THE LAW OF ARMED CONFLICT: PROBLEMS AND PROSPECTS.

CONFERENCE TO MARK THE PUBLICATION OF THE ICRC STUDY ON "CUSTOMARY INTERNATIONAL HUMANITARIAN LAW", Chatham House, 18 April 2005.

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- I am grateful to Jean-Marie Henckaerts for his kind remarks about the International Law Association's London Principles on the Formation of Customary International Law, which was relied on in several places in the introductory chapter to this useful study. I should, however, point out that though I did indeed make a large contribution to this document, first as Rapporteur and later as Chairman, it was a collective effort. Some of the leading experts in the world on customary law were members of the International Committee, and the Principles were agreed not only by them, but by the whole Association – largely without controversy. The original idea behind these principles was to summarize the relevant rules in an accessible form, for the benefit of courts, students, practitioners and others. It is gratifying to note that the authors of the present very useful study found our document useful. But I should also make it clear that, although consulted, I was not involved in writing the final version of the introductory chapter to these volumes, and so cannot claim any of the considerable credit

due for compiling this work - or conversely any responsibility for it.

- I am not therefore here either to defend or to attack this publication. Rather, I have been asked to give a very brief, and consequently rough, guide to what customary law is, and to some of the problem areas; to its relationship to treaty law – which is clearly very pertinent in the context of international humanitarian law; and then to highlight some methodological issues that arise in the specific context of IHL.

1. WHAT IS CUSTOMARY INTERNATIONAL LAW?

- Though customary law was once an important part of the domestic law of all countries, it has now pretty much disappeared from the domestic law, not only of Western countries, but of all States whose laws follow that model – in other words, most of the rest of the world. It is only in some aspects of the law of some African countries (and a few others) that it has any significance. Consequently, for most lawyers, when international lawyers speak of

customary international law, we are referring to an unfamiliar concept.

- A working definition of customary international law is that it is the law that emerges from the constant, uniform and widespread practice of States (and other subjects of international law).

- It is a relatively *informal* process. Whereas we know exactly what procedures (formalities) are required for making legislation or treaties, the customary process is rather more unstructured. Hence to ask questions like "Exactly how many States does it need to make a new customary rule" rather misses the point: it is a characteristic of informal systems that there are rarely precise numerical criteria.

- There are, however, rules, and quite a lot of the time it is possible for impartial commentators to agree on whether a customary rule has come into being. It is a bit like saying "I cannot precisely define an elephant, but I know one when I see it." But in this particular corner of the

jungle, things are a bit more complicated: as well as the undoubted elephants, there are things that are quite like elephants, but are difficult to classify; things that might or might not develop into elephants; things that masquerade as elephants; and things that might have been elephants once, but are now either defunct or have metamorphosed into something else.

- Customary law is the result of a process of claim and response, whether express or implied. A simple example is the emergence of coastal States' sovereign rights over the resources of the continental shelf adjacent to their territorial sea. President Truman of the USA first claimed this right in 1945. Other States both acquiesced in this claim and imitated it, and so a customary rule emerged. If they had objected, they could have prevented its emergence. Claim and response.

- <u>What do we mean by State practice?</u> All sorts of actions count. Making claims through the diplomatic channel; legislating; issuing instructions to armed forces; making formal public statements as to the State's position;

protesting; taking physical action such as bombardment, arresting ships, treating POWs in a certain way; and so on.

- There is no specified time-element: some time will inevitably elapse, because there has to be a certain *quantity* or density of practice on the part of a sufficiency of States, but not a prescribed amount of time. And it can in fact be quite short.

- The practice has to be uniform and constant. That is to say, if a State sometimes does one thing, and sometimes another, that cannot contribute to the formation of a customary rule. And likewise, inconsistencies between different States' conduct. Substantial uniformity suffices, however.

  If a State or States do something inconsistent with a rule and claim the right to do so, this will prevent the rule being formed because there will not be sufficient uniformity. Likewise, if the rule already exists and they diverge from it, even in the face of possible protest, this

can undermine the rule. But simply straying from the straight and narrow, whilst denying that one is doing it, or relying on some exception or other excuse, will not undermine the rule or stop its being formed. See e.g. the exposition by the International Court of Justice of the rule prohibiting armed intervention in the *Nicaragua case.* All law sets standards that we do not all of us always meet, but that does not stop its being law.

- The practice has to be <u>widespread.</u> (We are concerned here with general custom, not regional or other forms of "particular" custom.) As in other forms of customary law, to ask precisely how many States must participate is to misunderstand the nature of customary law. There is no magic number.

- But what is clear is that all important actors or groups of actors must participate in the practice. If there are persistent objectors, one of two things will normally happen.

i. If the objectors are sufficiently important players in the particular area of activity concerned, and they dissent, then they prevent a general rule coming into existence. This is what I might term the strong, or "preventive" form of the rule.

ii. If, on the other hand, the objector or objectors are *not* major players in the area of activity (say, land-locked Afghanistan in the context of the law of the sea), then their dissent cannot prevent a rule of general customary law coming into being; but that particular objector or objectors will not be bound by the new rule. This we might call the weak, or "insulating" form of the persistent dissenter rule.

- There are different <u>stages in the life of a customary rule.</u> The first stage is when it is beginning to emerge, as in the early days of continental shelf claims and responses. At a later stage, the rule may have fully matured, in which case a State cannot opt out of it simply by saying that it is new to that area of activity, or even because it is a new State that played no part in the rule's formation. But the evolution of a customary rule does not stop when it has

matured: every act that violates it undermines it, unless it is protested, in which case the protest may strengthen it. Likewise, every time it is followed, it is strengthened.

- It has traditionally been said that the State practice needs to be accompanied by a subjective element: the so-called *opinio juris sive necessitatis.* This phrase, which is spurious and incoherent even in Latin, can be roughly translated as "a belief in the legally permissible or obligatory character (as the case may be) of the conduct in question". This is not the place to go into my own reservations about the concept in any detail. Suffice it to say that it is not clear how those who initiate a new practice can really think that they are already under an obligation or have a right; and if – as some therefore do – we say that the subjective element is not belief, but the *will* that something should be law, this neither explains why new States are bound willy-nilly, nor does it correctly account for why States obey a law that is already a law. In my view, the subjective element is rarely a necessary ingredient, though it can be useful in exceptional cases, such as in evaluating conduct that is

ambiguous. (Cf. the *Lotus case* in the Permanent Court of International Justice.) However, I do not think that we need to dwell on my dissent from the prevailing orthodoxy, because, in practical terms, it will be rare for anything to turn on the difference.

- Before I leave this general introduction to customary law, I must deal with one other important point. As a general rule, resolutions of international organizations or of international conferences are not a sort of "instant customary law". This is not because they are merely "verbal acts": many forms of State practice, such as the making of a diplomatic claim or a protest, are also verbal acts. Rather, it is because the *context* is such that the assumption is that these resolutions are not binding. In the case of the UN General Assembly, this is clear from the language and the drafting history of the Charter, for instance. That is not to say that a General Assembly resolution cannot be evidence that something is *already* a rule of customary law. But it is only rebuttable evidence, and in the words of the song from "Porgy and Bess", "It ain't necessarily so". Likewise, although a resolution can

provide the *impetus* for the development of State practice which in turn gives rise to a customary rule, it is not the resolution but the subsequent practice which makes the rule. And once again, we cannot assume that practice will in fact develop along the lines envisaged in the non-binding resolution.

2. THE RELATIONSHIP BETWEEN CUSTOMARY LAW AND TREATY LAW

- The relationship between treaty law and customary law is an important one, both generally and in the specific context of international humanitarian law, where a lot of the ground is covered by treaty. Indeed, if all States were parties to all of the treaties on this subject, there would be relatively little scope for a discussion of the role of customary law, for normally treaties prevail over custom. But there is room for a customary IHL, both because there is not 100 per cent participation in the treaties, and because there is some ground that the treaties do not – or arguably do not – cover.

- Of course, as with the resolutions of international organizations and conferences, it is always possible that a treaty will reiterate something that is already a customary rule. It is *possible*, but it would be a gross error to assume that this is usually the case. For if you think about it, if something is already indisputably customary law, why should States take the trouble to convene a diplomatic conference just to codify it in writing?

- To turn, now, to another possibility, it can happen that the provisions of a treaty give rise to State practice which matures into a rule of customary law. But we have to be careful here. The conduct of States parties to the treaty amongst themselves does not, strictly, count towards the formation of customary law. What they are doing is referable to their treaty obligation, not to customary law (cf. *North Sea Continental Shelf cases*). It is only if the treaty rule is imitated in the relations between parties to the treaty and non-parties, or between non-parties, that a customary rule can emerge. The process by which a treaty can inspire the formation of a customary rule in this way is not unknown: the abolition of privateering

following the Declaration of Paris of 1856 is an example of this process. But there is far from being any guarantee that this will happen: once again, "It ain't necessarily so", and we have to look at the actual evidence.

- Sometimes, when a customary rule is emerging, the conclusion of a treaty along the same lines can, it is said, help "crystallize" that process. I am a little suspicious of this metaphor, and I am not at all sure that, in the final analysis, it is not reducible to one or both of the other two processes, but I do not propose to go into this further now, nor some other of the more *recherché* aspects of the relation between treaty and custom.

3. PARTICULAR ISSUES RELATING TO CUSTOMARY IHL.

- This discussion of the relation between custom and treaty leads me neatly into some particular problems we have to watch out for in trying to identify the rules of customary IHL.

- (a) The first one is relatively straightforward. If a State is *not* a party to a given Convention, it cannot be safely assumed that it is bound by it. It is not bound *qua* treaty, because such treaties bind only those who ratify or adhere to them. Nor can it be assumed that a rule contained in the treaty obliges that State as a matter of customary law. Even if the great majority of States are parties to the treaty, that is still the position. For the reasons I have just explained in my account of the general rules, we have to look for evidence that, in the relations between the parties and non-parties, or between non-parties, the same or a similar rule has been regarded as binding.

- Indeed, we can go further. If the State which has failed to become a party to the treaty has also consistently manifested its opposition to the creation of a customary rule of like content, then the "persistent objector" rule will come into play. So, if it is not a major actor in this area (say, Liechtenstein), it can at least exclude itself from the operation of any customary rule that may come into existence. And if

it *is* a major player – say, a permanent member of the Security Council – then its persistent objection can prevent any rule of *general* customary law coming into being. This may not prevent there being a *particular* rule binding on those States that do subscribe to the customary rule – but there is no general rule and no presumption that all States are bound by it unless the specifically opt out.

- There is a possible qualification which I should mention here. Many take the view that the persistent objector rule does not apply if this would be contrary to a rule of *ius cogens,* which means a fundamental rule of international public policy from which no derogation is permissible. This is potentially particularly relevant to IHL, as p. xxxix of the Introduction to the study notes. However, I would make two points here:
  i. first, not all rules of IHL can be characterized, probably, as *ius cogens;*
  ii. secondly, it is questionable how far this alleged exception can apply to the first, strong form of the

persistent objector rule. Because if it is a question of the formation of a new rule, and sufficiently important actors refuse to accept it as a rule, logically it never gets to be any kind of rule, let alone one of *ius cogens.*

- (b) Staying with the relations between treaty and custom in the specific context of IHL, the next issue is perhaps more of a theoretical than a practical one. Some Conventions – for instance, those of Geneva of 1949, have achieved almost world-wide coverage. Strictly speaking, this means that there is very little opportunity for non-treaty interaction between the parties and non-parties, or between non-parties, and thus very little opportunity for new customary law to arise in imitation of the new treaty rule. It is therefore, I suggest, only if the treaty is declaratory of existing customary law, or – perhaps – if the parties have clearly recognized that the rules in question are *also* to be regarded as binding in customary law, that we can talk of non-treaty law in these cases. Of course, it is always possible, and does happen, that

there are customary rules which the treaties in question do not cover.

- (c) What about declarations made at diplomatic conferences about the content of international humanitarian law? For instance, there may not be sufficient agreement to incorporate a proposal into a treaty, or there may be disagreement as to its meaning; and so one or more delegations make statements of their understanding of the customary law position. There may even be a resolution of the conference, passed by the requisite majority. What value should we attach to such declarations?

  Well, in the case of declarations by just one or some delegations, they clearly do not bind other States. Those other States do not have expressly to object – the context is such that they can just sit back and let the words drift over them, if they choose. The State *making* the declaration may be in a different position. Depending on the status in the delegation of the person making it, and the general context, this kind of

unilateral *prise de position* by a State can be binding on it.

If there is a resolution passed by the Conference itself, then, in accordance with general principles, this is not binding on States. It would require express rules of procedure to make them binding, and such rules are not normally to be found. States who vote against are certainly not bound. And even those who vote in favour might not be, because the general expectation is that such resolutions – like those of the General Assembly – are not binding, so you can safely vote for them without undertaking a legal obligation.

There is, however, a possible exception – though here we are on contentious ground. If an international humanitarian conference were to adopt a unanimous (or perhaps even a *nearly* unanimous) resolution, and it was clear from the content and context that those voting for it did not regard this as the mere expression of a pious hope, but a formal expression of their position as to the customary law in question, there is

no reason of principle or theory why that should not count. Ideally, it should be backed up by more concrete action, but I am not sure that this is indispensable. I might perhaps add, on the one hand, that the International Law Association was persuaded, though not without controversy, to endorse such an approach to the resolutions of international organizations and conferences; and, on the other hand, that such a combination of unanimity and a clear intention to make new customary law is likely to be a very rare occurrence indeed.

- (d) Finally, I should mention the problem of how to interpret abstentions. There may be particular types of violence or weaponry that States simply have not resorted to, even if there is no treaty prohibition. Abstaining from using nuclear weapons is one example. Can we deduce from this widespread practice of abstention the existence of a customary prohibition? In the *Nuclear Weapons* advisory opinion, a majority of the International Court said "no". But it was not because it is inherently impossible to for a customary rule to grow out of

abstentions. It is just that they are, on their face, ambiguous: a State might fail to use a weapon or means of warfare because it fears reciprocation, or unforeseen effects on its own forces, or political revulsion from the public, etc. – not necessarily for *legal* reasons. It is here that the subjective element can have a useful part to play. For only if there is evidence that the States concerned refrained from the conduct out of some sense of legal obligation, or at any rate out of a sense that they were setting a legal precedent, can we say that the conduct counts towards the creation or identification of a customary rule. On the facts of the *Nuclear Weapons* case, it was clear that several important nuclear weapon States did not consider that they were under an obligation to abstain – in fact they had, to coin a phrase, an *opinio non juris*: they made it clear that they did *not* accept that they were under a legal obligation to abstain from using them, even in self-defence. In the case of other topics, again one would have to examine the evidence and it would be unsafe without more to assume that a failure to use a weapon or to engage in a particular type of conduct

not specifically prohibited could *ipso facto* give rise to a customary law obligation to abstain.

These, then, are some of the methodological considerations which I hope might be helpful in considering, for the remainder of this conference, the substantive rules discussed in these very significant volumes.

Thank you.