime boundary where the principle of freedom is restricted by the demands

of state sovereignty. Today there is a conflict between that freedom and restrictions based upon another principle, the so-called common heritage of mankind. Are the resources of the deep seabed in theory available to all individually (though in practice only to those states rich, and technologically advanced, enough to be able to take advantage of the freedom), or are they part of the common heritage and available for the benefit of the community of nations as a whole through some mechanism of international co-operation?

In relation to the laws of war, there are a number of underlying (legal) principles that can come into conflict with the doctrine of military necessity, which itself can claim to be entitled to a degree of legal recognition. Somewhere there has to be a compromise between humanitarian ideals and the realities of the demands of a war situation. As the preamble to the 1907 Convention put it, the wording of the provisions contained therein was "inspired by the desire to diminish the evils of war, as far as military requirements permit".

As a general principle it has long been recognized that the right of belligerents to adopt means of injuring the enemy is not unlimited, a prescription contained in Article 22 of the Hague Regulations and reiterated most recently in Article 35.1 of the 1977 Protocol I to the Geneva Convention of 1949. Nevertheless the range of anti-personnel weapons that can legitimately be used remains a matter of controversy. In the Hague Regulations, Article 23 expanded on the general principle contained in Article 22 by "especially" forbidding (a) the use of poison or poisoned weapons, or (e) of arms, projectiles, or material calculated to cause unnecessary suffering. The only major treaty to amplify these restrictions was the Geneva Protocol 1925 for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare. However, the UN General Assembly has attempted to extend the range of specific prohibitions in a number of resolutions. In Resolution 1654(XVI) of 24 November 1961, the Assembly declared inter alia that any State "using nuclear and thermo-nuclear weapons is to be considered as violating the Charter of the United Nations, as acting contrary to the laws of humanity and as committing a crime against mankind and civilisation",[17] but the roll showed that of the 101 members represented, 20 cast their vote against the resolution, and 26 abstained. Without going into a detailed discussion of the legal significance of Assembly resolutions, the result in this case showed an absence of the necessary consensus, or *opinio juris*, in support of the norm being postulated.

During the 1974-77 Diplomatic Conference the Assembly passed a series of resolutions aimed against the use of napalm and other incendiary weapons,[18] and,

17. See also GA Res 33/71 B; 34/83 G; 35/152 D; and 36/92 I, in which the Assembly *declared once again* that the "use of nuclear weapons would be a violation of the Charter of the United Nations and a crime against humanity"; see also Res 36/92 K which *requested* the Committee on Disarmament "to start without delay negotiations in an appropriate organisational framework with a view to concluding a convention on the prohibition of the production, stockpiling, deployment and use of nuclear neutron weapons" on the basis that the "inhumane effects" of such a weapon would constitute "a grave threat, particularly for the unprotected civilian population". Note that Article 36 of Protocol I provides that in the case of a new weapon a party "is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party".
18. GA Res 3076 (XXVIII); 3255 (XXIX); 3464 (XXX).

in Resolution 31/64 of 10 December 1976, invited the Conference "to accelerate its consideration of the use of specific conventional weapons, including any which may be deemed to be excessively injurious or to have indiscriminate effects, and to do its utmost to agree for humanitarian reasons on possible rules prohibiting or restricting the use of such weapons". In the event, in addition to the basic rule about the choice of methods or means of weapons not being unlimited (Article 35.1), the 1977 Protocol I went on to provide that it was "prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering" (Article 35.2). The more detailed issues of conventional weapons "the primary effect of which is to injure by fragments not detectable by X-ray", land-mines and booby-traps, "the use of incendiary weapons, including napalm", and certain other conventional weapons "such as small calibre projectiles and certain blast and fragmentation weapons" were referred to in a Conference Declaration 22(IV) of 7 June 1977 which suggested that a follow up Conference be held after further consideration by the General Assembly. Such a Conference was held in Geneva from 10-28 September 1979 and from 15 September-10 October 1980, at which the following instruments were adopted as Appendices to the Final Act of the Conference:[19]

A. 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.
B. Protocol on Non-Detectable Fragments (Protocol I).
C. Protocol on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices (Protocol II).
D. Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III).
E. Resolution on Small-Calibre Weapons Systems.

One might surmise that the reactions to proposed prohibitions on the use of various types of weapon could well stem from perceptions of the military value of a particular weapon to the State concerned, or to the perceived disadvantage to a State if another State might unscrupulously take advantage of adherence to a Convention prohibiting a certain weapon while placing itself in a position to make use of the weapon should the occasion arise.

An example of the first type of situation is the refusal by the United States to accept obligations binding that country to renounce absolutely the manufacture or use of nuclear weapons. It is the view of western strategists that such a step would give too great an advantage to the Soviet Union and its East European allies which have a considerable numerical superiority over NATO in conventional forces.

A good illustration of the second situation is the fear expressed about the viability of the regime established by the Nuclear Non-Proliferation Treaty 1968 (the NPT)[20] that some non-nuclear-weapon States might use accession to that Treaty as a means of cloaking their true objective of acquiring a nuclear weapons

19. Texts in (1980) 19 ILM 1524.
20. Adopted and commended by the General Assembly in Resolution 2373 (XXII) of 12 June 1968: text in 729 UNTS 161.

capability. The principal obligation for such a State party to the Treaty, set out in Article II, is that it should not "receive the transfer from any transferor whatsoever of nuclear weapons or other nuclear explosive devices", nor should it "manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices". However, nothing in the Treaty is to "be interpreted as affecting the inalienable right of all the Parties to the Treaty to develop research, production and use of nuclear energy for peaceful purposes" (Article IV.1). Furthermore, all parties to the Treaty "undertake to facilitate, and have the right to participate in, the fullest possible exchange of equipment, materials and scientific and technological information for the peaceful uses of nuclear energy" (Article IV.2). Once they had obtained the benefits bestowed by Article IV and acquired the necessary nuclear expertise and manufacturing base, they could then, so the argument goes, withdraw from the Treaty by giving notice in accordance with Article X.1:

> "Each Party shall in exercising its national sovereignty have the right to withdraw from the Treaty if it decides that extraordinary events, related to the subject-matter of this Treaty, have jeopardised the supreme interests of its country. It shall give notice of such withdrawal to all other parties to the Treaty and to the United Nations Security Council three months in advance. Such notice shall include a statement of the extraordinary events it regards as having jeopardised its supreme interests."

Of course the reluctance to enter into a binding commitment is the greater when the undertaking is one not to acquire a particular weapon or type of weapon, rather than in the case of an undertaking simply not to use a particular weapon. In the case of the Geneva Protocol of 1925 for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare,[21] States were willing to undertake not to use such weapons, though there was nothing to prevent a State acquiring them. However, where the nature of a weapon makes its use potentially dangerous to the user as well, the military advantage of its possession may be nullified.

It has become clear in recent years that whereas poisonous gases and other chemicals could be used in a controlled manner, bacteriological agents could not be employed with sufficient discrimination. Hence in 1971 a Convention was drafted on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxic Weapons and their Destruction (the BW Convention).[22]

The preamble to this instrument recognised the contribution which the Geneva Protocol "has already made, and continues to make, to mitigating the horrors of war" and then went on to express the parties' determination, "for the sake of all mankind, to exclude completely the possibility of bacteriological (biological) agents and toxins being used as weapons". This was to be achieved through the undertakings in Article I that each State party would "never in any circumstances . . . develop, produce, stockpile or otherwise acquire or retain . . . microbial or other biological agents, or toxins whatever their origin or method of production,

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21. Text in Schindler and Toman, op cit, 110.
22. Attached as an Annex to and commended by General Assembly Resolution 2826 (XXVI) of 16 December 1971: text in (1972) 11 ILM 309.

or type and in quantities that have no justification for prophylactic, protective or other peaceful purposes''; and in Article II that parties should destroy or divert to peaceful purposes all agents, toxins, weapons and equipment in its possession or under its jurisdiction or control. In many respects the Convention has a close resemblance to the NPT — a similar undertaking to facilitate the fullest possible exchange of equipment, material and scientific and technological information (Article X); a similar right of withdrawal (Article XIII); and an undertaking to negotiate a further disarmament measure (Article IX).[23] As far as enforcement is concerned, the BW Convention provided for complaints of non-compliance to be lodged with the UN Security Council (Article VI). This has created obvious problems as the permanent members of that body (or their allies) are the most likely to be involved in arguments about the implementation of the Convention. Already the possibility of a Chinese veto prevented the Council formally accepting its role as arbiter of such complaints. In addition, doubts have been expressed as to whether the Soviet Union's statement of compliance with the requirements of Article II was satisfactory or whether the US President's directive for the destruction of such weapons had been fully carried out.[24] Subsequently, the United States has made public allegations that an outbreak of anthrax in the Sverdlovsk region of the Soviet Union in 1979 raised a suspicion that that country was acting in violation of the 1972 Convention. In the absence of proper investigation procedures, it is not possible to assess the accuracy of these allegations. Even if the outbreak did result from air-borne infection consequent upon an explosion, it does not necessarily follow that there had been an infraction of the treaty.[25]

The contrast with the situation with regard to chemical weapons is striking. The philosophy giving rise to the distinction appears to be that chemical weapons, unlike bacteria, can be deployed by a commander against an enemy without affecting his own men. Such a line of reasoning is supported, in western eyes, by reports that the Soviet Union or its allies have made use of chemical weapons in various parts of Asia (Laos, Kampuchea and Afghanistan). These allegations were placed on the Agenda of the General Assembly which, by resolution 35/144C of 12 December 1980, *decided* ''to carry out an impartial investigation to ascertain the facts appertaining to these reports regarding the alleged use of chemical weapons'' and *requested* ''the Secretary-General to carry out such investigation''. The Secretary-General appointed a group of experts who submitted an interim report in time for the 1981 session. The Assembly, noting that the investigation was not yet complete, *requested* the Secretary-General, with the assistance of the group of experts, to continue the investigations (resolution 36/96C of 9 December 1981). However, the political difficulties of investigating such a sensitive issue are reflected in the voting on

23. In the case of this Convention, the obligation was to continue negotiations in good faith towards the objective of the effective prohibition of chemical weapons; under Article VI of the NPT the undertaking was to pursue negotiations in good faith on effective measures relating to the cessation of the nuclear arms race.
24. SIPRI Yearbook 1976, 398–9.
25. Some materials may legitimately be retained; or the explosion could have occurred during the process of destruction.

the two resolutions. In 1980 the roll showed 78 in favour, 17 against, with 36 abstaining, while in 1981 the vote was 86-20-34.

Despite continuing efforts to place restrictions upon the means whereby warfare is conducted, progress has been slow and piecemeal. Even if one accepts that there is a basic humanitarian legal principle, that, in an armed conflict, the right of the parties to that conflict to choose the methods whereby the enemy is injured, or the conflict is prosecuted, is not unlimited, the application of that principle to specific instances is far from clear. It is an area in which the translation of principle into rules has been less readily acknowledged in the practice of States. The possession of, and ability to use if necessary, the more horrendous weapons have been seen by States as the only safeguards against their use by other States. In the case of a significant number of the parties to the Geneva Protocol of 1925, there are reservations similar to that of the United States which stipulates that the Protocol should cease to be binding "in regard to an enemy State if such State or any of its allies fails to respect the prohibitions laid down" therein. The perceived dictates of national self-preservation prevent acceptance of limitations upon the acquisition of a variety of weapons that it might be useful to employ in an emergency.

Another difficulty concerns the way in which some of the proscriptions are formulated. In article 23(e) of the Hague Regulations it was forbidden to "employ arms, projectiles, or material calculated to cause unnecessary suffering". The question of what was within the limits of *necessary* suffering has never been satisfactorily resolved, but Article 35.2 of the 1977 Protocol I was drafted in similar terms: "It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superflous injury or unnecessary suffering."

Apart from the reluctance of States to commit themselves to specific limitations, there is always the likelihood, if an armed conflict occurs, that both sides will have recourse to illegal activities, the one in retaliation against alleged use by the other. Apart from the difficulty of deciding which side was the first transgressor, the very existence of the legal rule might be placed in doubt by the activities in question. At the start of the Second World War, there was a degree of uncertainty about the rules of air warfare. However, in so far as the rules of land and naval warfare attempted to distinguish between combatants and civilians, it was to establish that the former only were liable to attack. Thus, by Article 25 of the Hague Regulations 1907, the "attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited", and a similar rule was expressly applied to sea warfare by Article 1 of Hague Convention (IX) Concerning Bombardment by Naval Forces in Time of War 1907.[26] It was arguable that the same rule applied to air bombardment by virtue of the reference to "by whatever means" in Article 25. In addition, a Commission of Jurists, appointed following a recommendation by the Washington Disarmament Conference of 1922, had produced a code of Rules of Air Warfare which included, in Article 22,[27] a prohibition on aerial bombardment "for the purpose of terrorising the civilian population . . . or of

26. Text in Schindler and Toman, op cit, 724.
27. Text in Schindler and Toman, op cit, 142.

injuring non-combatants''. Although no formal convention was ever drawn up, in September 1938 the League of Nations Assembly adopted, without dissent, a resolution which recognised, among the principles it regarded ''as a necessary basis for any subsequent regulations'', one stating that the ''intentional bombing of civilian populations is illegal''.[28]

The use of air attacks against centres of population was considered in evidence before the Nuremberg Tribunal. The defendant Kesselring was closely examined on the bombing of Rotterdam on the day of the Dutch surrender, it being put to the defendant that the purpose of the raid was ''to secure a strategic advantage by terrorisation of the people'', in order that they would accept peace terms.[29] In relation to the bombing of London and other English cities, the defendant Goring stated that those attacks were commenced in retaliation for British attacks on German cities.[30] The value of this argument to the defence was reduced by the evidence of the use of air attacks against a wide range of Polish towns and also by the terms of a memorandum issued by Hitler on 9 October 1939. The following sentences were from that memorandum put to the defendant Jodl in cross-examination on 6 June 1946: ''the destruction of the Anglo-French army is the main objective, the attainment of which will make possible the prerequisite conditions for later and successful employment of the German Air Force against other objectives. The brutal employment of the German Air Force against the heart of the British will to resist can and will follow at the given moment''.[31]

Nevertheless, these incidents and attitudes were not included in the Indictment itself. Although Section G of Count Three dealing with War Crimes was headed ''Wanton Destruction of Cities, Towns and Villages and Devastation not Justified by Military Necessity'', the provisions of the Hague Regulations specifically referred to were Articles 46 and 50,[32] both of which formed part of Section III of the regulations concerning ''Military Authority over the Territory of the Hostile State''. Further, the examples given in the Indictment[33] were those of destruction by land forces (burning or dynamiting, flooding of large parts of Holland etc). Nor was there any reference to the examples, given in the evidence

28. Text in Schindler and Toman, op cit, 161. See also the resolution adopted by the General Commission of the Disarmament Conference in July 1932 that ''air attack against the civilian population shall be absolutely prohibited'': Hackworth, *Digest of International Law*, Vol 6, 265; and two decisions of the Greek-German Mixed Arbitral Tribunal in *Coena Bros* v. *German State* and *Kiriadolou* v. *German State* which applied the similar rules in the Hague Convention to air bombardment: Hackworth, loc cit, 264.
29. Proceedings of 13 March 1946, IMT, Vol IX, 231–8; see also the examination of the defendant Goering on 15 March 1946, ibid, 338–40.
30. Ibid, 340–1.
31. IMT, Vol XV, 473. See also the affidavit of George Messersmith dated 30 August 1945 and referred to in court on 28 November 1945 (Vol II, 389 et seq), particularly the passage: ''Goering and Milch often said to me or in my presence that the Nazis had decided to concentrate on air power as the weapon of terror most likely to give Germany a dominant position'' (ibid, 390).
32. IMT, Vol I, 61–2.
33. The reference to Article 50, which prohibited the infliction of any ''general penalty'' upon the population of an occupied territory ''on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible'', made it apparent that the acts of destruction being referred to were mainly those carried out as punishments or vengeance for hostile acts emanating from a particular locality.

referred to above, in the Tribunal's judgment. Bombardment from the air against industrial cities which were also centres of population became an accepted part of the activities of both sides, an escalation of terror that culminated at Hiroshima and Nagasaki in 1945.[34]

3. *General principles of law*

The uncertainties over categorising different principles (do they exist only on a moral plane, or do they have legal content?) or over the relationship between principles and rules (the extent to which the former constitute the inspiration for the latter) are present in the Statute of the International Court of Justice. In deciding disputes submitted to it, the Court is required to apply, by virtue of Article 38. 1, inter alia

"a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
b. international custom, as evidence of a general practice accepted as law;
c. the general principles of law recognized by civilised nations".

When this provision was originally drafted in 1920 as part of the Statute of the former Permanent Court, the role of paragraph c was not made clear either in the wording used, or in the discussions of the Committee of Jurists which formulated it. To some it was based upon the need to avoid the possibility of a *non-liquet*, and had its counterpart in the constitutions of a number of European States.[35] To others it was an invitation to the Court to employ procedural rules which were common to most systems of law, including the principles of good faith in the conduct of legal relationships.[36] Lauterpacht was always prepared to take municipal law analogies much further in advancing the development of international law.[37] Given the way that notions of equity have been invoked by international tribunals[38] and in the drafting of international agreements,[39] the Lauterpacht view has proved prophetically correct. Cumulatively the effect of Article 38. 1.c was seen at the time to be a denial of positivist theory and a reaffirmation of natural law as a component of international law and not just as an inspiration for the development of its rules in the normative practice of States.

Paragraph c was not a total innovation, but more an act of recognition of the reemergence of a rival to positivism. In this context, it is perhaps worth observing how curious it is that John Austin has had a far greater long term influence over legal thinking, to the detriment of international law,[40] than did John Westlake who was for twenty years Whewell Professor of International

34. A similar approach can be discerned in the refusal of the Tribunal to hold Admiral Doenitz guilty for his conduct of submarine warfare against British merchant shipping, IMT, Vol I, 311–2.
35. See Hudson, *The Permanent Court of International Justice*, 610–11, and fns 45–7. Lauterpacht, *International Law Collected Papers*, Vol 2, 222, referred to the concept of the completeness of the law as "perhaps the most general of the general principles of law".
36. Hudson, loc cit.
37. *Private Law Sources and Analogies of International Law and International Law, Collected Papers*, Chapter 8.
38. Particularly in the *North Sea Continental Shelf* cases ICJ Rep 1969, p 3, and the *Anglo-French Continental Shelf Delimitation* case, (1977) 54 ILR 6.
39. See especially the United Nations Convention on the Law of the Sea, 69.3, Articles 59, 69.1, 70.1, 70.4, 74.1, 83.1.
40. As a result of the "law as the command of a sovereign" theory postulated in Lecture I of his *Lectures on Jurisprudence*.

Law in the University of Cambridge. Westlake was unusual for his time and in sharp contrast to his successor in the Cambridge Chair, Oppenheim, in being strongly of a naturalist persuasion. In his view:[41]

> "Reason is a source of international law . . . for two causes. First, the rules already regarded as established, whatever their source, must be referred to their principles, applied, and their principles extended to new cases, by the methods of reasoning proper to jurisprudence, enlightened by a sound view of the neccessities of international life. Secondly, the rules as yet established, even when so applied and extended, do not cover the whole field of international life, which is constantly developing in new directions. Therefore from time to time new rules have to be proposed on reasonable grounds, acted on provisionally, and ultimately adopted or rejected as may be determined by experience, including the effect, not less important in international than in national affairs, of interest coupled with preponderating power."

Westlake was here using principles in a juridical sense. One should look to the (legal) more abstract principle behind the rule in order to judge whether a different situation from that covered by the rule should be brought within the ambit of a similar rule. However, his reference to reason went further: it was an invocation of the social logic of man as the basis of international legal obligation. As he wrote elsewhere,[42] "the social nature of man, and his material and moral surroundings in the regions and at the time in question, are the ultimate source of international law, in the sense that they are the cause why any rules of international law exist, and that they furnish a test with which any particular rules of that law must comply on pain of not being durable." For Westlake, consent might be the "immediate source of international law" but the reason for this being so was not a positivist fiction: it was because "the social nature of man and his material and moral surroundings may furnish principles of action", though "only the consent of a society can establish rules".[43]

Here then was a statement of the dictates of the public conscience in juridical terms. Westlake would undoubtedly have approved of the approach later adopted by the International Court in the *Corfu Channel* case.[44] The United Kingdom had sought reparations from Albania as a result of damage caused to a number of British warships by mines laid in Albanian waters in the North Corfu Channel. The Court drew the conclusion from the evidence that the laying of the minefield "could not have been accomplished without the knowledge of the Albanian Government".[45] Once such knowledge was established, in the Court's view the parties were agreed upon the obligation flowing from that fact. The Court summarised the situation in the following well-known passage:[46]

> "The obligations incumbent upon the Albanian authorities consisted in notifying, for the benefit of shipping in general, the existence of a minefield in Albanian territorial waters and in warning the approaching British

41. *International Law* 2nd ed (1910), Vol 1, 14–15.
42. *The Collected Papers of John Westlake on Public International Law* (1914), 18.
43. Ibid.
44. ICJ Rep 1949, p4.
45. At 22.
46. Ibid.

> warships of the imminent danger to which the minefield exposed them. Such obligations are based, not on the Hague Convention of 1907, No. VIII, which is applicable in time of war, but on certain general and well-recognised principles, namely: elementary considerations of humanity, even more exacting in peace than in war; the principle of freedom of maritime communication; and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States."

The Convention referred to in the judgment, relative to the laying of Automatic Submarine Contact Mines,[47] had proved largely ineffective during the Second World War. However, the point was inescapable that, if an attempt had been made "to restrict and regulate" the employment of such mines in order "to ensure, as far as possible, to peaceful navigation the security to which it is entitled, despite the existence of war",[48] the use of such mines in peacetime in a strait used by international shipping (and through which foreign warships were therefore entitled to pass) was unlawful. It was the logic of the proposition which established the rule by analogy.[49] In Westlake's terms, and apparently in those adopted by the Court, Convention VIII laid down a rule based upon wider principles, those of humanity (the attempt "to mitigate the severity of war"[50]) and of freedom of navigation ("the principle of the freedom of sea routes, the common highway of all nations"[50]). The first principle was *a fortiori* applicable in the Corfu situation in which, whatever the tensions existing between Albania and other countries, there was no state of open warfare. The second principle was equally paramount in the absence of open hostilities between the United Kingdom and Albania.

What is not clear is the extent to which these "elementary considerations of humanity" constituted a legal principle. In other words, were these "considerations" of equal juridicial status to the other principles mentioned, the freedom of maritime navigation and the obligation that a State should not knowingly allow its territory to be used contrary to the rights of other States? Presumably, in juridical terms, the elementary considerations of humanity gave rise to the duty to warn of the danger in the same way as the other two principles did.

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47. Text in Schindler and Toman, op cit, 716. The main defect in the Convention was Article 2 by which it was "forbidden to lay automatic contact mines off the coast and ports of the enemy, with the sole object of interrupting commercial shipping." Such an objective would rarely be the sole purpose, and could never be shown to be the sole purpose, of laying mines. In addition, Article 3 required that "every possible precaution must be taken for the security of peaceful shipping" and in particular "to notify the danger zones as soon as military exigencies permit". In the course of its Memorial to the Court in the *Corfu Channel* case, ICJ Pleadings, Vol 1, 39, the United Kingdom argued that "since the adoption of the Convention in 1907, States have in their practice treated its provisions as having been received into general international law. Even Germany, who in the wars of 1914–1918 and 1939–1945 was guilty of serious breaches of the Convention, publicly professed to be complying with its provisions. The Allied Powers in both wars held themselves bound by the Convention and throughout observed the provisions relating to notification."
48. Preamble to the Convention.
49. This was certainly the line of reasoning advanced by the United Kingdom before the Security Council (see Annex 23 to the UK Memorial to the Court, ICJ Pleadings, Vol 1, 213) and before the Court itself (loc cit, 37–40).
50. Both these quotations also come from the preamble to the Conventions.

This interpretation of this passage in the Court's judgment seems to have been that held by the United Kingdom. In the *Aerial Incident* case, an airliner belonging to El-Al Israeli Airlines Ltd had been shot down by Bulgarian fighter planes when it had intruded into Bulgarian airspace. Applications were made to the International Court by Israel, the United States and the United Kingdom. The Court subsequently held that it had no jurisdiction in respect of the case brought by Israel,[51] and the other cases were discontinued. However, in the course of the Memorial setting out its claim against Bulgaria, the United Kingdom drew the analogy between the present circumstances and the *Corfu Channel* case as follows:[52]

> "The Government of the United Kingdom submit that there can be no justification in international law for the destruction, by a State using armed force, of a foreign civil aircraft, clearly identifiable as such, which is on a scheduled passenger flight, even if that aircraft enters without previous authorisation the airspace above the territory of that state.
>
> . . . The principles on which the Government of the United Kingdom rely are illustrated by the judgment of the International Court of Justice in the *Corfu Channel* case . . . That judgment shows that international law condemns actions by States which in time of peace unnecessarily or recklessly involve risk to the lives of nationals of other States or destruction of their property. In the *Corfu Channel* case . . . the International Court of Justice based Albania's duty to warn shipping of the presence of a minefield in its territorial waters on 'general and well-recognised principles', one of which was 'elementary considerations of humanity even more exacting in peace than in war'. . . . So far from permitting the use of force in circumstances such as those of the present case, international law, on grounds of humanity, recognises for ships a right of entry into the territory of a foreign State in case of overriding necessity. It has also been maintained that a similar right arises in respect of the entry of aircraft into the airspace above the territory of a foreign State."

Such a ship or aircraft would be entitled to assistance from the territorial State. The mere fact that the reason for entry was inadvertance rather than being driven off course by bad weather, would not turn the obligation to help into a liberty to destroy. That much at least flowed from the elementary considerations of humanity relied upon as, apparently, a legal factor in the *Corfu Channel* case.

The role of humanitarian principles in rule creation was also relevant to the concept of genocide as an international crime. In 1914 the concept of a war crime (i.e. a criminal act contrary to the laws and customs of warfare committed against a member of an enemy army — e.g. a prisoner of war — or of the population of an occupied territory) was clear enough. However, early in the course of hostilities Turkish forces carried out a massacre of Armenians who were the inhabitants of a part of the Turkish Empire. On 28 May 1915, the Governments of France, Britain and Russia issued a joint declaration warning that they would hold members of the Turkish Government personally responsible for those "nouveaux crimes . . . contre l'humanité et la civilisation".[53]

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51. ICJ Rep 1959, p127.
52. ICJ Pleadings, *Aerial Incident* case, 358.
53. See *History of the United Nations War Crimes Commission* (1948), 35.

Subsequently the Commission on Responsibilities, set up by the Paris Peace Conference 1919, issued a majority opinion that the Axis Powers had carried out the war "by barbarous or illegitimate methods in violation of the established laws and customs of war and the elementary laws of humanity". In a minority opinion, the American representatives objected to the invocation of laws and principles of humanity on the ground that they did not provide a sufficiently certain standard against which to adjudge the legality of the conduct called in question. In addition, in their view, these activities were infractions of a moral code and could not be applied by a judicial tribunal the task of which was to administer existing law.[54] As a result, the provisions of the Versailles Treaty (Articles 228-230)[55] relating to the punishment of war criminals were limited solely to "persons accused of having committed acts in violation of the laws and customs of war" (Article 228). The exception was Article 227 whereby the Allied and Associated Powers publicly arraigned Emperor William II "for supreme offence against international morality and the sanctity of treaties". Hence the tribunal provided for under that Article was to be "guided by the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality". This threatened prosecution was never carried out because of the refusal of the Dutch government to extradite the former Emperor. It would seem however that the international morality referred to had more to do with the disregard of international treaties than with crimes against the moral rights of individuals. The Armenian massacres were covered by a specific provision (Article 230) in the Treaty of Sèvres signed with Turkey, but that Treaty never came into force. It was replaced by the Treaty of Lausanne which contained no such provision and which was accompanied by a Declaration of Amnesty covering all offences committed between 1 August 1914 and 20 November 1922.[56]

In the course of the Second World War, the activities committed by the Nazi authorities in Germany itself and throughout occupied Europe led to the establishment of the United Nations War Crimes Commission in October 1943. During 1942 and 1943 there had been a series of statements by individual government spokesmen and declarations by governments in exile in London (the Declaration of St. James's of 13 January 1942[57]) or by the major allied countries (the Moscow Declaration of 1 November 1943[58]). It was the work of the Commission, and more particularly its Legal Committee, which influenced the extension of criminal acts under international law to those perpetrated by a State against segments of its own population.[59]

Whereas the Commission also concerned itself with activities occurring prior to the outbreak of war, and not necessarily related to the war itself, the Charter of the International Military Tribunal was more limited. Article 6 stated that the

54. Ibid, 36–7.
55. Text in Parry, Consolidated Treaty Series, Vol 225, 189.
56. *History of the United Nations War Crimes Commission*, 45.
57. Ibid, 89–90.
58. Ibid, 107–8.
59. Ibid, 174–80.

"following acts . . . are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility. . . .

> (c) *Crimes against humanity:* namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated."

While there was thus a temporal extension to acts committed "before . . . the war", the Tribunal adopted the view that inhumane acts as well as persecutions were limited by the requirement of a connection with any (other) crime within the jurisdiction of the Tribunal:[60]

> "With regard to Crimes against Humanity there is no doubt whatever that political opponents were murdered in Germany before the war, and that many of them were kept in concentration camps in circumstances of great horror and cruelty. The policy of terror was certainly carried out on a vast scale, and in many cases was organized and systematic. The policy of persecution, repression, and murder of civilians in Germany before the war of 1939, who were likely to be hostile to the Government, was most ruthlessly carried out. The persecution of Jews during the same period is established beyond all doubt. To constitute Crimes against Humanity, the acts relied on before the outbreak of war must have been in execution of, or in connection with, any crime within the jurisdiction of the Tribunal. The Tribunal is of the opinion that revolting and horrible as many of these crimes were, it has not been satisfactorily proved that they were done in execution of, or in connection with, any such crime. The Tribunal therefore cannot make a general declaration that the acts before 1939 were Crimes against Humanity within the meaning of the Charter, but from the beginning of the war in 1939 War Crimes were committed on a vast scale, which were also Crimes against Humanity; and insofar as the inhumane acts charged in the Indictment, and committed after the beginning of the war, did not constitute War Crimes, they were all committed in execution of, or in connection with, the aggressive war, and therefore constituted Crimes against Humanity."

To avoid any implication in this pronouncement that the mass murder of a particular group, if carried out in time of peace or in a way unrelated to activities in breach of the laws of war, was not contrary to international law, the UN General Assembly passed resolution 96(I) in December 1946. In that resolution it was affirmed that genocide, which it described as "a denial of the right of existence of entire human groups", was "a crime under international law". Subsequently the Assembly unanimously approved a Convention on the Prevention and Punishment of the Crime of Genocide in resolution 260(III) of 9 December 1948.[61] By Article 1, the Contracting Parties confirmed "that genocide, whether committed in time of peace or in time of war, is a crime under

60. IMT, Vol I, 254–5.
61. Text in Schindler and Toman, op cit, 172; 78 UNTS 277.

international law which they undertake to prevent and to punish".[62] The significant aspect is that the Assembly was anxious to formulate the offence in terms of an existing proscription by using the word "confirm". Indeed, in the Preamble, reference was made to the earlier declaration of the Assembly in resolution 96(I) "that genocide is a crime under international law, contrary to the spirit and aims of the United Nations and condemned by the civilised world".

The Genocide Convention did become the subject of proceedings before the International Court as a result of a disagreement among UN members as to the effect of reservations made by certain States to the Convention. In its advisory opinion[63] the Court held that it was open to States to make reservations, the nature of and reactions to which could only be assessed in the light of the characteristics of the Convention which had been adopted "for a purely humanitarian and civilising purpose".[64] This purpose was presumably the moral (non-legal) principle upon which the relevant legal norms were based. As the Court continued,[65] it was "difficult to imagine a Convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality". However, the Convention was also based upon legal principles. According to the Court,[66] the "origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as 'a crime under international law' involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations. . . . The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognised by civilised nations as binding on States, even without any conventional obligation".

Elementary notions of humanity, or whatever similar expression is used, are available as a basis for principles or rules of law, but they have to be transformed into such principles or rules by the practice of States, or through being recognised and acted upon by an international tribunal. In the case of genocide, the principle became rapidly established. In other fields the translation of moral principles into legal principles has been slower, but the problems have been greater in giving specific content to those principles in the form of precise rules. In particular, we have seen how limitations upon the weapons to be used against an enemy have not developed far beyond the principle that a belligerent should not employ "arms, projectiles, or material calculated to cause unnecessary suffering".

62. Genocide was defined by Article 2 as meaning "any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such:
    (a) Killing members of the group;
    (b) Causing serious bodily or mental harm to members of the group;
    (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
    (d) Imposing measures intended to prevent births within the group;
    (e) Forcibly transferring children of the group to another group."
63. ICJ Rep 1951, p 15.
64. At 23.
65. Ibid.
66. Ibid.

The 1977 Protocols and underlying principles

The movement to extend the protection of the 1949 Geneva Conventions gained impetus from the International Conference on Human Rights, convened in Tehran by the United Nations to celebrate, as part of the International Year of Human Rights, the twentieth anniversary of the Universal Declaration. Resolution XXIII of the Conference[67] expressed a number of ideas which were to remain a major influence on the formulation of parts of Protocol I. These may be summarised as:

1. that the 1949 Conventions were not sufficiently broad to cover all armed conflicts and that, in particular, persons who struggle against minority racist or colonial regimes should be protected against inhuman and brutal treatment and should be accorded the status of prisoners of war (Preamble);
2. that better protection should be provided for civilians, prisoners and combatants by additional international conventions or by revision of existing instruments (paragraph 1(b));
3. that, pending the adoption of new rules, all States should ensure that inhabitants and belligerents are protected in accordance with the principles referred to in the de Martens clause (paragraph 2).

A further idea was emphasised in resolution 2444 (XXIII) passed by the General Assembly in December 1968:[68]

4. that civilians deserved special protection: thus it was prohibited to launch attacks against the civilian population as such and, in addition, a distinction must at all times be made between persons taking part in the hostilities and civilians.

On the face of them, these matters fall within the general stream of development of humanitarian law from humanitarian principles. However, a closer examination might suggest that this estimate is superficial in some respects. This is not the occasion to elaborate on all four matters, so the discussion will concentrate on certain aspects of 1 and 4 above, and in particular, conflicts covered by Protocol I and the way in which the distinction between combatants and non-combatants has been reduced almost to vanishing point as a result of the attempt to (over-) extend the field of application of that Protocol.

The 1949 Conventions drew a distinction between "all cases of declared war or of any other armed conflict" between two or more parties to the particular Convention, to which the Convention as a whole would apply (common Article 2), and conflicts not of an international character, in which certain minimum rights only were guaranteed (common Article 3).[69]

The original ICRC draft protocols, published in 1973, were based upon this division, Protocol I relating to the protection of victims of international armed conflicts, and Protocol II dealing in some detail with non-international armed

67. Text in Schindler and Toman, op cit, 197.
68. Text in Schindler and Toman, op cit 199.
69. By that Article, the following provisions were to be applied "as a minimum":
"(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
To this end the following acts are and shall remain prohibited at any time and in any place

conflicts. However, the decision of the diplomatic conference to extend the definition of international armed conflicts (i.e. situations referred to in Article 2 common to the 1949 Conventions) to "include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination" (Article 1.4) reduced significantly the importance of Protocol II: the most politically sensitive of internal wars had in this way been "internationalised".

From a humanitarian point of view, the potential effects of such a step might be welcomed. Apart from the extent of the protection afforded by Protocol I to individuals of a belligerent entity,[70] application of the Protocol opens up the road to neutral or ICRC protection as of right on the initiative of the parties to the conflict to persons caught up in that conflict (Article 5).

However, political and ideological preoccupation with Southern Africa, which was a major factor behind pressure for such a change, was not necessarily the most logical basis for expanding the ambit of humanitarian law. Apart from difficulties of deciding what does amount to a fight against colonial domination etc. (i.e., when does a case of self-determination arise), there is also uncertainty over the level of fighting that is necessary before this extension becomes operative. On signing Protocol I, the United Kingdom made a declaration setting out a series of "understandings" about a number of its provisions. In particular, in relation to Article 1, it was stated that "the term 'armed conflict' of itself and in its context implies a certain level of intensity of military operations which must be present before the Conventions or the Protocol are to apply to any given situation, and that this level of intensity cannot be less than that required for the application of Protocol II, by virtue of Article 1 of that Protocol, to internal conflicts". Thus, before Protocol I can operate on the basis of Article 1.4, there must be, in the words of Article 1.1 of Protocol II, an armed conflict on the territory of a party "between its armed forces and dissident armed forces or other organised groups which, under responsible command, exercise such control over part of its territory as to enable them to carry out sustained and concerted military

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whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for."

70. A non-State entity cannot be a party to the Protocol as such, but Article 96.3 covers the situation in the following way:

"The authority representing a people engaged against a High Contracting Party in an armed conflict of the type referred to in Article 1, paragraph 4, may undertake to apply the Conventions and this Protocol in relation to that conflict by means of a unilateral declaration addressed to the depositary. Such declaration shall, upon its receipt by the depositary, have in relation to that conflict the following effects:

(a) the Conventions and this Protocol are brought into force for the said authority as a Party to the conflict with immediate effect;

(b) the said authority assumes the same rights and obligations as those which have been assumed by a High Contracting Party to the Conventions and this Protocol;

(c) the Conventions and this Protocol are equally binding upon all Parties to the conflict."

operations''; and it would follow, on the basis of Article 1.2 of Protocol II, that neither Protocol would apply ''to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.''

Internal wars, including wars of national liberation, have been characterised by the use of irregular forces, often indistinguishable from the civilian population. This latter problem was not new because the various resistance movements operating during the Second World War in Nazi occupied Europe could only have survived by remaining indistinguishable from the population as a whole.

Despite this precedent, the 1949 Conventions retained the basic approach of Article 1 of the Hague Regulations. Members of other militias or volunteer corps including organised resistance movements were only granted the protection of the POW Convention (Article 4), or the Wounded and Sick Convention (Article 13), or the Shipwrecked Convention (Article 13), if the organisation to which they belonged satisfied four conditions:

(a) being commanded by a person responsible for his subordinates;
(b) having a fixed distinguishable sign recognisable at a distance;
(c) carrying arms openly;
(d) conducting their operations in accordance with the laws and customs of war.

Under the Protocol, the distinction between persons entitled to protection as members of a military force and those who had forfeited the main benefits of the three Conventions mentioned above has become blurred. The principal definition of a combatant is that contained in Article 43,[71] which provides inter alia:

''1. The armed forces of a Party to a conflict consist of organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognised by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.''

''3. Whenever a Party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other Parties to the conflict.''

There is no mention here of the Hague Regulations' and 1949 Conventions' requirements of a distinctive sign and carrying arms openly. In fact, Article 44.7 plays down the notion that there is any obligation to wear uniform of any description.[72] Moreover, the need to distinguish combatants from non-combatants is given a new justification.

Originally the wearing of a sign and the carrying of arms openly were designed to protect the armed forces of the enemy from acts of perfidy, such as attacking

71. Article 44.1 lays down that any ''combatant, as defined in Article 43, who falls into the power of an adverse Party shall be a prisoner of war.''
72. Article 44.7 reads:
> ''This Article is not intended to change the generally accepted practice of States with respect to the wearing of the uniform by combatants assigned to the regular, uniformed armed units of a Party to the conflict.''

the enemy "while concealing the distinctive signs of an armed force" or making "improper use of the national flag, military insignia or uniform of the enemy" or of a flag of truce (Oxford Manual, Article 8). Similar provisions were incorporated in the Hague Regulations (Article 23), and Protocol I contains the following more elaborate provision (Article 37.1):

> "It is prohibited to kill, injure or capture an adversary by resort to perfidy. Acts inviting the confidence of an adversary to lead him to believe he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray the confidence, shall constitute perfidy. The following acts are examples of perfidy:
> (a) the feigning of an intent to negotiate under a flag of truce or of a surrender;
> (b) the feigning of an incapacitation by wounds or sickness;
> (c) the feigning of civilian, non-combatant status; and
> (d) the feigning of protected status by the use of signs, emblems or uniforms of the United Nations or of neutral or other States not Parties to the conflict."

However, it is difficult to see how a situation covered by paragraph (c) can satisfactorily be distinguished from the circumstances referred to in Article 44.3:

> "In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:
> (a) during each military engagement, and
> (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.
>
> Acts which comply with the requirements of this paragraph shall not be considered as perfidious within the meaning of Article 37, paragraph 1(c)."

It need hardly be said that the limited period for which a person is required to carry his arms openly is not a satisfactory differentiating factor from an act of perfidy. Gone are any other requirements (such as the wearing of a uniform or some distinctive emblem). Indeed the very expression "while he is engaged in a military deployment preceding the launching of an attack" is fraught with ambiguity. In order to clarify the position as far as they were concerned, both the United Kingdom and the United States made declarations at the time of signing that Protocol of their understanding that the word deployment meant "any movement towards a place from which an attack is to be launched".[73]

The operations of clandestine resistance or guerilla groups have proved to be ideologically acceptable to third world countries in a period of continuing anti-colonialist sentiment. Nevertheless, one wonders whether the humanitarian spirit of the law is best served by such a blurring of the distinction between

73. Texts in Schindler and Toman, op cit, 635, 636.

combatants and non-combatants. Supporters of this development would no doubt point to the extent of the protection granted to combatants who fail to satisfy the minimum requirements of Article 44.3. Paragraph 4 of that Article states that such a person is to forfeit his right to be a prisoner of war, but goes on to provide that "he shall, nevertheless, be given protections equivalent in all respects to those accorded to prisoners of war" by the Third Geneva Convention and by the Protocol itself.

There is however a more ominous side to this development: it almost appears to be an inducement not to be too particular about compliance with Paragraph 3. It is as if the lessons of the German occupation of large parts of Europe in the early 1940s had been ignored or forgotten.

The German armies and authorities were faced with increasing opposition from the local population of countries they had occupied. In some cases the opposition took the form of a refusal to work, and in others attacks on members of the occupying force or their sympathisers, or acts of sabotage. These attacks on persons or property were undertaken by resistance groups, who for reasons of survival, did not satisfy the requirements of Article 1 of the Hague Regulations. Because the perpetrators of those acts were often impossible to identify, the German forces resorted to the taking and shooting of hostages. There followed an escalation of violence. As the tide of war turned against Germany, so the resistance movements expanded; as this occurred, so the repressive measures increased in severity — more hostages, the destruction of individual towns or villages to expiate the "crimes".[74] In addition, large numbers of "suspects" were sent to concentration camps, most of which were similar to Flossenburg, described by the Judge Advocate's Section of the Third U.S. Army as a "factory of death".[75]

It was the extreme barbarity of the reactions, with the shadow of the concentration camps inevitably present, which swayed the balance so heavily against the Nuremberg defendants. Nevertheless, some of the severity of the German reaction, in the West at any rate, was the result of activities on the part of the local population that were illegal under the Hague Regulations. As Von Rundstedt said in the course of giving evidence before the Tribunal:[76]

> "Disorderly, irregular warfare behind the front of the enemy army must bring very great misery to the population of the country affected. No army in the world can tolerate such conditions for any length of time, and, in the interests of the security and protection of its own troops, it must take sharp energetic measures. But this should, of course, be done in a correct and soldierly manner. Excesses such as those in Oradour were strongly condemned by myself and by all army leaders. We very much disliked seeing the attempt made on the German side to set up the Werewolf movement at the last moment. If it had been put into practice, it would have

74. See, for example, the increasing severity of the reprisals following the attempt to blow up an army leave train in Rotterdam in August 1942, the attempted assassination of Higher SS and Police Leader Rauter, and the destruction of the town of Putten: evidence of Wimmer on 13 June 1946, IMT, Vol.XVI, 188–192. The most notorious examples of the destruction of towns and the massacre of their populations were Oradour-sur-Glane in France and Lidice in Czechoslovakia: see Judgment, IMT, Vol I, 234.
75. Cited Judgment, loc cit.
76. Proceedings of 12 August 1946, IMT, Vol XXI, 28.

> brought untold misery to our fatherland, and justly so. I would consider it fortunate for humanity if through international agreements such illegal wars could in future be made impossible."

Protocol I ignores this warning and in doing so puts in jeopardy the humanitarian principles which the Protocols are designed to refine and enhance.

As has already been mentioned, the reasons for the inclusion of Article 1.4 and Article 44 in the Protocol were first and foremost political and ideological. The humanitarian objectives could have been achieved in other ways. The triumph of ideology in this context amounts to something akin to the acceptance of the notion of a just war, a war, that is, which a majority of States find politically acceptable. As a result, individuals fighting in such a "just cause" are freed from most of the requirements in the past demanded of legitimate combatants. The suggestion that Protocol I in this vital respect recognises such a concept as the just war is not so very fanciful. The Nuremberg Tribunal, in giving judgment against those ultimately responsible for the policies pursued in the occupied countries, was unconcerned at the illegalities committed against the occupying forces. The conduct of the Nazi regime as a whole was sufficient to justify (to render just) the resort to arms by unidentified individuals and groups in territories under Nazi domination. As counsel, Dr Nelte, said on behalf of the defendant Keitel before the Tribunal:[77]

> "There have been repeated references here to the concepts of soldierly conduct, obedience, loyalty, performance of duty and patriotism. It is my belief that all men recognize these concepts to be good. But it is permissible to say that not all of these concepts are unequivocal. Thus are opposed: 'best soldierly conduct' and 'militarism', 'natural obedience' and 'contemptible blind subservience', 'the categorical imperative of the performance of duty' and 'the exaggerated sense of responsibility', 'the deep love for one's country' and 'chauvinism'.
>
> We see that all these concepts can run through the scale of good and evil. The origin and the essence of these concepts are everywhere the same, but the forms they take on through tradition and education and by the effects thereof vary greatly."

Dr Nelte went on to say:[78]

> "Although the national criterion, that is, the national judgment of good and bad, right and wrong, had been well established in any case up to now, the concepts never have been deprived of their relativity, especially when national differences existed for other reasons. A convincing example of this is the opinion expressed about the resistance movement.
>
> All countries extol what is considered to be the highest form of patriotism: when someone risks his life for his country under the utmost danger. However, according to the Hague Rules of Land Warfare such resistance movement is forbidden. We have here a clear example of the contrast between ethical and legal evaluation. This proves that there are no absolute concepts of good and bad or right or wrong and that beyond all written laws there are unwritten laws which acquit the culprit when he obeys those higher laws. Those higher laws, however, also depend on subjective and national,

77. Proceedings of 8 July 1946, IMT, Vol XVII, 604.
78. Ibid, 605.

> that is, collectively subjective considerations. If anybody believes something to be good or right such faith may come into existence out of an actually higher law, a truly higher idea; but it may also grow out of misled faith, out of a false idea. Who would or who could judge when a faith or an idea was or was not right?''

The 1977 Protocols and customary international law

All legal systems are faced with the problem of reconciling private self-interest with the public good. The more successful the political order is in achieving this harmony, the more stable it will be. What is true of municipal systems is also true in part of the international legal order.

In the case of the law of armed conflicts, however, there is no municipal law parallel. The widespread outbreak of violence which the authorities are unable to curb or prevent might well be a sign that the municipal order is on the verge of collapse. The same may not hold true of the international system. In the period since 1945, there have been constant wars involving two, or a relatively small number of, States. The international order has not collapsed; rather it has grown accustomed to cope with a situation of relative disharmony. This is in contrast to the cataclysmic changes wrought by the Second World War which threatened an overthrow of the existing order. Although the fascist revolution ultimately failed, the new order which emerged in its aftermath was significantly different from that which had existed in the 1930s.

The laws of war hold an unusual place in the framework of international law. It is too facile to suggest that they only operate once the ''normal'' order has broken down. The effectiveness of law (even its existence) depends upon the fabric of a society holding fast under stress. A distinction must therefore be drawn between a situation where the society does disintegrate (as in 1939-45) and one where the social order holds firm around the group involved in hostilities (as has been the case since 1945).

In the former case the underlying principles themselves may be called in question by the conflict. That can occur in two ways, both of which were in fact present during the Second World War. In the first place, the very nature of the Nazi regime and its ideology presented a challenge to the underlying philosophy of the laws and customs of war and of humanitarian ideals. Secondly, the nation at war concept created difficulty in distinguishing between military and civilian targets. Most factories were turned over to the production of goods with some military value. Indeed, land given over to the growing of food is just as vital to the long-term conduct of a successful war. To what extent, therefore, may a belligerent attack the factories, farming land or the houses of the workers in these industries? In effect, as has already been mentioned, there was not a great deal to choose between the bombing activities of either side during World War II.

In a war of competing ideologies, the development of the law depends to a large extent upon the outcome of the conflict. The victory of the Allies was, in this context and in general terms, a victory for humanitarian ideals over totalitarian brutality. It was marred by the doubts that were created over the extent to which the civilian war effort made such non-combatants a legitimate target for air attack. In relation to this principle, there was no guardian of the community interest capable of exerting sufficient pressure on the States concerned to uphold the humanitarian point of view.

In the case of the more limited wars of the post-1945 era, the community interest in asserting the cause of humanitarianism has been relatively well represented. In such circumstances, the ICRC has been, not just a protector of the rights of the victims of the conflict, but an influential voice in support of the Conventions which bear its name. Its influence has been increased by the fact that it has been able to reflect the views of a majority of members of the international community of States. In so far as these views constitute an *opinio juris,* much of the conventional law may be said to represent, or to have come to be accepted as, customary international law.

Given the relatively slow rate at which the Protocols have been ratified (in the case of Protocol I, with which this discussion is most concerned, the number of ratifications at the end of December 1982 had reached only 26[79]), the operation of its provisions may be dependent upon acceptance of the rules contained therein as part of customary international law.[80] In this process a number of factors have to be borne in mind. There are the normal guidelines for assessing whether a rule of customary international law has crystallised or emerged on the basis of a conventional rule. In addition, there is the question of how far it is a relevant factor that the principle underlying the more specific rules has been accepted already in an earlier convention. In contrast, there is the problem that arises where the new rules seem to depart from the principle underlying and encompassed by an earlier conventional rule.

The relationship between a conventional rule and the creation of customary international law was much canvassed in the *North Sea Continental Shelf* cases,[81] in which the two applicant States, Denmark and the Netherlands, were attempting to establish that the Federal Republic of Germany, although not a party to the 1958 Convention on the Continental Shelf, was nevertheless bound by the equidistance principle of demarcation contained in Article 6 of that Convention. A number of the Court's pronouncements on this issue are germane to the present discussion.

1. *That the rule or principle already represents or crystallises existing law*

In some instances, Protocol I does no more than restate an existing rule or principle. The example has already been given of the requirement that the wounded, sick and shipwrecked be humanely treated (Article 10.2). In other cases, the underlying principle is elaborated upon. For example, the fundamental guarantees in Article 75 of the Protocol, which apply to all persons affected by a situation referred to in Article 1 and who are in the power of a party to the conflict, are in many respects a spelling out of principles governing the protection to be accorded to prisoners of war and civilians under the Third and Fourth Geneva Conventions.

In so far as Article 75 clarified or extended the interpretation of the expression "humanely treated" in Article 13 and Article 27 respectively of the above

79. Figures provided by the Department of Foreign Affairs, Canberra: none of the permanent members of the Security Council had at that date ratified; nor had Australia.
80. Of course, unlike in other areas of international law, there is more likely to be an agreement between the parties to a conflict that a conventional regime shall govern the hostilities, even if the parties are not formally parties to the conventions in question.
81. ICJ Rep 1969, p 3.

Conventions, it is justifiable to regard Article 75 as crystallising a rule based upon the already established principle. In the course of its judgment in the *North Sea* cases, the International Court rejected the argument of the applicant States that the equidistance principle had become crystallised by the adoption of the Continental Shelf Convention. On the Court's view of the evidence of the work of the International Law Commission, the Commission had considered a number of different formulae for delimitation between adjacent States and had adopted the equidistance principle, tempered by the special circumstances exception in the interests of equity, on the basis of the advice of a Committee of Experts. Hence, there was no corpus of practice supporting the pre-existence of such a rule. In contrast, Articles 1-3 could well have had a crystallising effect upon the law, the Court observing that they were the Articles which, at the time of the 1958 Conference, were "regarded as reflecting, or as crystallising, received or at least emergent rules of customary international law relative to the continental shelf".[82]

In effect, there seems to be little difference between a provision which restates an existing principle and one which defines an emerging principle. The Vienna Convention on the Law of Treaties 1969[83] referred in its Preamble to the "codification and progressive development" of the law "achieved in the present Convention". Nevertheless, on the occasions that the International Court has had to consider specific provisions of the Convention, it has relied upon them without hesitation, though with some reservations as to whether the provision in question constituted solely a case of codification. In the course of the *Namibia* advisory opinion,[84] the Court commented that the rules laid down by the Convention "concerning termination of a treaty relationship on account of breach (adopted without a dissenting vote) may *in many respects* be considered as a codification of existing customary law on the subject. In the light of these rules, only a material breach of a treaty justifies termination."[85] The Court then went on to consider how the Convention[86] defined a material breach, and whether South Africa's conduct amounted to such a breach, as so defined, of the Mandate agreement with respect to South-West Africa.

Similarly, in the *Fisheries Jurisdiction* case,[87] in the context of an argument by Iceland that circumstances had radically altered since the Exchange of Notes of 1961 between Iceland and the United Kingdom, the Court once again based its approach on the relevant article of the Vienna Convention:[88]

> "International law admits that a fundamental change in the circumstances which determined the parties to accept a treaty, if it has resulted in a radical transformation of the extent of the obligations imposed by it, may, under certain conditions, afford the party affected a ground for invoking the termination or suspension of the treaty. This principle, and the conditions and exceptions to which it is subject, have been embodied in Article 62 of

82. At 39.
83. Text in (1969) 8 ILM 679.
84. ICJ Rep 1971, p 16.
85. At 47 (emphasis added).
86. Article 60.
87. ICJ Rep 1973, p 3.
88. At 18 (emphasis again added).

> the Vienna Convention on the Law of Treaties, which may *in many respects* be considered as a codification of existing customary law on the subject of the termination of a treaty relationship on account of change of circumstances."

The latter example is especially pertinent to the present discussion. As a general proposition, it is arguable that a State should be entitled to resile from its treaty obligations if the circumstances have changed to a sufficiently radical extent. Such a principle is common to most systems of law dealing with contractual obligations. In international law, the principle had a number of more specific possible applications: a treaty obligation may have lapsed; it may have become impossible to perform; or there might have been some other change of circumstances fundamentally altering the nature of the obligation still to be performed under the treaty. The attitude of the Convention to these three matters undoubtedly had a determinative effect on the law. As to the first, the International Law Commission's final draft Articles deliberately omitted any references because "while 'obsolescence' or 'desuetude' may be a factual cause of the termination of a treaty the legal basis of such termination, when it occurs, is the consent of the parties to abandon the treaty, which is to be implied from their conduct in relation to the treaty."[89]

In the case of an actual impossibility preventing performance of the treaty, there was no doctrinal disagreement about the operation of the principle of change of circumstances, although the specific rule is formulated in relatively narrow terms; the impossibility must result from "the permanent disappearance or destruction of an object indispensable for the execution of the treaty" (Article 61.1).

As far as fundamental change of circumstances in general was concerned, there had been doctrinal disagreements as to the existence or scope of such a principle. The International Law Commission's final report referred to the fact that almost "all modern jurists, however reluctantly, admit the existence in international law of the principle . . . commonly spoken of as the doctrine of *rebus sic stantibus*", but went on to point out that most of them "at the same time enter a strong *caveat* as to the need to confine the scope of the doctrine within narrow limits and to regulate strictly the conditions under which it may be invoked; for the risks to the security of treaties which the doctrine presents in the absence of any general system of compulsory jurisdiction are obvious."[90] Given the uncertainties over the application of the principle, the way in which the actual rule was formulated was something more than a mere codification of the existing law. Although in a sense the principle itself was "codified", the articulation of the circumstances in which it was to apply was at least a crystallisation of the law: it was certainly a development of it.

This analysis highlights the significance of the International Court's treatment of the provision. Despite the fact that it was, on the Court's own admission, only "in many respects", and not in *all* respects, a codification of existing customary international law, the Court was prepared to adopt and apply the conventional rule.

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89. Yb ILC 1966, Vol II, 237.
90. Ibid, 257.

Although it is unlikely that the International Court would be seised of an issue of the applicability of the laws of war,[91] nevertheless, its receptive reaction to the general applicability of conventional rules even if they only crystallise pre-existing practice would be a valuable guide to the legal effects of the Protocols. Three factors would undoubtedly favour such an approach:

(a) where the text gives expression to a pre-existing (moral) principle; or
(b) *a fortiori* where it expresses more specifically a pre-existing (legal) principle, based upon State practice or an earlier treaty provision;
(c) because of the humanitarian nature of the instrument itself.

This last factor is of a different order from (a) and (b). However, it has certainly influenced the International Court on a number of occasions. In the *Namibia* advisory opinion,[92] the interpretation placed upon the Mandate agreement took account of changing ideals within the world community over the ensuing 50 years. In the course of its judgment in the *Barcelona Traction* case,[93] the Court referred to the "essential distinction" which should be drawn "between the obligations of a State towards the international community as a whole, and those arising vis-a-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes* . . . Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law . . .; others are conferred by international instruments of a universal or quasi-universal character."

It is legitimate to argue that the humanitarian aspects of the laws of armed conflict, being designed to protect the defenceless individual caught up in the hostilities, can be classified as belonging to this higher stratum of norms. The Court in the above passage was contrasting such norms, which were enforceable at the behest of the international community as a whole, with those which are vested only in a single State and which are enforceable through the right of diplomatic protection. In time of war such a right would be inappropriate because of the severance of diplomatic relations between the parties to the conflict. However, it had long been established practice for a neutral State to protect the rights of a belligerent State in the territory of its adversary (its diplomatic and consular premises and archives for example). With the enormous number of prisoners taken during the First World War, many of whom were in captivity for long periods of time, the need for some more formal arrangements led to the establishing by the ICRC of a Central Information Agency. In addition, a number of Protecting Powers followed the ICRC initiative in sending representatives to visit prisoner of war camps.

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91. In the *Pakistani Prisoners of War* case, ICJ Rep 1973, p 238, the Court decided that the written proceedings should "first be addressed to the question of the jurisdiction of the Court to entertain the dispute", having been informed that Pakistan had asked the Court to postpone further consideration of its request for interim measures of protection (at 330).
92. ICJ Rep 1971, p 16 at 31–2.
93. ICJ Rep 1970, p 3 at 32.

This right of the Protecting Power was recognised in Article 86 of the 1929 Geneva Convention relative to Prisoners of War, but it was expressly made subject to Article 88 which preserved the humanitarian functions of the ICRC. This situation was maintained by Article 8 of the Third Geneva Convention 1949 (common to the other three Conventions, although in the Fourth Convention it appears as Article 9), and Article 10 (again common, although numbered Article 9 in the First and Second Conventions).

There is much to be said in favour of arguing that the protecting function comprises two aspects: a diplomatic one and a humanitarian one.[94] A Protecting Power will normally carry out both tasks, although it is permissible "to entrust to an organisation which offers all guarantees of impartiality and efficacy the duties incumbent on the Protecting Powers" but only with the agreement of the "High Contracting Parties" (Article 10). If adequate protection cannot be arranged, then "the Detaining Power shall request or shall accept . . . the offer of the services of a humanitarian organisation, such as the International Committee of the Red Cross, to assume the humanitarian functions performed by Protecting Powers" (Article 10). This provision thus distinguishes between two types of function and it would be logical to connect this distinction to that being drawn between different types of international obligation, those owed to a particular State and subject to a right of diplomatic protection, and those owed to the international community as a whole, and enforced, in this case, through the good offices of the ICRC.

To this satisfying hypothesis there are major obstacles. In the first place, the Second World War saw examples of access by ICRC representatives to prisoner of war establishments being refused on the ground that the prisoners in question came from States not parties to the 1929 Convention. In response to this objection, it could plausibly be argued that the effect of the 1949 Conventions and State practice in the interim has been to confirm the role of ICRC quite independently of the conventional nexus. Hence, the procedures set out in Article 5 of Protocol I for the appointment of an acceptable Protecting Power, and for the acceptance of the ICRC in lieu of such appointment, are means of implementing an already established principle.

The second obstacle concerns the similar reservations that were made by various East European States to the substitution of the ICRC under the 1949 Conventions. To take the example of the USSR reservation to Article 10 of the Third Convention, that country stated that it would "not recognise the validity of requests by the Detaining Power to a neutral State or to a humanitarian organisation, to undertake the functions performed by a Protecting Power, unless the consent of the Government of the country of which the prisoners of war are nationals has been obtained."[95] However, it needs to be pointed out that no reservation was made in respect of Article 9, although the humanitarian activities of the ICRC under that Article were expressly made subject to the consent of the parties to the conflict. Similarly, under Article 5 of the Protocol, although the

94. In fact Protocol I seems to distinguish between diplomatic functions in general, which may even be carried out by representatives of the State party to the conflict itself, and those relating to the hostilities which would normally be handled by a designated protecting power: see Article 5.6.

95. Schindler and Toman, op cit, 517.

substitution of the ICRC if any of the parties to a conflict fail to agree upon a Protecting Power seems to operate independently of consent, the *functioning* of such substitute is made subject to the consent of the parties to the conflict (Article 10.4). More importantly, Article 81.1 of the Protocol makes ICRC activities in carrying out "the humanitarian functions assigned to it by the Conventions and this Protocol" no longer dependent upon the consent of the parties to the conflict.[96]

Thus, three things are clear: (1) the role of the protecting power, including the right to insist that the humanitarian obligations incumbent on the detaining power are carried out, is not subject to the consent of the detaining power; (2) refusal to allow the ICRC to carry out, in addition, its humanitarian functions may no longer be legally justifiable;[97] and (3) the humanitarian protection of the individual has been given increasing prominence. As a result of a number of indirect political pressures, as well as more directly because of the development of specific conventional rules, there is much to be said in support of the view that the fundamental humanitarian guarantees of Protocol I and the means for their implementation are but an affirmation or crystallisation of customary international law.

2. The subsequent development of customary international law from a conventional text

In the *North Sea Continental Shelf* cases,[98] the most significant aspect of the Court's judgment was directed to the issue of whether the equidistance principle had developed into a rule of customary international law on the basis of Article 6 of the Convention as accepted and acted upon in the practice of States. The Court postulated a number of tests, which had to be satisfied before a conventional rule could be regarded as constituting a customary rule: these may be classified as

(a) the nature of the conventional rule;
(b) the substance of the practice; and
(c) the attitude of the participating States.

As far as (a) was concerned, the Court suggested that "the provision concerned should, at all events potentially, be of a fundamentally norm-creating character"[99] before it could be the foundation of a customary rule "partly because of its own impact, partly on the basis of subsequent State practice".[1]

There is not the space here to analyse the meaning to be placed upon this somewhat enigmatic pronouncement. One suspects that the Court was saying no more than that the provision must be laying down a principle or rule which is

96. Article 81.1 reads:
> "The parties to the conflict shall grant to the International Committee of the Red Cross all facilities within their power so as to enable it to carry out the humanitarian functions assigned to it by the Conventions and this Protocol in order to ensure protection and assistance to the victims of conflicts; the International Committee of the Red Cross may also carry out any other humanitarian activities in favour of these victims, subject to the consent of the Parties to the conflict concerned."

97. Moreover, it could have adverse political consequences for the detaining power, not least because of the propaganda advantage this might give to its enemies.
98. ICJ Rep 1969, p 38.
99. At 41–2.
1. At 41.

capable of imposing a direct and complete obligation upon any State which accepts it, either expressly, by becoming a party to the treaty, or tacitly, by falling in with such State practice as is sufficient to establish the principle or rule as part of customary international law.

To take a simple illustration, the common Article, numbered 9 in the Third Geneva Convention, created no direct and complete obligation even for a party to the Convention: it merely stated that the provisions of the Convention were not to constitute an obstacle to the humanitarian activities which the ICRC (or other impartial humanitarian organisation) might undertake "subject to the consent of the parties to the conflict concerned". In contrast Article 81.1 of Protocol I provides that the Parties to the conflict "*shall grant*" to the ICRC "all facilities within their power so as to enable it to carry out the humanitarian functions assigned to it by the Conventions and this Protocol". The former provision was clearly not norm-creating; the latter could well be to the extent that the humanitarian obligations spelt out in the various instruments have an independent existence as part of customary international law.

As to (b), the substance of the practice, the Court referred to the need for "widespread and representative participation" on the part of States in the application of the conventional rule.[2] However, this pronouncement may be regarded as a maximum requirement because the Court was directing itself to the fact that, in the circumstances of the case, only a brief period had elapsed since the Convention had been adopted (a little over 10 years) and had come into force (nearly five years). As the Court continued:[3]

> "Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked".

In other words, where the rule being advanced is a new one (i.e., "purely conventional") and where the time that has elapsed since its articulation in the convention is relatively short, the practice relied upon in support of its acceptance as a (new) rule of customary international law must be "extensive and virtually uniform".

As the period of time passes from the date upon which the convention was adopted, so the need for an intensity of supportive practice diminishes. There is time for the reactions of other States to be tested. Their acquiescence in the activities of States supporting a conventional rule will add to the appearance that the rule represents the norm.

While this factor is largely one of emphasis, there is another aspect of the above passage from the Court's judgment which needs to be considered. The test being advanced was expressly limited to a "new" conventional rule: Article 6 was, on the Court's assessment of the facts, an innovation introduced not long before by the International Law Commission and adopted by the Conference.

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2. At 42.
3. At 43.

A parallel example in Protocol I to which reference has already been made[4] is the attempt to expand the range of combatants at the expense of blurring the distinction betwen them and the civilian population. It will be recalled that, because, according to Article 44.3, there are situations in armed conflicts where, owing to the nature of the hostilities, an armed combatant cannot distinguish himself from the civilian population, it was laid down in that paragraph that he would nevertheless retain his status as a combatant provided he carried his arms openly during each military engagement and "during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate". As was explained, this was very much a departure from pre-existing principle, both in operation and philosophy. As such, it was a "new conventional rule", to which the stricter requirements, laid down by the International Court for the creation of customary law, should apply. Certainly over the shorter term, only the widespread and representative participation of States in an extensive and virtually uniform practice would suffice to bring about the transformation of such a conventional rule binding upon parties to the Protocol alone into a rule of customary international law binding upon all (or at least upon all who had not expressly dissented from such a rule).

On the other hand, as has also been pointed out, there are a number of provisions in Protocol I which are new only in the sense of being more explicit expressions of already existing principles. In some cases the very articulation in the new text will constitute a crystallisation of the law. In others, where the principle itself was in the broadest terms or where its relations with some other principle was ill-defined, the new text would provide a significant impetus to the creation of a new customary rule. In such circumstances, the requirements referred to in the *North Sea* cases for the intensity of State practice need not be so strictly complied with. Indeed, the attitude of States at the drafting conference may be regarded as a criterion of the status of a particular rule. In the *Namibia* case,[5] the Court referred to the fact that the rules laid down in the Vienna Convention concerning termination of a treaty as a result of breach had been "adopted without a dissenting vote" as a ground for treating those rules as being "in many respects . . . a codification of existing customary law on the subject." By way of contrast, in the *Fisheries Jurisdiction* case,[6] the Court took the failure of the 1960 Conference on the Law of the Sea to adopt by one vote (the necessary majority being two-thirds) a text governing the extent of fishery rights as a basis for the development through subsequent practice of "the concept of preferential rights of fishing in adjacent waters in favour of the coastal State in a situation of special dependence on its coastal fisheries."[7] The Court referred to the adoption at the 1958 Conference of a resolution concerning the situation of countries the people of which were overwhelmingly dependent upon coastal fisheries, as well as to the above vote, as signifying "overwhelming support for the idea that in certain special situations it was fair to recognise that the coastal State had preferential fishing rights."[8]

4. Above, p 69.
5. ICJ Rep 1971, p 16 at 47.
6. ICJ Rep 1974, p 3.
7. At 23. See also at 26.
8. At 26.

The fact that the International Court was prepared to take account of voting patterns and the attitudes of participants at a drafting conference does give added significance to the travaux préparatoires and to the principle of majority voting. It also places the minority at a disadvantage and makes it of greater importance that they make their expressions of dissent from particular rules in the clearest terms.

However, apart from the classification of the rules in the Vienna Convention as representative of customary international law on the basis of the voting at the Vienna Conference, compared with the use of the voting patterns at the 1958 and 1960 Geneva Conferences as evidence of a general trend in State practice, there is a further distinction between the two examples. The Vienna Convention was regarded as codifying actual rules, whereas the Geneva votes were taken as a basis for establishing only a principle, that of *preferential* fishing rights. On this hypothesis the Court was able to hold that Iceland had been in breach of international law in attempting to establish *exclusive* rights to exclude automatically British vessels from the disputed waters. There was no question of the Court formulating on such a basis specific rules adjusting the rights of the two States to take proportionate amounts of fish from the proclaimed zone.

There nevertheless remains a justifiable fear that a large majority in favour of a specific provision might make it easier for that majority to argue that the rule in question represents, or will more easily become received as part of, customary international law. While the interests of humanitarian idealism might be served by this approach if applied to parts of Protocol I, there are some aspects of that instrument which have an ideological, and not necessarily a humanitarian, inspiration. Such may be the case with Article 44, and the same could also be said of Article 1.4 in so far as it is related to the operations of Article 44.3.[9]

As to (c), the attitude of States towards the binding quality of a norm which is said to arise from a pattern of State practice to which they conform, a particular problem arises in relation to the conventions that have been discussed. Often those conventions are applied to non-parties on the basis of reciprocity. In other words, an offer is made publicly that, as long as the other side will abide by the conventions, so will the declarant State. While certain rules based upon humanitarian principles may be applicable in any case as part of customary international law,[10] the express acceptance of a conventional regime as a whole in such circumstances would not amount to evidence that the rules in question are being accepted as already binding irrespective of the convention.

There has been some dispute about whether, in evaluating the weight to be given to different types of State practice, any distinction should be drawn between the acts of States in conformity with an alleged rule and pronouncements emanating from their representatives. The principal protagonist in favour of drawing such a distinction is D'Amato.[11] For most purposes, however, there seems to be no reason for differentiating between what States do in the widest sense and what they say. As McDougal and Schlei wrote in another context:[12]

9. See above, pp. 67, 69.
10. See the Nuremberg Tribunal's view of the Hague Regulations, referred to above p. 49.
11. *The Concept of Custom in International Law.*
12. "The Hydrogen Bomb Tests in Perspective", (1955) 64 Yale Law Journal 648 at 656.

> ". . . the public order of the high seas . . . is a continuous process of interaction in which the decision-makers of individual nation-states unilaterally put forward claims of the most diverse and conflicting character to the world's seas, and in which other decision makers, external to the demanding nation-state and including national and international officials, weigh and appraise these competing claims in terms of the interests of the world community and of the rival claimants and ultimately accept or reject them."

However, the D'Amato approach does have one advantage. In drawing attention to the differences between words and action, D'Amato showed the importance of the role that articulation of a rule can have in giving coherence to a sequence of otherwise meaningless events (whether acts or situations in which no action was taken). In the *Lotus* case,[13] following a collision between a French and Turkish ship on the high seas, the Turkish authorities arrested and put on trial the French officer of the watch at the time of the collision. The French government argued that, because of a dearth of cases in which municipal courts had exercised criminal jurisdiction over a foreign national on a foreign ship on the high seas, there was a rule of customary international law prohibiting the exercise of jurisdiction by any other than the flag State in such circumstances. In rejecting this contention, the Permanent Court commented that even "if the rarity of the judicial decisions to be found among the reported cases were sufficient to prove in point of fact the circumstances alleged by the Agent for the French Government, it would merely show that States had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so; for only if such abstention were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom."[14]

According to D'Amato,[15] the "articulation of a rule of international law — whether it be a new rule or a departure from and modification of an existing rule — in advance of or concurrently with a positive act (or omission) of a state gives a State notice that its action or decision will have legal implications." In addition, of course, it is a warning to other States that the act in question will have such implications and that it may require some response from them if they wish to preserve a contrary view. However, more specifically in relation to the *Lotus* case, D'Amato placed a somewhat different emphasis on the failure to articulate a particular rule: "the absence of prior notification that acts or abstentions have legal consequences is an effective barrier to the extrapolation of legal norms from patterns of conduct that are noticed ex post facto."[16] Or, as he went on to explain,[17] "if no statesman or responsible jurist had ever articulated a legal rule to the effect that States could not exercise criminal jurisdiction in cases involving collision on the high seas between flag ships of different States over seamen of the foreign vessel, then it would be unpersuasive to argue that States

13. (1927) PCIJ, Ser A No 9.
14. At 27.
15. Op cit, 74.
16. Op cit, 75.
17. At 84.

(that is, their decision makers) *could* have recognised themselves as being under an obligation to abstain."

In relation to the law of armed conflicts, many rules have been articulated, to the extent that most of those which did not already exist as customary rules, appeared in the Conventions or in Protocol I. However, articulation by treaty in this manner does leave room for uncertainty as to the status of the rules, Part of the uncertainty stems from another aspect of the Court's judgment in the *North Sea* cases. It was argued on behalf of the applicant States that, though not formally bound by Article 6 of the Continental Shelf Convention, the Federal Republic had, by its conduct, "manifested its acceptance of the conventional regime".[18] In rejecting this contention, the Court took a very narrow view of what might be termed "tacit acceptance" of treaty obligations by requiring very clear evidence of such an intention:

> "It is clear that only a very definite, very consistent course of conduct on the part of a State in the situation of the Federal Republic could justify the court in upholding [that contention]; and, if [such a course] had existed — that is to say if there had been a real intention to manifest acceptance or recognition of the applicability of the conventional regime — then it must be asked why it was that the Federal Republic did not take the obvious step of giving expression to this readiness by simply ratifying the Convention. In principle, when a number of States, including the one whose conduct is invoked, and those invoking it, have drawn up a convention specifically providing for a particular method by which the intention to become bound by the regime of the convention is to be manifested — namely by the carrying out of certain prescribed formalities (ratification, accession), it is not lightly to be presumed that a State which has not carried out these formalities, though at all times fully able and entitled to do so, has nevertheless somehow become bound in another way."[19]

This is an unfortunate approach on the part of the Court. There may be a variety of reasons why the government of a State feels inhibited about submitting ratification of a treaty to its constitutional processes. Tacit acceptance of the obligations of the treaty should not be circumscribed by such a rigorous formula. The paramount factor should be one of intention. If the intention to undertake the obligations in question is present, the issue of why the State chose to act informally becomes irrelevant. In the *Nuclear Tests* cases,[20] the Court had no such qualms about holding France bound by statements made on its behalf despite the fact that France had never become bound by the Moscow Treaty of 1963 (the Partial Test Ban Treaty) prohibiting the testing of nuclear devices in the atmosphere. A less rigid approach is certainly desirable in relation to the humanitarian provisions of any treaty.

If the question is not whether there has been an informal acceptance of treaty obligations, but whether the treaty has come to be recognised as developmental of customary international law, there is no need to interpret the reactions of individual States so strictly. In this respect, the text of the treaty itself provides an articulation of the rule, and actions of non-parties in accordance with the

18. ICJ Rep 1969, at 25.
19. Ibid.
20. ICJ Rep 1974, p 253.

treaty provisions are more readily, in the absence of circumstances indicating the contrary, regarded as evidence of the acceptance of the treaty as representing customary international law.

The expression "an articulation of the rule" is employed in order to sound a note of caution. The existence of a treaty provision is not so clear as a statement by an actor State that its actions are justified by international law, but this belief can legitimately be inferred in a case where the State has acted in a manner consistent with the terms of the treaty. It would of course be open to the actor to point to reasons why the action should not be interpreted in this light, e.g. a statement by the actor that, on this particular occasion, it intended to comply with the terms of the treaty for some reason other than that it recognised their binding nature, such as that it was doing so only on the basis of reciprocity.

In relation to the present topic, there may be an additional reason why statements by State representatives at international gatherings might assume added significance. In comparison to the wealth of State practice in relation to law of the sea, for example, the amount concerning this area of the law is likely to be much less. Although many States have been involved in hostilities since 1945, they have not produced clear-cut illustrations of the practice of States. One of the principal reasons for this has been the secrecy with which relations between the antagonists and third States have been conducted. Even more has this been the case with the ICRC, the impartiality of which would be jeopardised if representations it might make to one side became public knowledge and were used for propaganda purposes by the other side.

Conclusion

The title of this conference, as indeed of this paper, emphasises the shift that has taken place from the laws and customs of war to the humanitarian nature of the contemporary law of armed conflicts. In a similar way to that in which the movement for international human rights has attempted to extend the traditional notion of diplomatic protection for wrongs committed against the person of a national of the intervening State to provide protection even in respect of acts by a State causing harm to its own nationals, so the ambit of humanitarian law has attempted to encompass all persons, according to their needs, caught up in an armed conflict.

There is an additional, and closer, analogy to be drawn between the two situations. The law of human rights was developed through the acceptance of certain principles which were principally of moral persuasion (the Universal Declaration of 1948) and the translation of those precepts into authoritative legal texts (the European Convention of 1950 and the UN Covenants of 1966).[21] In the case of the laws of war, we have already seen how the humanitarian element was present in the earliest texts,[22] and how it was reinforced in the Charter of the Nuremberg Tribunal. There has been the same process of first giving expression to humanitarian ideals, translating them from the moral to the legal order, and then expressing those principles in terms of more specific rules.

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21. For the similar approach in relation to the status of refugees, see Greig "The Protection of Refugees and Customary International Law" (1983) 8 Aust YB Int Law 108.
22. Above p 48.

This approach has obvious advantages. In the first place, the development of the law is dependent upon the support of the society which it is designed to serve. To harness the "dictates of the public conscience" is to hasten the process of law creation. In addition, the very fact that the law conforms to the moral persuasions of the community places a State which does not wish to accept the (new) legal principle in a position of some disadvantage. For many States it would be embarrassing to appear to be arguing against not just the legal principle, but also against the moral principle upon which it is based. In addition, its stand may be the less acceptable to other States and, if the matter should ever be submitted to adjudication, to an international tribunal. In the *Namibia* case,[23] the South African government attempted to argue that the application of the policy of apartheid to South-West Africa, being, so Africa alleged, in the interests of the inhabitants of that territory, could not constitute a breach of the Mandate agreement under which it administered the territory. The Court had no hesitation in rejecting such an argument: "the former Mandatory had pledged itself to observe and respect, in a territory having an international status, human rights and fundamental freedoms for all without distinction as to race. To establish instead, and to enforce, distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter"[24] of the United Nations, and indeed of the sacred trust of civilisation upon which the Mandate was based.

The translation of legal principles into more specific rules is often a matter of importance, not least because, as principles, they may be more vulnerable to limitation by a plea of military necessity. The moral purpose of the legal principles is thus served by their further elaboration in the form of rules which limit the scope of the military necessity exception.

The further development of the rules of humanitarian inspiration in Protocol I is to be welcomed. Even if they are not accepted formally by States through ratification, they do provide an impetus for the creation of new rules of customary international law. This process will be more easily achieved in the case of rules derived from humanitarian principles: it will be more difficult in cases where the humanitarian elements have been diffused by political and ideological factors. Law making by the international community is more readily achieved by consensus than by the tyranny of numbers.

23. ICJ Rep 1971, p 16.
24. At 57.