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## IMPLEMENTING INTERNATIONAL HUMANITARIAN LAW: OLD AND NEW WAYS

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### 1. Introduction: From Celebrations to Challenges and Reflections

The end of the 20<sup>th</sup> century was marked by a series of celebrations pertaining to human rights and humanitarian law: bicentennial of the American Declaration of Independence (1776), bicentennial of the French Revolution (1789), fiftieth anniversary of the United Nations Charter (1945), of the Universal Declaration on Human Rights (1948), and of the four Geneva Conventions of 12 August 1949 on the protection of war victims. The adoption of the Statute of the International Criminal Court, in Rome in July 1998, was also part of this series of events, which, after the fall of the Berlin Wall, led to believe that humankind was entering a new era of international cooperation.

The beginning of the 21<sup>st</sup> century brought more realism: the United Nations Millennium listed what still needs to be done.<sup>2</sup> And the 11 September shifted priorities of many countries from freedom to security.

Implementation is only one of the seven following stages in the struggle for the respect of legal norms protecting human life and dignity. We should include all of them in considering how to improve the implementation of international humanitarian law:

- a) codification
- b) ratification
- c) application
- d) implementation
- e) sanction of violations
- f) reparation
- g) reconciliation.

Each stage of the **codification** of international humanitarian law was the result of a post-war shock wave in public opinion and governments, a collective painful process of learning. These codifications occurred as follows:

- The battle of Solferino (1859)<sup>3</sup> between Austrian and French armies was the impetus for the First Geneva Convention, in 1864, protecting military wounded on land;

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<sup>2</sup> See the UN Millennium Development Goals (MDG) online: [www.un.org/millenniumgoals/](http://www.un.org/millenniumgoals/)

<sup>3</sup> See: Henry DUNANT: A Memory of Solferino, Geneva: ICRC. 1939.

- The naval battle of Tsushima (1905) between Japanese and Russian fleets prompted adjustment of the Convention on war at sea, in 1907, extending protection to military shipwrecked;
- World War I brought about the two 1929 Conventions, including a much broader protection for prisoners of war;
- World War II led to the four 1949 Conventions<sup>4</sup>, an extensive regulation of the treatment of civilians in occupied territories and internment. The 1949 Geneva Conventions – with the UN Charter in 1945, the Universal Declaration on Human Rights in 1948 – are the result of the tragedies of millions of civilians and prisoners victims of total war and genocide in Europe and in Asia. The survivors pushed for the adoption of international instruments in order to avoid the repetition of such tragedies;
- The decolonization of African colonies and the Vietnam War preceded the two 1977 Additional Protocols<sup>5</sup>, which brought written rules for the protection of civilian persons and objects against hostilities;
- A worldwide campaign by Governments, United Nations agencies, the Red Cross and Red Crescent Movement and NGOs in a full partnership, which stressed the human suffering and socio-economic costs caused by anti-personnel mines resulted on the total ban on anti-personnel landmines signed in Ottawa on 4 December 1997;<sup>6</sup>
- A similar worldwide coalition<sup>7</sup> provoked the adoption of the International Criminal Court Statute in Rome in 1998.

As for the issue of **ratification**, the universal ratification of the 1949 Geneva Conventions is a fact. More ratifications are needed for the 1977 Additional Protocols as well as for the 1998 ICC Rome Statute.

The decisions on the **application** of the 1949 Conventions and 1977 Additional Protocols are the key to the implementation, with the legal status of conflicts, territories, categories of persons, individuals.<sup>8</sup>

We shall deal with the topic of implementation along the following lines:

- existing legal mechanisms of international humanitarian law;

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<sup>4</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949.

<sup>5</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II).

<sup>6</sup> See Kenneth ANDERSON, “The Ottawa Convention Banning Landmines, the Role of International Non-Governmental Organizations and the Idea of International Civil Society”, EJIL, Vol. 11, (2000) No. 1, full text available online: <http://www.ejil.org/journal/Vol11/No1/art8.html>

<sup>7</sup> The Coalition for the International Criminal Court. See <http://www.iccnw.org/>

<sup>8</sup> See the INTERNATIONAL COURT OF JUSTICE (ICJ). *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. Advisory Opinion. 9 July 2004, paragr. 96-101 on the applicability of the Fourth Geneva Convention of 1949 to all the territories occupied by Israel in 1967. Available online at: <http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm>

- recent developments;
- proposals.

Implementation includes the **sanction** of violations, even **reparation** (indemnities to victims). As we shall see, it should be extended to **reconciliation** in order to prevent recurring conflicts and violations of international humanitarian law.

## 2. Legal Mechanisms

The mechanisms provided for in the 1949 Geneva Conventions on the protection of war victims are:

1. The **States Party**, which undertake to “respect and ensure respect” for the Conventions in all circumstances.<sup>9</sup> “Respect” clearly refers to the individual obligation to apply it in good faith from the moment that it enters into force.<sup>10</sup> “To ensure respect”, according to the ICRC Commentary to the 1949 Conventions, “demands in fact that the States which are Parties to it should not be content merely to apply its provisions themselves, but should do everything in their power to ensure that it is respected universally.”<sup>11</sup> This collective responsibility to implement international humanitarian rules<sup>12</sup> often takes the form of bilateral or multilateral measures by States Party. Leaving aside the exceptional meeting provided for in Article 7 of Protocol I of 1977<sup>13</sup> States Party to international humanitarian law treaties have used bilateral or multilateral meetings, at the United Nations, the Non-Aligned Movement (NAM), regional organizations (OAS, AU, OSCE, the European Parliament, the Council of Europe) as well as the Inter-Parliamentary Union (IPU), to manifest their concern that humanitarian law should be respected.<sup>14</sup> “In all circumstances” means in time of armed conflict as well as in time of peace, taking preventive steps, in the form of training<sup>15</sup> or evaluation,<sup>16</sup> and prosecution.<sup>17</sup>

<sup>9</sup> Common Article 1 to the 1949 Geneva Conventions

<sup>10</sup> ICRC Commentary on the Additional Protocols, Geneva, ICRC, 1987, p. 35, para. 39

<sup>11</sup> ICRC Commentary III, p. 18 (Art. 1). See

- Luigi CONDORELLI and Laurence BOISSON DE CHAZOURNES, « Quelques remarques à propos de l’obligation des Etats de « respecter et faire respecter » le droit international humanitaire « en toutes circonstances », in SWINARSKI, Christophe (Ed.) Studies and essays on international humanitarian law and Red Cross principles, Geneva, ICRC, 1984, pp. 17-35;

- Umesh PALWANKAR. “Measures available to States for fulfilling their obligation to ensure respect for international humanitarian law” IRRC no 298, pp. 9-25;

- BOISSON DE CHAZOURNES, Laurence, and CONDORELLI, Luigi. „Common Article 1 of the Geneva Conventions revisited: Protecting collective interests“, *IRRC*, March 2000, Vol. 82, No. 837, pp. 67-87

<sup>12</sup> The 1949 Geneva Conventions as well as Additional Protocol I, for the States Party to this Protocol. See the ICRC Commentary on the Protocols, ad Art. 1 of Protocol I, p. 35-38

<sup>13</sup> Article 7 (« Meetings ») : « The depositary of this Protocol [Switzerland] shall convene a meeting of the High Contracting Parties, at the request of one or more of the said Parties and upon the approval of the majority of the said Parties, to consider general problems concerning the application of the Conventions and of the Protocol ». Such a meeting was convened by Switzerland on 5 December 2001 in Geneva. (« Conference of the High Contracting Parties to the Fourth Geneva Convention.»)

<sup>14</sup> ICRC Commentary on the Additional Protocols, p. 36, paragr. 43.

. See also Michel VEUTHEY, « Pour une politique humanitaire » in SWINARSKI, Christophe (Ed.) Studies and essays on international humanitarian law and Red Cross principles, Geneva, ICRC, 1984., pp. 989-1009.

<sup>15</sup> Training is an obligation according to the four 1949 Geneva Conventions : Article 47 of the First Convention states the following : « The High Contracting Parties undertake, in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries, and, in particular, to include the study thereof in their programmes of military and, if possible, civil instruction, so that the principles thereof become known to the entire population, in particular to the armed fighting forces, the medical personnel and the chaplains. »

According to common Article 1 to the four 1949 Geneva Conventions and to Article 1 of Additional Protocol I, all States Parties to these instruments have the obligation « *to respect and ensure respect* » for them « *in all circumstances* ». This wording has been widely understood as implying a double responsibility for every State Party : for its own duties as well as a collective responsibility for the behavior of other States Parties.<sup>18</sup> The International Court of Justice held that Article 1 had turned into customary law.<sup>19</sup>

2. The **Protecting Power**,<sup>20</sup> which was widely used in Europe during WW II<sup>21</sup> and much less

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The Second Convention contains a similar provision (Article 48).

Article 127 of the Third Convention adds the following paragraph : « Any military or other authorities, who in time of war assume responsibilities in respect of prisoners of war, must possess the text of the Convention and be specially instructed as to its provisions. »

Article 144, 2 of the Fourth Convention reads as follows : « Any civilian, military, police or other authorities, who in time of war assume responsibilities in respect of protected persons, must possess the text of the Convention and be specially instructed as to its provisions. »

Additional Protocol I

- reaffirms the duty to disseminate (Article 83 – Dissemination) ; and
- adds the obligation to ensure that legal advisers are available (Art. 82 – Legal Advisers in armed forces)

Additional Protocol II, applicable in non-international armed conflicts, simply states that « This Protocol shall be disseminated as widely as possible. » (Art. 19 – Dissemination).

<sup>16</sup> Article 36 (« New Weapons ») of Protocol I reads as follows :

« In the study, development, acquisition or adoption of a new weapon, means or method of warfare, a High Contracting 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. »

<sup>17</sup> The four 1949 contain common provisions on the « Repression of Abuses and Infractions » :

-First Convention : Art. 49-51

-Second Convention : Art. 50-52

-Third Convention : Art. 129-131

-Fourth Convention : Art. 146-148

Article 85 of Additional Protocol I reaffirms those provisions, adds a few acts to be considered as grave breaches (specially attacks against civilians and civilian objects), and classifies grave breaches of the 1949 Conventions and Protocol I as war crimes.

See also Maria Teresa DUTLI and Cristina PELLANDINI « The International Committee of the Red Cross and the implementation of a system to repress breaches of international humanitarian law » IRRC, No 300, May 1994, pp. 240-254.

<sup>18</sup> Jean S. PICTET (Ed.) *The Geneva Conventions of 12 August 1949. Commentary. IV. Geneva Convention relative to the protection of civilian persons in time of war*. Geneva, International Committee of the Red Cross, 1958, pp. 15-17.

<sup>19</sup> International Court of Justice, *Case concerning the military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America)*, *Judgement of 27 June 1986 (Merits)*, Vol. 114, Para. 220. See Antonio CASSESE, *International Law*, pp. 6-8 (“Collective Responsibility”), pp. 182 ss. (“State Responsibility”) and especially pp. 207-210, and p. 419.

<sup>20</sup> See George A.B. PEIRCE, « Humanitarian protection for the victims of war. The system of Protecting Powers and the role of the ICRC », *Military Law Review*, Vol. 90, 1980, pp. 89-162. and D. P. FORSYTHE, "Who guards the guardians : Third parties and the law of armed conflict", *American Journal of International Law*, vol. 70, 1976, pp. 41-61

<sup>21</sup> H. COULIBALY, "Le rôle des Puissances protectrices au regard du droit diplomatique, du droit de Genève et du droit de La Haye", in: F. KALSHOVEN, Y. SANDOZ, eds., *Implementation of International Humanitarian Law*, Dordrecht, Martinus Nijhoff, 1989, pp. 69-78

C. DOMINICE, J. PATRNOGIC, "Les Protocoles additionnels aux Conventions de Genève et le système des Puissances protectrices", *Annales de droit international médical*, vol. 28, 1979, pp. 24-50

J.-P. KNELLWOLF, *Die Schutzmacht im Völkerrecht unter besonderer Berücksichtigung der schweizerischen Verhältnisse*, Dissertation Bern, Bern, Ackermann Druck, 1985

B. LAITENBERGER, "Die Schutzmacht", *German Yearbook of International Law*, vol. 21, 1978, pp. 180-206

thereafter.<sup>22</sup> Additional Protocol I defines the Protecting Power in international humanitarian law as “a neutral or other State not a Party to the conflict which has been designated by a Party to the conflict and accepted by the adverse Party and has agreed to carry out the functions assigned to a Protecting Power under the Conventions and this Protocol”<sup>23</sup> the role of the Protecting Power is to maintain the liaison between two States at war, to bring relief assistance to the victims and protection to prisoners of war and civilian internees.

3. The **International Committee of the Red Cross (ICRC)**, which received mandates from the international community in the 1949 Geneva Conventions:

- to visit and interview prisoners of war<sup>24</sup> and civilian internees,<sup>25</sup>
- to provide relief to the population of occupied territories;<sup>26</sup>
- to search for missing persons and to forward family messages to prisoners of war<sup>27</sup> and civilians;<sup>28</sup>
- to offer its good offices to facilitate the institution of hospital zones<sup>29</sup> and safety zones;<sup>30</sup>
- to receive applications from protected persons.<sup>31</sup>
- to offer its services in other situations<sup>32</sup> and especially in time of non-international armed conflicts<sup>33</sup>

The First 1977 Additional Protocol mentions two additional mechanisms of implementation:

- The **United Nations**, “in situations of serious violations of the Conventions or of this Protocol” (Art. 89 of Protocol I).
- The optional “**International Fact-Finding Commission**” (Art. 90 of Protocol I)<sup>34</sup>

To this day, none of these provisions (Article 89 and 90 of Protocol I) have been invoked.

The implementation mechanisms of international criminal law<sup>35</sup> was significantly developed

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<sup>22</sup> It was used in Suez in 1956, in Goa in 1961 and between India and Pakistan in 1971. For a more recent example, see the State Department Press Briefing, Thursday, April 1, 1998 p.m. :

« The United States Government is contacting authorities in Belgrade through our Protecting Power, Sweden, in regard to the illegal abduction of three American servicemen who were serving in non-combatant status in Macedonia. There is no basis for their continued detention by the Belgrade authorities. We insist that they be provided any necessary medical assistance and treated humanely and in accordance with all prevailing international agreements and standards. We will hold Belgrade authorities responsible for their safety and treatment. » <http://www.aiipowmia.com/inter/in040299e.html>

<sup>23</sup> Protocol I, Art. 2, letter C

<sup>24</sup> Third Geneva Convention, Article 126

<sup>25</sup> Fourth Geneva Convention, Article 143

<sup>26</sup> Fourth Geneva Convention, Articles 59 and 61

<sup>27</sup> Third Geneva Convention, Article 123

<sup>28</sup> Fourth Geneva Convention, Article 140

<sup>29</sup> First Geneva Convention, Article 23

<sup>30</sup> Fourth Geneva Convention, Article 14

<sup>31</sup> Fourth Geneva Convention, Article 30

<sup>32</sup> Article 9 of Conventions I, II and III ; Article 10 of the Fourth Convention

<sup>33</sup> Common Article 3 to the 1949 Conventions.

<sup>34</sup> The website of the Commission : <http://www.ihffc.org>

<sup>35</sup> See „International Criminal Law“ by Patrick HEALY & Kimberly PROST, McGill University Faculty of Law <http://www.law.mcgill.ca/academics/coursenotes/healy/intcrimlaw/> and the following links mentioned there: <http://www.yale.edu/lawweb/avalon/imt/imt.htm>

as the United Nations Security Council established the ad hoc Tribunals on Former Yugoslavia and Rwanda<sup>36</sup> and with the 60<sup>th</sup> ratification of 1998 Rome Statute of the International Criminal Court<sup>37</sup> on 11 April, and its entry into force on 1 July 2002.

The International Criminal Court is a milestone in the international community's fight to end impunity for war crimes, genocide and crimes against humanity.

The International Criminal Court will be able to punish war criminals and perpetrators of genocide or crimes against humanity in cases where national criminal justice systems are unable or unwilling to do so. It is vital for the Court's effective functioning that all States ratify the Rome Statute and that the States Parties rapidly adopt comprehensive implementing legislation in order to be able to cooperate with the Court.<sup>38</sup>

### 3. New Developments

Increasingly, human rights mechanisms, on the international, regional and national level, deal with human rights as well as with international humanitarian law issues:

- **The United Nations** General Assembly (Third Committee), the Commission on Human Rights, the Sub-Commission on the Promotion and Protection of Human Rights, the Human Rights Committee;

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Charter of the International Military Tribunal (<http://www.yale.edu/lawweb/avalon/imt/imt.htm>), Judgment of the IMT for the Trial of German Major War Criminals (<http://www.yale.edu/lawweb/avalon/imt/imt.htm>)

<sup>36</sup> See the following links, quoted by Patrick HEALY & Kimberly PROST: Jurisdiction of the Yugoslavian and Rwandan Ad Hoc Tribunals, Security Council Resolution 827(1993), 25 May 1993

(<http://www.un.org/Docs/sc.htm>), Security Council Resolution 955 (1994), 8 November 1994,

(<http://www.un.org/Docs/sc.htm>), Statute of the International Criminal Tribunal for the Former Yugoslavia ("ICTY"), Arts. 6,8,9. (<http://www.un.org/icty/basic.htm>), Statute of the International Criminal Tribunal for Rwanda ("ICTR"), Arts. 5,7,8 (<http://www.ictcr.org>), ICTY, Rules of Procedure and Evidence, Rules 7-13

(<http://www.un.org/icty/basic.htm>), ICTY, Prosecutor V. Dusko Tadic a/k/a "Dule", Appeals Chamber Decision

on the Jurisdictional Motion, 2 October 1995, ss. 9-48, 9-64. (<http://www.un.org/icty/cases-ae2.htm>),

Substantive Law and the Ad Hoc Tribunals, Statute of the ICT Y, Arts 2-5, 21

(<http://www.un.org/icty/basic.htm>), Statute of the ICTR, Arts 2-4, 20 (<http://www.ictcr.org>), ICTY, Prosecutor v. Drazen Erdemovic, Appeals Chamber, Joint separate opinion of Judge McDonald and Judge Vohrah, ss. 32-58,

66, 73-91, Separate and dissenting opinion of Judge Cassese, ss. 11-12, 40-51. (<http://www.un.org/icty/cases-ae2.htm>), ICTR, The Prosecutor v. Jean-Paul Akayesu, Trial Chamber, Summary of the Judgment.

(<http://www.ictcr.org>), ICTR, The Prosecutor v. Jean-Paul Akayesu, Trial Chamber, Judgment, ss. 5.5 and 7.

(<http://www.ictcr.org>), Evidence, Procedure, and the Ad Hoc Tribunals, ICTY, Rules of Procedure and Evidence, Rules 39-43, 54-61, 89-98 (<http://www.un.org/icty/basic.htm>), ICTY, Prosecutor V. Dusko Tadic a/k/a "Dule",

Judgment on evidentiary matters. (<http://www.un.org/icty/cases-te.htm>), Judgment on Corroboration in section V(c), Judgment on Hearsay in section V(h), ICTY, Prosecutor v. Blaskic, Judgment on the request of The Republic of Croatia for review of the decision of Trial Chamber II of 18 July 1997, ss. 25-60.

(<http://www.un.org/icty/blaskic/ace14.htm>)

<sup>37</sup> See Jurisdiction of the ICC: Trigger Mechanisms and the Exercise of the Court's Jurisdiction

(<http://www.un.org/icc/backinfo.htm>) Rome Statute of the International Criminal Court, Arts 11-15, 17-18.

(<http://www.un.org/icc>)

Substantive Law and the ICC:

Crimes within the Court's Jurisdiction (<http://www.un.org/icc/backinfo.htm>)

Rome Statute of the International Criminal Court, Arts 5-9, 21, 22-33, 55, 67, 69. (<http://www.un.org/icc>)

Preparatory Commission for the International Criminal Court: results of working groups on ICC rules of procedure and evidence

Most recent laws (<http://www.un.org/law/icc/prepcomm/docs.htm>)

<sup>38</sup> International Criminal Court: A reality at last, ICRC, Geneva, 11 April 2002.

- **For the Americas:** the Organization of American States Commission on Human Rights and the Human Rights Court;
- **For Africa:** the African Commission on Human and Peoples' Rights, under the aegis of the African Union (AU). The Commission was established in 1987 in Banjul, The Gambia. The Commission comprises 11 officials, each from a different country. They serve for renewable six-year terms which governments cannot cut short. They also elect their own president and vice-president, and determine their own operational rules. The African Commission's role is more wide-ranging than that of its European counterpart, which is confined to handling complaints. Its missions also includes promotion of human and peoples' rights and interpreting the Charter. The Commission may also develop and set out principles and rules for use by African lawmakers, and co-operate with other African or international institutions involved in rights issues. The AU adopted in 1998 a Protocol on the Establishment of the African Court on Human and People's Rights, which is not yet in force.
- **In Europe:** the European Commission, the European Court, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, all under the aegis of the Council of Europe,<sup>39</sup> as well as the relevant organs of OSCE<sup>40</sup> and the European Union.<sup>41</sup>

In addition to the formal mechanisms of implementation of international humanitarian law and human rights, there is an increasing role for informal mechanisms, on the international as on the national level:

- good offices<sup>42</sup>
- media, local, regional and international,<sup>43</sup>
- NGOs such as Human Rights Watch<sup>44</sup> or Amnesty International

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<sup>39</sup> See the website of the CPT : <http://www.cpt.coe.fr/>

<sup>40</sup> Elisabeth KARDOS-KAPONYI « The Charter of Fundamental Human Rights in the European Union » p. 139, mentions the Office for Democratic Institutions and Human Rights (ODHIR), the High Commissioner of National Minorities and the Representative on Freedom of the Media. Document available online : [www.lib.bke.hu/gt/2001-1-2/kardos-kaponyi.pdf](http://www.lib.bke.hu/gt/2001-1-2/kardos-kaponyi.pdf)

<sup>41</sup> Ibidem, pp. 140-170

<sup>42</sup> The ICRC can offer its good offices to facilitate the establishment of hospital zones (according to Article 23 of the First 1949 Convention) and safety zones (Art. 14, First Convention). Other institutions or persons could offer their good offices. See B.G. RAMCHARAN. *Humanitarian Good Offices in International Law: The Good Offices of the United Nations Secretary-General in the Field of Human Rights*. The Hague: Martinus Nijhoff, 1983.

<sup>43</sup> See Roy W. GUTMAN, «Spotlight on violations of international humanitarian law. The role of the media » IRRC no 325 (December 1998), pp. 619-625, Urs BOEGLI, « A few thoughts on the relationship between humanitarian agencies and the media » ibidem, pp. 627-631, and, more generally, DANIELI, Yael (Ed.), *Sharing the Front Line and the Back Hills. International Protectors and Providers: Peacekeepers, Humanitarian Aid Workers and the Media in the Midst of Crisis*, Amityville, NY, Baywood Publishing, 2002, 429 p.

<sup>44</sup> See the open letters sent to public officials in Washington DC and in Europe after the 11 September 2001 in order to promote the application of international humanitarian law and fundamental human rights guarantees. See also the open letter sent to the Revolutionary Armed Forces of Colombia-People's Army (FARC-EP) on 8 May 2002 denouncing the use of indiscriminate weapons (gas cylinder bombs) as contrary to international humanitarian law. A copy of the letter sent to Commander Marulanda can be found at <http://www.hrw.org/press/2002/05/colombia0508.pdf>

- engaging non-State actors<sup>45</sup> to abide by humanitarian rules and principles<sup>46</sup>
- civil society<sup>47</sup>
- ad hoc independent monitors, agreed upon by all parties;<sup>48</sup>
- private diplomacy, including private economy (multinational as well as local);
- spiritual leaders,<sup>49</sup> including mediators such as the Sant'Egidio Community.<sup>50</sup>

#### 4. Proposals for a Better Respect of International Humanitarian Law

Three proposals:

- reinforce existing mechanisms of international humanitarian law (IHL);
- make a better use of mechanisms of other legal systems;
- be more creative in using remedies.

#### 4.1. Reinforce Existing International Humanitarian Law Mechanisms

##### 4.1.1. States Parties to the Geneva Conventions

The individual duties of each State Party in preventing and repressing violations of international humanitarian law are clearly defined in the 1949 Conventions and 1977 Protocols.

As for their collective responsibilities, there is still much to be done to clarify the extent of Common Article 1 to the 1949 Geneva Conventions. The international community of States

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<sup>45</sup> See Rainer HOFMANN (Ed.) / Nils GEISLER (Assistant Ed.): *Non-State Actors as New Subjects of International Law*. International Law – From the Traditional State Order Towards the Law of the Global Community. Proceedings of an International Symposium of the Kiel Walther-Schücking-Institute of International Law, March 25 to 28, 1998. Berlin 1999. Duncker und Humblot. 175 p.

Daniel BYMAN, Peter CHALK, Bruce HOFFMAN, William ROSENAU, David BRANNAN.

*Trends in Outside Support for Insurgent Movements*, Washington, DC, Rand, 2001,

<sup>46</sup> See the « Guidelines for Engaging Non-State Actors in a Landmine-Ban »

<http://www.icbl.org/wg/nsa/library/draft%20guidelines.html>

and Claude BRUDERLEIN, "The Role of Non-State Actors in Building Human Security: The Case of Armed Groups in Intra-State Wars." *Policy paper for the Centre for Humanitarian Dialogue*, Geneva, Switzerland (prepared for the Ministerial Meeting of the Human Security Network in Lucerne), May 2000.

[www.hdcentre.org/NewsEvents/1999/Policy%20paper.doc](http://www.hdcentre.org/NewsEvents/1999/Policy%20paper.doc)

<sup>47</sup> Safeguarding human rights is not only the concern of Governments and international organizations.

Representatives of other international and local players, like human rights defenders, drawn from civil society, have also felt committed to this issue for a long time. See the « Human Security Network » Commitments at the Second Ministerial Meeting in Lucerne, Switzerland, May 11-12, 2000

<http://www.humansecuritynetwork.org/commit-e.asp>

<sup>48</sup> See the following Human Rights Watch appeals :

-Israel/Palestinian Authority: Protect Civilians, Allow Independent Reporting (HRW Press Release, April 3, 2002) at <http://hrw.org/press/2002/04/isr-pa040302.htm>

-Jenin: War Crimes Investigation Needed (HRW Press Release, May 3, 2002) at

<http://hrw.org/press/2002/05/jenin0503.htm>

<sup>49</sup> See Daniel L. SMITH-CHRISTOPHER (Ed.) *Subverting Hatred. The Challenge of Nonviolence in Religious Traditions*. New York, Orbis Books, 1998, 177 p.

<sup>50</sup> See <http://www.santegidio.org/> and Andrea RICCARDI, *Sant'Egidio, Rome et le monde*, Beauchesne éditeur, Paris, 1996 and Philippe LEYMARIE, « Les bâtisseurs de paix de Sant'Egidio », *Le Monde Diplomatique*, Septembre 2000, pp. 16-17

Party to the 1949 Geneva Conventions should reaffirm their collective responsibility according to Article 1, common to all four Conventions and to Protocol I. According to this provision, "*The High Contracting Parties undertake to respect and to ensure respect for this Convention in all circumstances*". Should measures<sup>51</sup> be limited to diplomacy, adoption of resolutions or rather the use of sanctions<sup>52</sup> and peace-enforcement operations in order to stop genocide and arrest war criminals? A number of Security Council resolutions, including those on anarchic conflicts, call upon all parties to respect international humanitarian law and reaffirm that those responsible for breaches thereof should be held individually accountable.

Existing rules and mechanisms could certainly be used more effectively on the domestic as well as on the international level. National implementing regulations as well as the criminal prosecution of violations by domestic courts could be improved. The role of regional organizations (African Union, Arab League, Council of Europe, OSCE, Organization of American States) to « ensure respect » for international humanitarian law « in all circumstances » could be enhanced.

In its Advisory Opinion of 7 July 2004, the International Court of Justice reaffirmed that

“[...] every State party to that Convention, whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with »<sup>53</sup>

This obligation can take different forms :

»Given the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction. It is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end. In addition, all the States parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 are under an obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention ».<sup>54</sup>

#### 4.1.2. Switzerland as the depositary of the Geneva Conventions

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<sup>51</sup> See Umesh PALWANKAR, « Measures available to States for fulfilling their obligation to ensure respect for international humanitarian law » IRRC, no. 298, pp. 9-25

<http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList113/35289C31F0187A41C1256B6600591427>

<sup>52</sup> Such as the U.S. Foreign Assistance Act, which forbids security assistance to any government that "engages in a consistent pattern of gross violations of internationally recognized human rights" [22 U.S.C. Secs. 2034, 2151n].

<sup>53</sup> 2004 Advisory Opinion, paragraph 158. Also see paragraph 157:

57. With regard to international humanitarian law, the Court recalls that in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, it stated that "a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and 'elementary considerations of humanity' . . .", that they are "to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law" (*I.C.J. Reports 1996 (I)*, p. 257, para. 79). In the Court's view, these rules incorporate obligations which are essentially of an *erga omnes* character.

<sup>54</sup> 2004 Advisory Opinion, paragraph 159

Is the role of the Depositary limited to register ratifications or a more dynamic one?

On 5 December 2001, Switzerland, as the Depositary of the 1949 Geneva Conventions, convened a Conference of High Contracting Parties to the Fourth Geneva Convention. The Swiss Department of Foreign Affairs took this opportunity to explain its position in this regard:

»In its capacity as the Depositary of the Geneva Conventions, Switzerland acts within the attributions of a Depositary, as foreseen by international law; its tasks are mainly to provide services of "notarial" nature (to inform, to consult).

The humanitarian tradition of Switzerland and its policy of "good offices" lead Switzerland to facilitate the emergence of a consensus as broad as possible between States Parties, in order to find appropriate responses on questions related to international humanitarian law ».

[...]

A clear distinction has to be done between the role and action of Switzerland in its capacity as the Depositary, on one side, and those of Switzerland as State Party on the other side. As well as all other States Parties, Switzerland undertakes "to respect and to ensure respect" for these Conventions "in all circumstances" (common art. 1 of the Geneva Conventions).

As almost the whole international community, Switzerland considers that the IVth Geneva Convention is applicable de jure to all Territories occupied by Israel. Thus, the Jewish settlements established in the Occupied Palestinian Territories represent a flagrant violation of the IVth Convention. Other practices, as the disproportionate and indiscriminate use of force (e.g. terrorism), collective punishment (e.g. closures) or reprisals are also prohibited by international humanitarian law. Its respect, in particular the respect of the IVth Geneva Convention, is of crucial importance in the context of the present crisis in the Middle East.

In this region as elsewhere in the world, Switzerland is strongly committed to ensure respect of international humanitarian law and uses different instruments, as e.g.:

- financial and political support to institutions providing protection or humanitarian relief (ICRC, UNRWA),
- financial support to NGOs providing legal aid or promoting respect of international humanitarian law or of human rights,
- application of the federal legislation on the export of weapons and other military equipment,
- diplomatic demarches with regard to violations of the IVth Geneva Convention,
- public statements and co-sponsoring of resolution of the UN Commission of Human Rights, etc.<sup>55</sup>

#### 4.1.3. The International Committee of the Red Cross (ICRC)

The ICRC's role as a neutral intermediary and independent humanitarian institution should be reinforced and accepted by all parties to today's armed conflicts, Governments and Non-State actors.<sup>56</sup> The ICRC needs to "take new initiatives to reach out to all actors that can obstruct its operations".<sup>57</sup>

The ICRC should be able to promote "special agreements" between parties to conflicts, according to Common Article 3, without any consequence on the status of the conflict, the

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<sup>55</sup> <http://www.eda.admin.ch/eda/e/home/foreign/hupol/4gc.html>

<sup>56</sup> See Pierre KRÄHENBÜHL, ICRC Director of Operations, "The ICRC's approach to contemporary security challenges: A future for independent and neutral humanitarian action", IRRC, September 2004, Vol. 86, No 855, pp. 505-513,

<sup>57</sup> *Speech by the ICRC's Director-General, Angelo Gnaedinger, to the Donor Retreat on the Consolidated Appeals Process and Coordination in Humanitarian Emergencies (Montreux, Switzerland, 26-27 February 2004)*

parties or the territories.

Special agreements were concluded through ICRC delegates in the Spanish Civil War (for the application by both the Madrid Government and the Burgos Junta of the two 1929 Geneva Conventions),<sup>58</sup> in Palestine in 1948,<sup>59</sup> in the Yemen Civil War in 1963<sup>60</sup> as well as in the Civil War in Nigeria<sup>61</sup> in 1969. Both sides accepted to abide by the four 1949 Geneva Conventions. In Afghanistan, the Soviet Union on one side and the Afghan mujahideens on the other side both signed the same agreement with the ICRC in order to ease the plight of prisoners : the Soviets let the ICRC visit prisoners in the Puli-Charki jail in Kabul and the mujahideens handed over their Soviet prisoners to the ICRC for a two-year internment in Switzerland before being repatriated to Mother Russia. In former Yugoslavia, numerous special agreements were concluded in Geneva and elsewhere under the auspices of the ICRC.<sup>62</sup> The status of the conflicts was on purpose left unclear – whether international or non-international – in order not to jeopardize ICRC's activities on the spot. In Somalia, ICRC was allowed to visit an US POW in the hands of General Aidid, thanks to such a special agreement.

In addition to the general applicability of the Geneva Conventions to a conflict and to the improvement of the treatment of prisoners on both sides, the establishment of protected areas was achieved by ICRC thanks to special agreements in Jerusalem in 1948, in Dacca/Dhakka in 1971, in Nicosia in 1974, in Jaffna in 1990, in Dubrovnik and Osjek in 1991. The rejection by the UN Security Council of such a procedure for Srebrenica – and the creation of the so-called « safe areas » instead - paved the way for the massacre of thousands of civilians.<sup>63</sup>

#### 4.1.4. The Protecting Power

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<sup>58</sup> See Dr. Marcel JUNOD, *Warrior Without Weapons*. Translated from the French „*Le Troisième Combattant*“ by Edward Fitzgerald. London, Jonathan Cape and New York, Macmillan, 1951, 318 p.

<sup>59</sup> See Jacques de REYNIER, *1948 à Jérusalem*, Geneva, Georg, 2002, 175 p. (First and second editions published by the Editions de la Baconnière, Neuchâtel, 1950 and 1969). On this conflict and other special agreements, see Michel VEUTHEY, *Guérilla et droit humanitaire*, Geneva, ICRC, 1983 (Second edition), pp. 50-51.

<sup>60</sup> See K. BOALS, „The Internal War in Yemen“ in Richard A. FALK (Ed.) *The International Law of Civil War*, Baltimore, Johns Hopkins Press, 1971

<sup>61</sup> ICRC, *Rapport d'activité 1967*, p. 37, and John STREMLAU, *The International Politics of the Nigerian Civil War*, Princeton, NJ, Princeton University Press, 1977

<sup>62</sup> See Jean-François BERGER, *The humanitarian diplomacy of the ICRC and the conflict in Croatia (1991-1992)*. Geneva, ICRC, 1995, 70 p.

<sup>63</sup> See the UN and the Dutch official reports on Srebrenica :  
- *The fall of Srebrenica*. A/54/549, 15 November 1999, available [Accessed 30 May 2005]: <http://www.hri.ca/fortherecord1999/documentation/genassembly/a-54-549.htm>  
- NETHERLANDS INSTITUTE FOR WAR DOCUMENTATION (NIOD)  
Srebrenica. Een “veilig” gebied. Reconstructie, achtergronden en analyses van de van een Safe Area (“Srebrenica. A ‘safe’ area. Reconstruction, background, consequences and analyses of the fall of a safe area”). Summary and order form of the Dutch original and English translation available at <http://www.srebrenica.nl/> [Accessed 30 May 2005]

The role of the Protecting Power could be rediscovered, not only in international conflicts but also in civil wars.

#### 4.1.5. The Fact-Finding Commission

The Fact-Finding Commission should be more pro-active, offer its services, including in non-international armed conflicts.

#### 4.1.6. Impartial humanitarian organizations

As the 1949 Geneva Conventions – especially Common Article 3 – mention “an impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties in conflict”, other humanitarian organizations might use this provision.

#### 4.1.7. United Nations

The role of the UN, mentioned in Article 89 (« Co-operation ») of Additional Protocol I, needs to be clarified.

Respecting fundamental human values belongs to the framework of the maintenance and re-establishment of international security.<sup>64</sup>

The international humanitarian law dimension should be included in peacekeeping operations. Peacekeeping forces should be trained, monitored in order to respect fully their obligations towards civilians, prisoners, wounded.

The legitimacy of military actions, including peacekeeping operations, depends on the behavior of troops.<sup>65</sup> Civilian casualties, allegations of ill-treatment, torture and execution of prisoners that stained various wars, and even peacekeeping operations, did bring them to an end, due to the reaction of the "public conscience" against torture<sup>66</sup>, killing of civilians<sup>67</sup> and mistreatment of prisoners.<sup>68</sup>

They should also receive adequate mandates and resources to prevent and suppress violations, including for the search and arrest of war criminals and “génocidaires”.

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<sup>64</sup> See Michel VEUTHEY “The Contribution of the 1949 Geneva Conventions to International Security”, *Refugee Survey Quarterly*, Vol. 18, Nr. 3, 1999, pp. 22-26.

<sup>65</sup> On peacekeeping operations and international humanitarian law, see -Robert KOLB. *Droit humanitaire et opérations de paix internationales*. Genève/Bâle/Munich/Bruxelles, Helbing & Lichtenhahn/Bruylant, 2002, 125 p.

-Daphna SHRAGA, “UN Peacekeeping Operations: Applicability of International Humanitarian Law and Responsibility for Operations-Related Damage” *AJIL*, Vol. 94, No. 2, April 2000, pp. 406-412

<sup>66</sup> The French War in Algeria was not lost militarily but because of reactions from the Algerian and French population, as well as from international public opinion, mostly against torture. See among others Henri ALLEG, *La question*. Paris, Pauvert, 1965, 121 p., P. VIDAL-NAQUET, *La torture dans la République. Essai d'histoire et de politique contemporaines (1954-1962)*. Paris, Editions de Minuit, 1972, 202 p. and John TALBOTT. *The War Without a Name : France in Algeria, 1954-1962*. New York, Knopf, 1980, 320 p.

<sup>67</sup> Such as in Vietnam, by the air bombings in the North and killings like the My Lai massacre in the South.

<sup>68</sup> Such as in Somalia, where Belgian, Canadian and Italian troops were prosecuted for mistreatment of prisoners and civilians.

We need to exert better targeted bilateral and multilateral diplomatic, economic and adequate military pressures against violators, in accordance with the UN Charter and international humanitarian law.<sup>69</sup>

#### **4.2. Better Use Implementation Mechanisms of Other Legal Systems**

International humanitarian law mechanisms need to be complemented by the implementation mechanisms of other legal systems: human rights, refugee law, the prohibition of torture, the prohibition of genocide, the protection of the natural environment, the protection of cultural objects, disarmament and arms control, the prohibition of illicit trafficking (arms, diamonds, drugs, human beings), compensation and reparation (civil liability).

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<sup>69</sup> See Anna SEGALL. « Economic sanctions : legal and policy constraints » *IRRC* December 1999, Vol. 81, No 836, pp. 763-784, and Claude BRUDERLEIN, « U.N. Sanctions Can Be More Humane and Better Targeted » *Public Affairs Report*, University of California, Berkeley, Vol. 41, No. 1, January 2000 (<http://www.igs.berkeley.edu/publications/par/Jan2000/Bruderlein.html>)

Arthur C. HELTON and Robert P. DeVECCHI, « Human Rights, Humanitarian Intervention & Sanctions » <http://www.foreignpolicy2000.org/library/issuebriefs/IBHumanRights.html> and H.C. Graf SPONECK, « Sanctions and Humanitarian Exemptions : A Practitioner's Commentary » *European Journal of International Law*, Vol. 13, Issue 1, 2002, pp. 81-87 – Full text available at : <http://www3.oup.co.uk/ejilaw/current/130081.sgm.abs.html>

#### 4.2.1 Human Rights

Human Rights mechanisms, at the national, regional and universal level, should be used more in monitoring, reporting, preventing and repressing international humanitarian law violations.

As the International Court of Justice stated, the application of international humanitarian law does not exclude the application of human rights:

”More generally, the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law. »<sup>70</sup>

#### 4.2.3. Refugee Law

Refugee status, according to Refugee Law instruments, should never be granted to war criminals.

#### 4.2.4. Prohibition of Torture

The prohibition of torture belongs to the hard core of international humanitarian law (Common Article 3 to the 1949 Geneva Conventions) as well as to underogable rights. Its national, regional and universal mechanisms could definitely complement and reinforce the work of the International Committee of the Red Cross pertaining to the protection of prisoners.

#### 4.2.5. Prohibition of Genocide

The 1948 Genocide Convention

#### 4.2.6. Protection of the Environment

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<sup>70</sup> INTERNATIONAL COURT OF JUSTICE (ICJ). *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. Advisory Opinion. 9 July 2004, paragr. 106. Available online at: <http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm>

See also the last sentence of paragraph 137:

”The construction of such a wall accordingly constitutes breaches by Israel of various of its obligations under the applicable international humanitarian law and human rights instruments ».

The ICJ had similarly stated in its earlier Advisory Opinion on The Legality of the Threat or Use of Nuclear Weapons, on 8 July 1996, paragraph 25 :

“The Court observes that the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency”.

The natural environment is closely linked to international humanitarian law.

In its 1996 Advisory Opinion on Nuclear Weapons, the International Court of Justice considered a number of international instruments protecting the environment:

"These included Additional Protocol I of 1977 to the Geneva Conventions of 1949, Article 35, paragraph 3, of which prohibits the employment of "methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment"; and the Convention of 18 May 1977 on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, which prohibits the use of weapons which have "widespread, long-lasting or severe effects" on the environment (Art. 1). Also cited were Principle 21 of the Stockholm Declaration of 1972 and Principle 2 of the Rio Declaration of 1992 which express the common conviction of the States concerned that they have a duty "to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction".<sup>71</sup>

#### 4.2.7. Protection of Cultural Objects

Cultural objects could be the heart and soul of nations.

#### 4.2.8. Disarmament and Arms Control

Not only weapons of mass destruction but small arms and light weapons<sup>72</sup> could be causes of massive violations of international humanitarian law. Monitoring arms transfers, beginning with light weapons,<sup>73</sup> and promoting innovative disarmament approaches, such as "weapons for food" or "weapons for development".

#### 4.2.9. Prosecution of Illicit Trafficking (Arms, Diamonds, Drugs, Human Beings)

The prosecution of illicit trafficking of arms, diamonds, drugs and human being is a necessary

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<sup>71</sup> INTERNATIONAL COURT OF JUSTICE. *Legality of the Threat or Use of Nuclear Weapons*, paragr. 27

<sup>72</sup> See among others:

-INTERNATIONAL COMMITTEE OF THE RED CROSS (ICRC)

Arms Availability and Violations of International Humanitarian Law and the Deterioration of the Situation of Civilians in Armed Conflicts. Expert Group Meeting. Report. Oslo, Norway, 18-20 May 1998, Oslo, Norwegian Red Cross, 1998, 87 p.

- UNITED STATES DEPARTMENT OF STATE Arms and Conflict in Africa

Bureau of Intelligence and Research Bureau of Public Affairs July 1999

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<sup>73</sup> See William HARTUNG "The New Business of War: Small Arms and the Business of Conflict" Ethics & International Affairs Annual Journal of the Carnegie Council on Ethics and International Affairs, Vol. 15, No 1 (2001). The author's argument is the following: The proliferation of internal conflicts fueled by small arms poses a grave threat to peace, democracy, and the rule of law. The weapons of choice in today's conflicts are not big-ticket items like long-range missiles, tanks, and fighter planes, but small and frighteningly accessible weapons ranging from handguns, carbines, and assault rifles on up to machine guns, rocket-propelled grenades, and shoulder-fired missiles. In conflict zones from Colombia to the Democratic Republic of the Congo, picking up a gun has become the preferred route for generating income, obtaining political power, and generating "employment" for young people, many no more than children, who have little prospect of securing a decent education or a steady job. Ending the cycle of violence fueled by small arms must become a top priority for the international community. No single treaty or set of actions, however, will "solve" the problem of light weapons proliferation. What is needed is a series of overlapping measures involving stricter laws and regulations, greater transparency, and innovative diplomatic and economic initiatives.

complement to the prevention and prosecution of violations of humanitarian law. Violations of IHL and drug- and arm-trafficking<sup>74</sup> frequently go hand in hand.<sup>75</sup>

#### 4.2.10. Compensation and Reparation

The link between implementation and reparation is clearly explained by the International Court of Justice in its 2004 Advisory Opinion:

»As regards the legal consequences for Israel, it was contended that Israel has, first, a legal obligation to bring the illegal situation to an end by ceasing forthwith the construction of the wall in the Occupied Palestinian Territory, and to give appropriate assurances and guarantees of non-repetition.

It was argued that, secondly, Israel is under a legal obligation to make reparation for the damage arising from its unlawful conduct. It was submitted that such reparation should first of all take the form of restitution, namely demolition of those portions of the wall constructed in the Occupied Palestinian Territory and annulment of the legal acts associated with its construction and the restoration of property requisitioned or expropriated for that purpose; reparation should also include appropriate compensation for individuals whose homes or agricultural holdings have been destroyed.

It was further contended that Israel is under a continuing duty to comply with all of the international obligations violated by it as a result of the construction of the wall in the Occupied Palestinian Territory and of the associated régime. It was also argued that, under the terms of the Fourth Geneva Convention, Israel is under an obligation to search for and bring before its courts persons alleged to have committed, or to have ordered to be committed, grave breaches of international humanitarian law flowing from the planning, construction and use of the wall. »<sup>76</sup>

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<sup>74</sup> See Ahmed RASHID, “The Taliban: Exporting Extremism” *Foreign Affairs*, Nov/Dec. 1999, pp. 22-35: “*The drug trade will expand. Those are the costs that no country – not Afghanistan, the United States, its allies, China or Iran – can hope to bear*”.

<sup>75</sup> See SALON.COM “Genocide, and drug-trafficking too”, by Frank SMYTH  
<http://www.salon.com/news/1999/03/05news.html>

<sup>76</sup> Paragraph 145. Also see:

152. Moreover, given that the construction of the wall in the Occupied Palestinian Territory has, *inter alia*, entailed the requisition and destruction of homes, businesses and agricultural holdings, the Court finds further that Israel has the obligation to make reparation for the damage caused to all the natural or legal persons concerned. The Court would recall that the essential forms of reparation in customary law were laid down by the Permanent Court of International Justice in the following terms:

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“The essential principle contained in the actual notion of an illegal act □ a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals □ is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it □ such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.” (*Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17*, p. 47.)

153. Israel is accordingly under an obligation to return the land, orchards, olive groves and other immovable property seized from any natural or legal person for purposes of construction of the wall in the Occupied Palestinian Territory. In the event that such restitution should prove to be materially impossible, Israel has an obligation to compensate the persons in question for the

Other legal remedies against violations of international humanitarian law could include:

- asking for compensation by way of civil liability claims;<sup>77</sup>
- introducing claims against private companies<sup>78</sup> that support<sup>79</sup> groups that commit violations<sup>80</sup> in countries where they operate.<sup>81</sup>

#### 4.2.11. Traditional customary mechanisms (such as “gacaca”).

Traditional customary mechanisms – not mentioned in international law instruments – are sometimes a very useful approach to over-burdened legal mechanisms. Those approaches often fill the gap between the sanction of violations and reconciliation, especially in non-international armed conflicts.

The ethics deficit<sup>82</sup> is not only in the denial of the fundamental dignity of others or in the denial of justice for too many victims of war crimes, crimes against humanity and genocide. It is also to be seen in the excessive emphasis on an impossible justice, and on the denial of forgiveness and reconciliation.

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damage suffered. The Court considers that Israel also has an obligation to compensate, in accordance with the applicable rules of international law, all natural or legal persons having suffered any form of material damage as a result of the wall's construction.

<sup>77</sup> John F. MURPHY “ Civil Liability for the Commission of International Crimes as an Alternative to Criminal Prosecution ”, *Harvard Human Rights Journal*, Vol. 12 (Spring 1999), pp. 1-56  
“ Because of the resistance of governments, progress toward greater civil liability for international crimes will depend upon the efforts of non-governmental actors to bring pressure to bear on governments ”. In an analogous context, see Jordan J. PAUST, “Suing Saddam: Private remedies for War Crimes and Hostage-Taking,” 31 *Virginia Journal of International Law* 351-380 (1991)

<sup>78</sup> Fabrice WEISSMAN, “ Liberia. Can Relief Organizations Cope With The Warlords? ” in Médecins Sans Frontières / Doctors Without Borders, *World in Crisis. The politics of survival at the end of the 20th century*, London/New York, Routledge, 1997, pp. 100-121 :  
“ Until it faces up its responsibilities, the international community could at least impose an embargo upon the private companies which continue to exploit the country's resources for the sole benefit of the warlords ” (p. 121, conclusion).

<sup>79</sup> See this statement by the US Committee for Refugees ([http://www.refugees.org/help/diamond\\_action.htm](http://www.refugees.org/help/diamond_action.htm)):  
“Some of the worst refugee crises in Africa are fueled in part by the flow of illicit diamonds and other valuable natural resources. In countries like Sierra Leone, Angola, and Congo "diamonds are a rebel's best friend." Illegal diamond deals are the primary source of revenue in this region and allow combatants to purchase weapons and ammunition at alarming levels”.  
See the Report, available online, “The Heart of The Matter: Sierra Leone, Diamonds & Human Security”, by Ian Smillie, Lansana Gberie and Ralph Hazleton, Partnership Africa Canada, Ottawa, January 2000, <http://www.web.net/pac/pacnet-l/msg00009.html>

<sup>80</sup> One case is this of security measures taken by oil companies in Colombia which led Human Rights Watch to issue the following statement: (“ Colombia: Human Rights Concerns Raised By The Security Arrangements Of Transnational Oil Companies (April 1998) <http://www.hrw.org/advocacy/corporations/colombia/Oilpat.htm>

<sup>81</sup> See by analogy Gary LEECH, <http://www.salon.com/news/feature/2000/09/07/oil/>

The South African Truth and Reconciliation Commission (TRC)<sup>83</sup> was set up by the Government of National Unity to help deal with what happened under apartheid. The conflict during this period resulted in violence and human rights abuses from all sides. No section of society escaped these abuses.<sup>84</sup> The TRC was the result of a compromise settlement between one side asking for a Nuremberg-like trial<sup>85</sup> and the other side for a blanket amnesty. It was an original combination of African tradition („ubuntu“) and Christian sacramental approach („penance“)<sup>86</sup>.

The Chairman of the TRC, Archbishop Desmond Tutu, in his foreword of the Final Report, quotes Judge Marvin Frankel:

„A nation divided during a repressive regime does not emerge suddenly united when the time of repression has passed. The human rights criminals are fellow citizens, living alongside everyone else, and they may be very powerful and dangerous. If the army and police have been the agencies of terror, the soldiers and the cops aren't going to turn overnight into paragons of respect for human rights. Their numbers and their expert management of deadly weapons remain significant facts of life... The soldiers and police may be biding their time, waiting and conspiring to return to power. They may be seeking to keep or win sympathisers in the population at large. If they are treated too harshly – or if the net of punishment is cast too widely – there may be a backlash that plays into their hands. But their victims cannot simply forgive and forget.“<sup>87</sup>

Less elaborate approaches of “Truth and Reconciliation Commissions” have been considered and experimented as tools of mending societies torn apart by war in Argentina, Bolivia, Bosnia, Brasil, Chad, Chile, East Timor, El Salvador, Ethiopia, Germany, Guatemala, Honduras, Northern Ireland, Morocco,<sup>88</sup> Paraguay, Peru, Philippines, Rwanda, Sierra Leone,<sup>89</sup> Uruguay, Zimbabwe.<sup>90</sup> It certainly is a painful process,<sup>91</sup> and a healing one, which should

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<sup>83</sup> See Alex BORAINÉ, *A Country Unmasked : Inside South Africa's Truth and Reconciliation Commission*. New York, Oxford University Press, 2001, 448 p.

<sup>84</sup> See the official website of the South African TRC : <http://www.doj.gov.za/trc/>

The full report is available online at : <http://www.polity.org.za/govdocs/commissions/1998/trc/index.htm>

A printed version (5 volumes and a CD-ROM) was published in March 1999 by MacMillan (London, UK)

<sup>85</sup> Apartheid has been declared a grave breach of international humanitarian law in Protocol I, (Art. 85, 4, c )

<sup>86</sup> Michael Jesse BATTLE and Desmond Mpilo TUTU *Reconciliation : The Ubuntu Theology of Desmond Tutu*, Cleveland, Ohio, The Pilgrim Press, 1997

<sup>87</sup> Marvin FRANKEL, *Out of the Shadows of the Night : The Struggle for International Human Rights*

<sup>88</sup> Susan SLYOMOVICS, « A Truth Commission for Morocco », *Middle East Report* 218, Spring 2001

[http://www.merip.org/mer/mer218/218\\_slymovics.html](http://www.merip.org/mer/mer218/218_slymovics.html)

<sup>89</sup> See the 2000 Report of the UN Office of the High Commissioner for Human Rights to the General Assembly (A/55/38, paras. 37-45) <http://www.hri.ca/fortherecord2000/vol2/sierraleonega.htm>

« The report notes that the OHCHR provided technical assistance to the government in drafting the law on the Truth and Reconciliation Commission (TRC). The OHCHR also developed a project for the preparatory phase of the Commission. The resumption of hostilities in May 2000 caused the Security Council to reconsider the role of UNAMSIL as well as other justice issues, including the establishment of a court to try human rights and humanitarian law abuses related to the conflict. The High Commissioner stated that these issues are crucial for the proper functioning of the TRC. The ongoing armed conflict, however, has delayed the implementation of the preparatory phase of that Commission ».

<sup>90</sup> Priscilla B. HAYNER « Fifteen Truth Commissions » *Human Rights Quarterly* Vol. 16, n. 4, Nov. 1994, pp. 597 – 655, Mike KAYE « The Role of the Truth Commissions in the Search for Justice, Reconciliation and Democratisation : Salvadorean and Honduran Cases » *J. Lat Amer. Stud.* 29, pp. 695-716 ; Neil J. KRITZ (Ed.) *Transitional Justice : How Emerging Democracies Reckon with Former Regimes*, Washington DC, USIP, 1995, 3 vol., José ZALAUQUETT, « Moral Reconstruction in the Wake of Human Rights Violations and War Crimes » in Jonathan Moore (Ed.) *Hard Choices*, Lanham, Rowman & Littlefield, 1998, pp. 211-227 and the website of the USIP <http://www.usip.org/library/truth.html> as well as: [http://www.beyondintractability.org/m/truth\\_commissions.jsp](http://www.beyondintractability.org/m/truth_commissions.jsp)

<sup>91</sup> See Priscilla B. HAYNER, *Unspeakable Truths: Confronting State Terror and Atrocity* New York, Routledge, 2001, 340 p.

not be exceptional.<sup>92</sup>

### 4.3. Explore New Approaches

#### 4.3.1. Reaffirm fundamentals and rules applicable in all circumstances (Common Article 3 and undergirdable Human Rights)

We need to underline the common values, to move beyond the celebrations of the 20th century of the 50th anniversary of the UN Charter, of the Universal Declaration on Human Rights, of the 1949 Geneva Conventions, of the 1951 Convention on Refugees among others to reaffirm the universality of fundamental values.

There are divergences of opinion between American and European allies (on the death penalty, for example). There are differences of emphasis between civil and political rights on one hand and social and economic rights on the other. There are also differences of importance of individual and group rights.<sup>93</sup>

We therefore need to reaffirm a common core of human values, in discovering what makes them universal beyond cultural differences:

- The right to life
- The right to personal security and religious freedom
- The right to family life
- The right to health care, adequate nutrition and shelter
- The principle of non-discrimination
- The prohibition of torture, inhuman or degrading treatment or punishment.<sup>94</sup>

The International Court of Justice, in the Nicaragua Case, considered Article 3 of the 1949 Geneva Conventions as "*elementary considerations of humanity*" binding all:

"The Court considers that the rules stated in Article 3, which is common to the four Geneva Conventions, applying to armed conflicts of a non-international character, should be applied. The United States is under an obligation to "respect" the Conventions and even to "ensure respect" for them, and thus not to encourage persons or groups engaged in the conflict in Nicaragua to act in violation of the provisions of Article 3. This obligation derives from the general principles of humanitarian law to which the Conventions merely give specific expression".<sup>95</sup>

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<sup>92</sup> See this prayer by Archbishop Tutu :

„We pray that wounds that may have been re-opened in this process have been cleansed so that they will not fester; that some balm has been poured on them and that they will now heal.“

<http://www.macmillan-reference.co.uk/PandH/TRCforeword.htm>

<sup>93</sup> "Human rights is a complex idea with differing emphases even as between various Western societies. Only with appropriate humility and self-doubt can true dialogue be encouraged." Stephen J. Toope, Cultural Diversity and Human Rights (F. R. Scott Lecture) <http://collections.ic.gc.ca/tags/cultural.html>

<sup>94</sup> Paul GROSSRIEDER, "Humanitarian Standards and Cultural Differences" in ICRC, Seminar for non-governmental organizations on humanitarian standards and cultural differences. Summary Report, ICRC & The Geneva Foundation to Protect Health in War, Geneva, 14 December 1998. Text available online:

<http://www.people.virginia.edu/~hc3z/ICRC-culture.htm>

<sup>95</sup> International Court of Justice, *Case concerning the military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgement of 27 June 1986 (Merits), Vol. 114, Para. 218. On this case, see: Rosemary ABI-SAAB, "The 'General Principles' of humanitarian law according to the International Court of Justice", *International Review of the Red Cross*, July-August 1987, pp. 367-375.

It reads as follows:

*In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:*

*(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 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.*

*An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.*

*The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.*

*The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.*

Renaissance literally means re-birth, renewal, return to the source. We need to research the roots of fundamental values in all civilizations, in order to move beyond the superficial universality of legal instruments, too often perceived as imposed by Western powers, and poorly implemented in too many cases.

As the ICRC survey conducted in 1999 for the 50th anniversary of the 1949 Geneva Conventions demonstrated, the local spiritual values are often the only efficient, convincing factor, which motivate the compliance with humanitarian rules in warfare.<sup>96</sup>

**4.3.2. Research factors influencing the application and implementation.** Draw lessons from best and worst practices in past and recent history.

*“Above all, we need detailed study of the pressures and factors that are persuasive for humanitarian law observance. It must not be assumed that courts, prison and firing squads are the sole mechanisms of enforcement”* wrote G.I.A.D. Draper.<sup>97</sup>

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<sup>96</sup> See the Global Report and the Parallel Report (Country Reports) of the “People on War Project” at:

<http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList74/4145CC3D8B377429C1256EB4002680BD>

All reports in PDF format are available online. The data of the survey carried out by the ICRC in 17 countries are available online at SIDOS (Swiss Data Online for the Social Sciences):

<http://www.sidos.ch/data/projects/pow/default.asp?lang=e>

The following factors , which could influence the behavior of parties to a conflict in a positive or negative way, should be considered:

1. **reciprocity** (mutual interest);
2. **military efficacy** (not contradictory with humanity);
3. **reprisals** (neither helpful nor permissible)
4. **economy** (the need to save resources);
5. **public opinion** (a question of image);
6. **return to peace** (which is the normal state of human relations);
7. **ethics** (religious, moral, political legitimacy);
8. **the human factor** (the role of individuals) ;
9. **preservation of civilization** (a common interest of every human being)
10. **synergy** (as the result of combining different approaches).

Reciprocity is inherent in all fields of law. There is no law without reciprocity. Thus treating prisoners humanely can influence the fate of the prisoners on the other side of the front, as well as the enemy's attitude towards civilian populations and the means and methods of warfare employed.

It must nonetheless be pointed out that in the 1949 Geneva Conventions<sup>98</sup> and in the 1969 Vienna Convention on the Law of Treaties **reciprocity is no longer a legal condition** for application of humanitarian law.<sup>99</sup>

The principle of humanity, the cornerstone of humanitarian law, has frequently been in opposition to military necessities. Nevertheless, these two essential factors are not necessarily contradictory. On the contrary, humanity and military effectiveness are often complementary; and the best approach is indeed to highlight the mutual military, political and economic benefits of recognizing the enemy - civil or combatant - as a human being with the same dignity as oneself. The surrender of the enemy may be more easily obtained if the enemy appreciates that it will be treated humanely. Moreover, attacks against the civilian population, far from reducing it into submission, more often incites it to resistance.

Additionally, discipline of its own troops must incorporate the respect of

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<sup>97</sup> G.I.A.D. DRAPER, *The Implementation and Enforcement of the Geneva Conventions of 1949 and of the two Additional Protocols of 1977*, Recueil, des Cours, 1979, III, The Hague, p. 1.

<sup>98</sup> The four Geneva Conventions of 12 August 1949 on the protection of war victims do not recognize reciprocity, the only exception, contained in Article 2 common to all four Conventions, being a Power not a Party to the Convention; they provide for the inalienability of rights (Art. 7 of the First, Second and Third Convention; Art. 8 of the Fourth Convention) and prohibit reprisals (First Convention, Art. 46; Second, Art. 47; Third, Art. 13, and Fourth, Art. 33).

See on this subject: PICTET, *Commentary*, I, p. 28; PICTET, *Red Cross Principles*, p. 87; PINTO, R. *Les règles du droit international concernant la guerre civile*, Recueil des Cours, The Hague, 1965, I, p. 530.

<sup>99</sup> Art. 60, paragraphs 1 and 5:

“1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.”

[...]

“5. Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any forms of reprisals against persons protected by such treaties.”

See Paul REUTER, *La Convention de Vienne sur le droit des traités*, Paris, 1970, p. 47.

humanitarian restraints. History shows that when combatants are given free rein to kill and destroy indiscriminately or commit acts of savagery against the enemy are more inclined to turn against their own leaders and to act ruthlessly against their own population. To assure that humanitarian principles are respected and implemented at this most basic level, credible instruction and rigorous training are essential. To this end, it is important that these rules be disseminated simply and clearly and that they be coupled with a system of disciplinary sanctions guaranteeing their observance.<sup>100</sup>

Violations of the Geneva Conventions represent a serious threat to international security, at the regional level and worldwide. Thus, international humanitarian law is increasingly becoming an essential part of global security issues, on the national, regional and international levels. Security today, however, also means human security, solidarity in peace and restraints in conflict that safeguard the common humanity.

The **economy** is another factor conducive to the implementation of humanitarian law. It is obviously more costly to strike indiscriminately than to limit one's attacks to military objectives. It is better for forces intent on liberating or conquering civilians, not to endanger their very survival by completely disorganizing their economic life or to create more displaced persons than can be sheltered and fed. Donor countries could use their economic leverage to put pressure on parties in internal conflicts to abide by humanitarian standards. In the same way, private companies could also play a role in this process.

No Government and no group of insurgents can be indifferent to **public opinion** (domestic and international). In order to preserve their legitimacy, political systems must either incorporate what is humanitarian or disappear for lack of humanity. Public opinion therefore is an important factor in implementing fundamental values. Its effects can be **negative** (calling for reprisals) or **positive** (asking for restraints and humanity).

The contribution that respect for humanitarian law can make to **peace** is an important political factor that is often overlooked. Just as respecting human rights facilitates the maintenance of peace, so the restoration of peace is largely facilitated by humanitarian acts. Such acts (release of prisoners, for example) are like seeds of dialogue that foster dialogue and reconciliation. Humanitarian gestures are the first step towards peace.

**Ethics** is the fundament of political legitimacy. As Nobel Prize Albert Camus wrote during the Algerian War: *"To fight for a truth without destroying it by the very means used to defend it."*<sup>101</sup>

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<sup>100</sup> See the Military Courses organized by the Institute of International Humanitarian Law in San Remo (Italy) [www.iihl.org](http://www.iihl.org) and

-Cees DE ROVER, 'Police and Security Forces. A new interest for human rights and humanitarian law' *International review of the Red Cross*, no. 835 (September 1999) pp. 637-647,

-Cees DE ROVER, *To Serve and to Protect. Human Rights and Humanitarian Law for Police and Security Forces*, ICRC, Geneva, 1998.

- Dieter FLECK (Ed.), *The Handbook of Humanitarian Law in Armed Conflicts*, Oxford, Oxford University Press 1995, 589 p.

<sup>101</sup> Albert CAMUS, *Actuelles III. Chroniques algériennes (1939-1958)*, Paris, Gallimard, 1958, p. 24 *"Se battre pour une vérité en veillant à ne pas la tuer des armes mêmes dont on la défend"*

#### 4.3.3. **Use new approaches** to change the behavior of parties to conflicts

New approaches are needed to influence parties to conflicts.

#### 4.3.4. **Use new technologies to monitor** the conduct of hostilities in order to prevent and prosecute violations

New technologies are available to monitor the conduct of hostilities. If they would be used more widely, they could contribute to the prevention and repression of violations: the monitoring of radio- and telephone communications are available practically exclusively to Governments, which could make known to belligerents that they are monitoring their instructions and would not remain indifferent to orders incompatible with international rules of the laws and customs of war, fundamental human rights or the prohibition of genocide. Until recently, satellite pictures were the monopoly of intelligence services. Commercial satellites now routinely provide NGOs such as Human Rights Watch and Physicians for Human Rights with pictures of burned down villages in an African civil war. Could Governments Parties to the Geneva Conventions make an even better use of the sharper images they could retrieve, day and night?

#### 4.3.5. **Approach new actors**, and make them accountable

Non-State actors play an increasing role in armed conflicts.

#### 4.3.6. **Reach individuals**

Lawyers tend to see Governments, institutions, and mechanisms. We need to reach individuals, at all levels, to exert an influence, from near and far, on parties to conflicts. Former Heads of State, like Nelson Mandela, can exert an influence. In a similar way, artists, actors and athletes, among others, could be used to bring a humanitarian message.

#### 4.3.7. **Mobilize public conscience**

The same fundamental values should be applicable in all situations of emergency<sup>102</sup> (armed conflicts and other emergency situations), reconstruction, development, economical growth,<sup>103</sup> peaceful settlement of conflicts, international, regional and national legal cooperation. In all situations, the human person should be at the center, taking into account the spiritual dimension of all human activities. We need to move from a *Code of Enmity* to a *Code of Amity*, from confrontation to cooperation.

## **TOWARDS A RENAISSANCE OF FUNDAMENTAL HUMAN VALUES**

### **Research Roots**

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<sup>102</sup> See OXFAM, « Africa at the Crossroads », Oxfam Policy Papers No 19 (March 02) [http://www.oxfam.org.uk/what\\_we\\_do/issues/misc/bp19\\_africa.htm](http://www.oxfam.org.uk/what_we_do/issues/misc/bp19_africa.htm)

<sup>103</sup> See Michael K. ADDO (Editor) *Human Rights Standards and the Responsibility of Transnational Corporations*. The Hague, Kluwer Law International, 1999, 384 p.

## Re-Anchor in All Civilizations

### Reaffirm Universality of Fundamental Values

We need to underline the common values, to move beyond the celebrations of the 20th century of the 50th anniversary of the UN Charter, of the Universal Declaration on Human Rights, of the 1949 Geneva Conventions, of the 1951 Convention on Refugees among others to reaffirm the universality of fundamental values.

There are divergences of opinion between American and European allies (on the death penalty, for example). There are differences of emphasis between civil and political rights on one hand and social and economic rights on the other. There are also differences of importance of individual and group rights.<sup>104</sup>

We therefore need to reaffirm a common core of human values, in discovering what makes them universal beyond cultural differences:

- The right to life
- The right to personal security and religious freedom
- The right to family life
- The right to health care, adequate nutrition and shelter
- The principle of non-discrimination
- The prohibition of torture, inhuman or degrading treatment or punishment.<sup>105</sup>

### Reinforce Existing Mechanisms

Common Article 1 to the four 1949 Geneva Conventions, duplicated in Additional Protocol I, establishes very clearly the collective responsibility of all States Party:

*“The High Contracting Parties undertake to respect and to ensure respect for the present Convention [this Protocol] in all circumstances”*

According to Article 89 of Protocol I, *“In situations of serious violations of the Conventions or of this Protocol, the High Contracting Parties undertake to act jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter”*. This is a quite important provision, allowing for creativity and flexibility, as needed.

The involvement of the UN in the implementation of IHL took many forms: denunciations of violations of IHL in resolutions by the Security Council or the General Assembly (regarding

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<sup>104</sup> “Human rights is a complex idea with differing emphases even as between various Western societies. Only with appropriate humility and self-doubt can true dialogue be encouraged.” Stephen J. Toope, Cultural Diversity and Human Rights (F. R. Scott Lecture) <http://collections.ic.gc.ca/tags/cultural.html>

<sup>105</sup> Paul GROSSRIEDER, “Humanitarian Standards and Cultural Differences” in ICRC, Seminar for non-governmental organizations on humanitarian standards and cultural differences. Summary Report, ICRC & The Geneva Foundation to Protect Health in War, Geneva, 14 December 1998. Text available online: <http://www.people.virginia.edu/~hc3z/ICRC-culture.htm>

"human rights violations in territories occupied by Israel", but also in Afghanistan, in El Salvador, in Guatemala, in the Iraq-Iran conflict, in the Gulf War, and even the dispatching of a mission to Iraq and Iran in 1985 to investigate conditions under which prisoners of war were being held, and, since 1992, in former Yugoslavia<sup>106</sup>)

Ending the impunity of perpetrators of atrocities is a major challenge.<sup>107</sup>

The most important step taken by the UN in this context is the establishment of international criminal tribunals such as

*"The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law committed in the Territory of the Former Yugoslavia"*. The Security Council established it in May 1993<sup>108</sup> for serious violations committed there since 1991. The Tribunal has competence on the following offenses: grave breaches of the Geneva Conventions,<sup>109</sup> violations of the laws and customs of war,<sup>110</sup> genocide,<sup>111</sup> and crimes against humanity.<sup>112</sup>

*"The International Tribunal on Rwanda"*. It was established by the Security Council in 1994. This is the first time that an international criminal tribunal has been established with respect to an essentially non-international conflict.

Those *ad hoc* Tribunals will need adequate resources and political support.<sup>113</sup> Their existence does not do away with the requirement in the 1949 Geneva Conventions for all States Party to see to the punishment of grave breaches wherever they occur, be it by Government officials or warlords...<sup>114</sup>

The *International Criminal Court* needs to be supported. It is only one part of a system that would end impunity to the perpetrators of genocide, crimes against humanity, war crimes, and

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<sup>106</sup> Of special interest are: Resolution 764 (1992) of 13 July 1992, in which the Security Council reaffirmed that all parties are bound to comply with the obligations under international humanitarian law and in particular the Geneva Conventions of 12 August 1949, and that persons who commit or order the commission of grave breaches of the Conventions are individually responsible in respect of such breaches; Resolution 771 (1992) of 13 August 1992, in which it demanded that all parties immediately cease and desist from all breaches of international humanitarian law; Resolution 780 (1992) of 6 October 1992, in which it requested the Secretary-General to establish, as a matter of urgency, an impartial Commission of Experts to examine and analyze the information submitted pursuant to resolutions 771 (1992) and 780 (1992), together with such further information as the Commission of Experts may obtain, with a view to providing the Secretary-General with its conclusions on the evidence of grave breaches of the Geneva Conventions and other violations of international humanitarian law committed in the territory of the former Yugoslavia.

<sup>107</sup> Mary GRIFFIN, « Ending the impunity of human rights atrocities : A major challenge for international law in the 21st century ». International Review of the Red Cross. 2000, No. 838, pp. 369-389. Available online at: <http://www.icrc.org/web/eng/siteeng0.nsf/iwpList106/9F9B884D66413C89C1256B66005E8C12>

<sup>108</sup> Resolution 827

<sup>109</sup> Article 2 of the Statute

<sup>110</sup> Article 3

<sup>111</sup> Article 4

<sup>112</sup> Article 5

<sup>113</sup> See Iain Guest (Overseas Development Council) on National Public Radio ("All Things Considered"), Friday 16 April 1999. "The Hague Tribunal was established by the UN Security Council in May 1993, ostensibly to deter war crimes, but the [Security] Council squabbled over funding and even delayed appointing a prosecutor for a year." (on 8 July 1994, Resolution 936, appointing Richard J. Goldstone)

<sup>114</sup> See Patricia GROSSMAN, „Bring Warlords to Justice“, International Herald Tribune, Saturday-Sunday, March 9-10, 2002, p.10

torture. Such a system could certainly contribute to deter people contemplating such crimes, to allow victims to obtain justice and to support reconciliation efforts. States Party to the Geneva Conventions have been increasingly aware of their responsibility to respect international humanitarian law as individual States and increasingly collectively. The awareness of their collective responsibility is a more recent phenomenon, resulting from the combined pressure of public opinion, the ICRC and various human rights NGOs,<sup>115</sup> bilaterally or before United Nations bodies. This collective responsibility not only pertains the enforcement of humanitarian rules. It is contributing to national stability and international security, preventing disorderly movements of populations, uprooting of displaced persons and refugees, and the spreading of uncontrolled violence around the world.<sup>116</sup>

## **Reinvent Remedies**

We need to be more creative in applying remedies<sup>117</sup> to promote the respect of fundamental values in all situations.

Some remedies might include :

1. The reaffirmation of fundamental humanitarian rules, customs and principles in a simple, easy to understand form, and translation into local languages;
2. Training of arm bearers (military, police, private security groups) in fundamental restraints of violence and essential humanitarian principles;<sup>118</sup>
1. Conducting international, regional and local public opinion campaigns to promote fundamental humanitarian values<sup>119</sup> and counter hate campaigns;

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<sup>115</sup> See the following recommendations by Amnesty International :

1. Ratify the Rome Statute of the International Criminal Court and enact effective implementing legislation to cooperate fully with the Court.
2. Enact and use universal jurisdiction legislation for the crimes of genocide, crimes against humanity, war crimes, torture, extra-judicial executions and "disappearances", in order that their national courts can investigate and, if there is sufficient admissible evidence, prosecute anyone who enters its territory suspected of these crimes, regardless of where the crime was committed or the nationality of the accused or the victim.
3. Enact legislation to ensure effective cooperation with the International Criminal Tribunals for the former Yugoslavia and Rwanda and any other international criminal court created in the future.

<sup>116</sup> International humanitarian law is one of the many legal, political, ethical instruments to deal, in today's global disorder, with our "genocidal mentality" and to "become healers, not killers, of our species" (Robert Jay LIFTON, Eric MARKUSEN, *The Genocidal Mentality. Nazi Holocaust and Nuclear Threat*, New York, Basic Books, 1990, p. 279).

<sup>117</sup> See <http://www.guardian.co.uk/waronterror/story/0,1361,583028,00.html>

Dr Scilla Elworthy, "Conflict resolution in the 21st century", Tuesday October 30, 2001

And Michel VEUTHEY "Remedies to Promote the Respect of Fundamental Human Values in Non-International Armed Conflicts", *The Israeli Yearbook on Human Rights*, Vol. 30 (2001), pp. 37-77.

<sup>118</sup> The March 2002 issue of "Democracy Issues", an electronic journal published by the United States Department of State, is dedicated to human rights education. It includes some interesting contributions, including articles by Felisa Tibbitts ("Emerging Models for Human Rights Education") and Nanc Flowers (Human Rights Education in U.S. Schools); an interview with human rights educators from South Africa ("Human Rights Education in Diverse, Developing Nations: A Case in Point -- South Africa"); and an article on training for judges, prosecutors, attorneys and the police ("International Human Rights Training" by Michael Hartmann). The journal also features a short bibliography and related web sites. The full text of the journal can be found at: <http://usinfo.state.gov/journals/itdhr/0302/ijde/ijde0302.htm>

2. Mobilization of public role models (such as artists or athletes) who can influence leaders and public opinion at large in close contact with local traditions;<sup>120</sup>
3. Including spiritual leaders in those campaigns, especially when religious and spiritual values have been used to fuel conflicts;<sup>121</sup>
4. Preparing the youth to recognize and defend the distinction between humanity and inhumanity through educational programs.<sup>122</sup> Reintegrate child soldiers in society;<sup>123</sup>
5. Learning from human rights<sup>124</sup> and environmental<sup>125</sup> activists in order to promote fundamental humanitarian values in order that in the long run humanitarian norms become a part of humanitarian consciousness;

### **Re-Activate the Network of Humanity**

We need to re-activate – or to create, when needed – a network of humanity carrying fundamental human values in all circumstances, and to maintain – or re-establish – the corresponding mechanisms on the local, national, regional and international level.

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<sup>119</sup> Including by campaigns for a universal ratification of human rights and international humanitarian law treaties. See Hans-Peter GASSER, "Steps taken to encourage States to accept the 1977 Protocols", IRRC, No. 258, May 1987. An other example is the campaign conducted in February 2002 to recommend to the U.S. Senate that it ratify the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (<http://world.pylduck.com/02/0212.html>)

<sup>120</sup> See the ICRC's "Woza Africa! Music goes to war". This was the slogan adopted by six popular African musicians who, responding to the ICRC's call, led a campaign in 1997 to help curb the indiscriminate violence that has long plagued their continent. The musicians strove to reach people's hearts and minds through a series of original songs which they performed live and recorded.

<sup>121</sup> See THE MILLENNIUM WORLD PEACE SUMMIT OF RELIGIOUS AND SPIRITUAL LEADERS New York, August 2000 « Commitment to Global Peace » (<http://global-forum.org/research/globalpeace.html>)

<sup>122</sup> See the educational programs of the International Committee of the Red Cross (ICRC) ([www.icrc.org](http://www.icrc.org)), Red Cross and Red Crescent National Societies as well as by the UNESCO ([www.unesco.org](http://www.unesco.org)) and Human Rights NGOs such as Human Rights Watch, Human Rights Internet and academic institutions such as the International Institute of Humanitarian Law, in San Remo (Italy) with courses on laws of war for military personnel, on refugee law and on international humanitarian law ([www.iihl.org](http://www.iihl.org))

<sup>123</sup> It is not only needed to stop the use of child soldiers (<http://www.hrw.org/campaigns/crp/index.htm>) but also to reintegrate them in society: see Mike WESSELS, « Child Soldiers », *Bulletin of Atomic Scientists*, Chicago, Nov/Dec 1997 ([http://pangaea.org/street\\_children/africa/armies.htm](http://pangaea.org/street_children/africa/armies.htm)) and the website of the Office of the SRSR for Children and Armed Conflict <http://www.undp.org/erd/recovery/ddr/organizations/osrg.htm> and the UNICEF « Children at both ends of the gun » : <http://www.unicef.org/graca/kidsoldi.htm>

<sup>124</sup> See AMNESTY INTERNATIONAL HANDBOOK (Seventh Ed.), available online, at <http://www.amnesty-volunteer.org/aihandbook/> and especially Chapter 4 (« Campaigning ») and 5 (« AI Action - Advice and Guidelines ») as well as the excellent HUMAN RIGHTS EDUCATION HANDBOOK available online : <http://www.hrusa.org/hrmaterials/hreduseries/hrhandbook1/toc.html> (Human Rights Resource Center, University of Minnesota, 2000)

<sup>125</sup> See Morton WINSTON, « NGO Strategies for Promoting Corporate Social Responsibility » *Ethics & International Affairs*, Vol. 16, Number 1 (Spring 2002). According to Morton Winston, there is a basic divide between NGOs :

-Engagers try to draw corporations into dialogue in order to persuade them by means of ethical and prudential arguments to adopt voluntary codes of conduct, while confronters believe that corporations will act only when their financial interests are threatened, and therefore take a more adversarial stance toward them.

-Confrontational NGOs tend to employ moral stigmatization, or "naming and shaming," as their primary tactic, while NGOs that favor engagement offer dialogue and limited forms of cooperation with willing MNCs.

## Rebuild Public Conscience

*“Either we live together as brothers, or we perish as fools.”* Martin Luther King

“Public conscience” was introduced in positive international law by the Martens Clause at the Hague Peace Conference in 1899. It was the result of a compromise reached at the 1899 Hague Peace Conference to break a deadlock between Great and small Powers in Europe over the definition of combatants: in case of doubt international humanitarian rules should be interpreted in a manner consistent with standards of humanity and the demands of public conscience.<sup>126</sup>

Humanitarian law is at the same time rooted in the history of all traditions of humankind, in all parts of the world, and is also very much part of our future, as one essential safeguard for our survival as a species. In the words of Jean Pictet, one of the founding fathers of contemporary humanitarian law, respect for humanitarian law is *“necessary to humankind's survival”*.

In the words of Martin Luther King: *“The chain reaction of evil - hate begetting hate, wars producing more wars - must be broken, or we shall be plunged into the dark abyss of annihilation”*.

As the spiritual dimension was at the origin of universal fundamental human values, we now need to bring back the spirit of humanity into the letter of international humanitarian law.

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<sup>126</sup> See Antonio CASSESE “The Martens Clause: Half a Loaf or Simply Pie in the Sky?” EJIL (2000), Vol. 11 No 1, pp. 187-216; Theodor MERON, “The Martens Clause, Principles of Humanity, and Dictates of Public Conscience”, AJIL, Vol 94, No. 2 (2000), pp. 78-89; Shigeki MIYAZAKI, “The Martens Clause and international humanitarian law” in SWINARSKI, C. (Ed.) *Etudes et essais sur le droit international humanitaire et sur les principes de la Croix-Rouge en l'honneur de Jean Pictet*, Geneva, ICRC, 1984, 1143 p., pp. 433-444