(3) Geneva Convention relative to the Treatment of Prisoners of War (Convention III) of 12 August 1949,

(4) Geneva Convention relative to the Protection of Civilian Persons in Time of War (Convention IV) of 12 August 1949;

(5) Protocol Additional to the Geneva Convention of 12 August 1949, relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977;

(6) Protocol Additional to the Geneva Convention of 12 August 1949, and relating to the Protection of Victims of Non-international Armed Conflicts (Protocol II) of 8 June 1977;

(7) Declaration Renouncing the use, in Time of War, of Explosive Projectiles under 400 Grams Weight, St Petersburg, 29 November/11 December 1868;

(8) Declaration concerning Expanding Bullets ('dum-dum bullets), The Hague, 29 July 1899;

(9) Convention (iv) respecting the Laws and Customs of War on Land and annexed Regulations on the Laws and Customs of War on land, The Hague, 18 October 1907.

(10) Protocol for the Prohibition of the use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare, Geneva, 17 June 1925

(11) Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948.

(12) Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 14 May 1954.

(13) Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxic Weapons and on their Destruction, 10 April 1972.

(14) Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques, 10 December 1976.

(15) Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, 10 October 1980.

(16) Protocol on Non-Detectable Fragments (Protocol I).

(17) Protocol on Prohibitions or Restrictions on the Use of Mines, Booby Traps and other Devices (Protocol II).

(18) Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III).

By 30 April 1996, the Geneva Conventions of 1949[6] were binding for 186 States, i.e. virtually the entire international community. Their additional Protocol of 1977 had also been widely accepted, with 144 States party to protocol I[7] and 136 States party to Protocol II [8] In addition, 36 States were bound by the 1980 Convention on Prohibitions

[6] 40 Member States of the AALCC are parties to the 1949 Geneva Conventions: Bangladesh, Botswana, China, Cyprus, Egypt, Gambia, Ghana, India, Indonesia, I.R. of Iran, Iraq, Japan, Jordan, Kenya, D.P.R. Korea, Rep. of Korea, Kuwait, Libya, Malaysia, Mauritius, Mongolia, Myanmar, Nepal, Nigeria, Oman, Pakistan, Philippines, Qatar, Saudi Arabia, Senegal, Sierra Leone, Singapore, Sri Lanka, Sudan, Syria, Thailand, Turkey, Uganda, U.A.E. & Yemen.

[7] 24 Member States of the AALCC are parties to Protocol I of 1977: Bangladesh, Botswana, China, Cyprus, Egypt, Gambia, Ghana, Jordan, D.P.R. Korea, Rep. of Korea, Kuwait, Libya, Mauritius, Mongolia, Nigeria, Oman, Qatar, Saudi Arabia, Senegal Sierra Leone, Syria, Uganda, U.A.E. & Yemen.

[8] 19 Member States of the AALCC are parties to Protocol III of 1977: Bangladesh, Botswana, China, Cyprus, Egypt, Gambia, Ghana, Jordan, D.P.R. Korea, Rep. of Korea, Kuwait, Libya, Mauritius, Mongolia, Nigeria, Oman, Philippines, Senegal Sierra Leone, Uganda & U.A.E.

or Restfictions on the Use of Certain Conventional Weapons, while 82 States had ratified the 1954 Convention for the Protection of Cultural Property.

Customary Law

Humanitarian law does not consist only of written rules which in their turn have been codified. The rules of international customary law also play an important role. Some of them set forth absolute obligations which are binding on all States (jus cogens). In this context, it may be noticed that the entire content of common Article 3, which is called the 'humanitarian convention in miniature', is now to be regarded as part of customary law since 'it reflects elementary considerations of humanity and constitutes the minimum yardstick for all kinds of armed conflict, whether international or noninternational'. Article 3 calls on the parties to a civil war to conclude special agreements making all or part of the provisions applying to international conflicts applicable to that civil war. Article 3 also enables the International Committee of the Red Cross (ICRC) to play a role in internal armed conflicts, since it authorises an impartial humanitarian body to offer its services to the parties.

Grave Breaches of the Geneva Conventions

All the Geneva Conventions contain a provision defining the notion of grave breaches, similar in scope each one of the conventions,[9] lists the following acts as follows : wilful killing; torture or inhuman treatment, including biological experiments; injury to body or health; extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; compelling a prisoner of war or other protected person to Serve in the forces of the hostile Power; wilfully depriving a prisoner of war or other protected

[9] Articles 50 of the First Convention, Article 51 of the Second Convention, Article 130 of the Third Convention and Article 147 of the Fourth Convention.

person of the rights of fair and regular trial prescribed in the third and Fourth Convention; unlawful deportation or transfer of a protected person; unlawful confinement of a protected person; and taking of hostages.

Additional Protocol 1 has considerably expanded the category of crimes that are considered to be 'grave breaches' under the Geneva Conventions, this category only includes infringements of the 'law of Geneva', i e. the provisions of the protection of those who do not (or do not any longer) take part in hostilities, including wounded and sick, prisoners of war and protected civilians. Protocol 1 not only adds new grave breaches of this category[10] but also introduces a new category of grave breaches, namely, the violations of the rules that regulate the conduct of hostilities as such.

The following examples from a long list ofnew grave breaches contained in paragraphs 3 and 4 of Article 85 of Protocol 1 are,in this regard, illustrative : making the civilian population or individual civilians the object of an attack; launching an indiscriminate attack; making non-defended localities and demilitarized zones the object of an attack; making a person the object of an attack, knowing that he is hors-de-combat; the perfidious use of the Red Cross emblem; the transplantation by the Occupying Power of parts of its own civilian population into the territory it occupies; and the unjustifiable delay in the return of prisoners; and making recognized historical monuments, works of art or places of worship, which constitute the cultural or spiritual heritage of peoples, the object of an attack.

It is now generally accepted that the protection of human rights standards and the protection of humanitarian norms are not separate efforts but joint and concerted goals and concerns. It is of prime importance that there should be better observance of humanitarian norms. It may be recalled that Article 3 of the Geneva Conventions constitutes a minimum standard containing fundamental rules of humanity which

[10] Article 85(2), eg protecting the physical or mental health and integrity of persons in the power of the adverse party by prohibiting, *inter alia*, physical mutilations and medical or scientific experiment and extending the applicable Scope of the grave breaches under the 1949 Conventions to new categories of protected persons.

should be restated and reenforced. So, the basic human rights fundamental rules of humanity which should be restated and reenforced. So, the basic human rights and humanitarian standards must be observed in order to meet the challenges facing the international community.

The Report of the Independent Commission on International Humanitarian Issues stated in this regard that :

> "States have undertaken not only to observe humanitarian norms but also, more importantly, to ensure their implementation and, thus, in the face of serious breaches, to act individually or collectively. This kind of collective control could be effective if it were used more frequently. It is in the interest of States (and of all others concerned) to combine political and humanitarian concepts. Far form being incompatible they condition and complement one another."[11]

(i) National Measures to Implement International Humanitarian Law

The Legal status of the obligation to implement binding instruments of humanitarian law leaves no doubt of its unequivocal and strongly imperative nature. The respective general rules of the Geneva Conventions and Additional Protocols spell out the implementation duties of the States Parties to undertake 'to respect and to ensure respect for these instruments 'in all circumstances', and consequently to take 'withthout delay ... all necessary measures for their execution, including 'orders and instructions' to be issued for ensuring their observance and supervision of their execution. The adoption of adequate national legislation and other regulations to implement international humanitarian law forms just part of these categorical executive obligations. However there is practical evidence that in a majority of States Parties the degree of conformity of the existing national legislation implementing international humanitarian law is unsatisfactory.

[11] Winning the Human Race? Report of the Independent Commission on International Humanitarian Issues, 75 (1988).

Resolution V on 'National Measures to Implement International Humanitarian Law,' which deals with a supervisory mechanism for national legislative implementation of international humanitarian law, which may be regarded as a necessary remedial measure undertaken by the International Red cross to meet this disagreeable situation, was adopted by the XXV International Conference of the Red Cross.[12] Under this Resolution V, ICRC received a wide mandate for arrangement of national reporting with an international procedure for regular assessment of legislative information.

The main objective of Resolution V is to assign a mandate to ICRC with respect to arranging a flexible reporting mechanism Resolution V starts with reminding the Governments of States Parties to the Geneva Conventions and, as the case may be, to the Additional Protocols about their contractual obligations. Then, in paragraph 1, which is a rewarded version of Article 84 of Additional Protocol 1, Resolution V urges the Governments... to fulfil entirely their obligation to adopt or supplement the relevant national legislation, as well as to inform one another, as stated above, of the measures taken or wider consideration for this purpose, and reminds the States Parties of their valid obligations. Paragraph 2 invites "National Societies to assist and co-operate with their own governments in fulfilling their obligation in this respect." Paragraph 3 appeals to 'Governments and National Societies to give the ICRC their full support and the information to enable it to follow up the progress achieved in legislative and other measures for the implementation of international humanitarian law.' Paragraph 4 of Resolution V requests the ICRC to gather and assess the said information and to report regularly to the International Conferences of the Red Cross and Red Crescent on the follow up to the present Resolution. Paragraphs 3 and 4, which constitute the core of Resolution V, are sufficiently clear and consistent and can be regarded as a procedural framework for a reporting mechanism according to the original concept of the initiators of Resolution V.

It must, however, be remembered that it cannot yet be claimed that much is known about the national implementation of international

[12] Geneva, 31 October 1986.

humanitarian law, the process of this law having so far not received much attention, say, from lawyers, political scientists or sociologists. The various obstacles to the adoption of appropriate measures in this respect might be, for instance, lack of awareness, lack of high degree expertise both in legislative draftsmanship or knowledge of the international legal problems involved. Lack of awareness may be remedied by spreading this awareness among those whose task it would be to take the relevant steps for implementation. The lack of knowhow, or legal expertise, can be overcome by adequate means of assistance, both in terms of financial and intellectual resources. The diplomatic efforts of ICRC to persuade relevant participants to do something are necessary also for these specific tasks.

In this connection, it will be useful to refer to the debates at the Bad Homburg Colloquium [13] which were extremely rich and useful. In the conclusions drawn by the Chairman, it was stated thus :[14]

> "Humanitarian Law has so far mainly been seen from an international perspective, taking into account the international process by which this law has been made, its practical application in relations between States, the involvement of international institutions such as ICRC, and the analysis and explanation of these international rules by academic writers.

The colloquium held at Bad Homburg has helped to put into focus another diamension of humanitarian law which to a large extent has so far escaped the attention of both practioners and theoreticians, and that is the comparative dimension. The way in which humanitarian law is applied is to a large extent determined by national means of implementation. Violations of this law are sanctioned according to national criminal law and disciplinary codes. The Status of a combatant, noncombatant or civilian cannot be determined without some kind of

[13] See National Implementation of International Humanitarian Law (Proceedings of an International Colloquium held at Bad Homburg, June 17-19-1988). Edited by Michael Bthe in Co-operation with Thomas Kurziden and Peter Macalister - Smith.
[14] Ibid, at pages 272-273.

reference to national law. Personal institutions and equipment enjoying special protection because they serve specific functions, such as the medical and civil defence, acquire such protective status only by virtue of some State act governed by State Law. Moreover, the international rules have to be translated into practical guidelines for national actors. It is comparative analysis of the national measures of implemeotation which reveals the significance of humanitarian law in reality and in practice.

There is thus a great need for comparative analysis, with all practical and theoretical difficulties involved in that task longway barriers have to be overcome. A meaningful comparative analysis must have regard both to the impact of a specific historical precondition for national measures taken or not taken, and to the common elements which are to be found in national solutions to the problems of implementation of international humanitarian law.

The Bad Homburg Colloquium may indeed have pointed out the direction in which future work at the practical and theoretical levels could usefully be directed in this respect - but a long journey still lies ahead.

Nexues between International Ad-Hoc Tribunals, International Criminal Court and Humanitarian law

For half a century, the Nuremberg and Tokyo trials and national prosecutions of World War II cases remained the major instances of criminal prosecution of offenders against fundamental norms of international humanitarian law. The heinous activities of the Pol Pot regime in Cambodia and the use of poison gas against a certain population are among the many atrocities left unpunished by either international or national courts.

Recent atrocities in the former Yugoslavia and Rwanda shocked the conscience of people everywhere, triggering, within a short span of time, several major legal developments including the establishment, by the Security Council acting under Chapter VII of the United Nations Charter, of the Statutes of the International Criminal Tribunals for the

former Yugoslavia and Rwanda, and the adoption by the International Law Commission of a treaty-based statute for an International Criminal Court. These developments warrant a fresh examination of the present state and future direction of the criminal aspects of international humanitarian law applicable to non- international armed conflicts - that occur with far greater frequency than international armed conflicts.[15]

A Tribunal for the prosecution of persons responsible for serious violations of international humanitarian law in the territory of former Yugoslavia was established by Security Council Resolution 808 of 22 February 1993. The Security Council demanded that all parties to the Yugoslav conflict comply with international humanitarian law, and threatened to take measures against those who did not comply.

The structure of the tribunal that the Security Council endorsed, provided for two trial chambers, an appellate chamber, a Prosecutor and a Registry. The subject matter jurisdiction of the Yugoslav Tribunal is war crimes: grave breaches of the Geneva Conventions of 1949; violation of the laws and customs of war; crimes against humanity; and genocide.

The Yugoslav Tribunal was not only based on the precedents set by Nuremberg and the customary law and the conventional law that followed, but went beyond the Nuremburg tribunal. While the Nuremburg tribunal allowed the victors to try the vanquished, the Yugoslav Tribunal allowed the international community to try individuals who commit crimes. In that respect it is a major step forward.

Whatever the practical achievements of the international tribunals for Yugoslavia may prove to be, the United Nations Security Council has established the first truly international criminal tribunal for the prosecution of persons responsible for serious violations of international humanitarian law. Its creation foreshadows at least some deterrence to future violations and gives a new lease of life to that part of international criminal law which applies to violations of humanitarian law.

[15] Theodor Meron International criminalization of internal atrocities, 89 AJIL 555 1995

Soon after, the tragic events in Rwanda horrified everyone. The response to the wide spread atrocities was to create an ad hoc Tribunal to deal with the situation. The Security Council by resolution 955 of 8 November 1994 established an international tribunal for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighboring States.

The establishment of an International Criminal Court thus assumes importance: "when you create a permanent institution of a global nature, it is not a decision for each state to try "them". It is a decision for each state to try "us", to subject its people to this institution. And thats a major step forward. Nuremberg was one step. The Yugoslav Tribunal was another step. A permanent standing International criminal Court would be a further significant step" (Robert B. Rosenstock)

The 26th International Red Cross and Red Crescent Conference held in Geneva in December 1995 identified implementation as one of the key challenges facing international humanitarian law and emphasized the need for measures to be taken at the international and national level. It is in this context that the efforts to establish international tribunals, for instance, to punish violations of international humanitarian law in the former Yugoslavia and Rwanda, and the proposals for the establishment of an International Criminal Court must be seen.

Efforts towards the establishment of an International Criminal Jurisdiction

The forerunner of an international criminal jurisdiction was the Nuremberg War Crimes Tribunal, set up after the Second World War.[16] The General Assembly taking note of the Charter of the Tribunal and the Judgements, asked the International Law Commission (hereinafter the Commission), to formulate the principles of international law and to

[16] See, The Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, along with the London Charter, which established the International Military Tribunal 8 August, 1945, 82 U.N.T.S. pp 279-284.

prepare a draft Code of Crimes against the Peace and Security of Mankind.[17] Accordingly, having adopted the formulation Principles of International Law recognized in the Charter of the Tribunal[18] and also having finalized the draft Code, the Commission placed it before the General Assembly.[19] The General Assembly, however, decided to postpone the consideration of the draft Code, as it raised various problems relating to the 'Definition of Aggression' which was being considered by a Special Committee.[20] It was only after "Definition of Aggression"[21] and the finalization of the draft Code of Crimes, were adopted by the General Assembly[22] that the move towards an International Criminal Court,[23] gathered momentum.

The most recent effort to establish an International Criminal Court (hereinafter ICC), began in 1990,[24] when upon an initiative taken by Trinidad and Tobago, the General Assembly asked the Commission to further consider and analyse within the formulations of the draft Code, the issues relating to an international criminal jurisdiction, paying particular attention to the proposals for the establishment of an ICC or other trial mechanism Thereupon, the Working Group set up by the Commission recommended that (a) the proposed Court, to be established by a multilateral treaty, be a temporary body ; (b) the Court shall have jurisdiction over private persons only; (c) the Court's jurisdiction shall be limited to crimes 'international in nature'; (d) the envisaged Court should not have compulsory jurisdiction; and (e) the Court must be

[17] General Assembly resolution 177(II) of 21 November 1947.

[18] Year book of the International law Commission, 1950 vol.II pp.374-378.

[19] Year book of the international Law Commission 1954 vol.II pp.150-152.

[20] General Assembly resolution 2330 (XXI) of 18 December 1967.

[21] General Assembly Resolution 3314 (XXXIX) of 14 December 1967.

[22] General Assembly Resolution 46/54 of 9 December 1991.

[23] For early efforts towards an international criminal court see; Quincy Wright, "Proposal for an International Criminal Court", American Journal of International Law, vol. 46(1952).

[24] See M. Cherif Bassiouni and L. Blakesley, "The Need for an International Criminal Court in the New International World Order", Vanderbilt Journal of Transnational Law, vol.25 (1992) pp. 151-158.

impartial independent and guarantee the process of law. The Commission reconstituted another two Working Groups in 1993 and 1994, who after prolonged deliberations and a thorough examination, prepared a consolidated text of sixty articles which were divided into eight main parts: Part 1 on Establishment; Part 2 on Composition and Administration; Part 3 on the Jurisdictional aspects; Part 4 on Investigation and Prosecution; Part 5 on Trial Mechanism Part 6 on Appeal and Review; Part 7 on International Cooperation and Judicial Assistance; and Part 8 on Enforcement of Sentences.[25]

ILC Draft Statute[26]

The draft Statute of the ICC, was commendable and a unique effort, as it incorporated elements from different legal systems, existing treaties, earlier proposals for international tribunals and relevant provisions of national criminal justice systems.[27]

The preamble of the draft Statute while providing the underlying philosophy of the ICC, purports to strengthen international co-operation for suppression and prosecution of offenders for "international" crimes. The proposed Court shall be complimentary to national justice systems and shall prosecute only those offenses, where trial procedures are missing or are ineffective. The envisaged ICC shall have three main administrative-cum-judicial organs: the President performing judicial functions, the Procuracy, incharge of investigation and prosecution, and the Registry to serve as the principal administrative organ of the ICC. The draft Statute provides for jurisdiction wherein, the said crime is international in nature and the substantive jurisdiction of the Court is accepted. There is a clear classification of jurisdiction based on: *rationae materiae* (subject matter), *rationae personae* (person) and *rationae temporis* (time).

[25] Revised Report on the draft statute for an ICC, Doc. No. A/CN.4/490, 19 July 1993 and A/CN.4.491, 17 June 1994.

[26] For Text of ILC Draft Statute see 'Annexure A' at the end of the Study.

[27] For an excellent narrative on the draft Statute see Dr. P.S.Rao, "Trends in International Criminal Jurisdiction", Indian Journal of International Law, vol.89(1998S) pp. 17-31; James Crawford, "The ILC adopts A DRAFT Statute for an International Criminal Court", American Journal of International Law, vol.89, 1995, pp.404-416.

The draft Statute also makes detailed provisions for investigation and prosecution of offenders; the trial procedure based oil the well established maxim of nullum crimen sine lege (no crime, without a law), appeal and review, international cooperation and judicial assistance and enforcement and sentences. Most of these provisions are present in municipal legal systems which offer fair trial based on well established canons of criminal jurisprudence.

Role of the International Community to re-draft the Statute on ICC

The draft Statute for the establishment of an ICC ws considered by the Sixth Committee during the forty-ninth Session of the General Assembly. During the debate the delegates while commanding the work of the ILC sought further clarification on a number of issues and felt that certain key issues like the establishment of the ICC and its role in the UN system the principle of complementarily and applicable law needed a detailed consideration. Accordingly, the Sixth Committee constituted an Ad Hoc Committee which was open to all States, Members of the United Nations or Members of specialized agencies to review the major substantive and administrative issues arising out of the draft Statute for an ICC.

Ad Hoc Committee

The Ad hoc Committee on the Establishment of an ICC met at the United Nations Headquarters from 3 to 13 April and 14 to 25 August 1995. Some of the main issues considered by the Committee were the : (i) establishment and composition of the Court; (ii) principle of complementarity; (iii) jurisdiction and applicable law; and (iv) financing of the Court.

There was a general consensus that the ICC, to ensure universality and wider acceptance, must be established by a treaty. Proponents of this mode argued, that a Security Council or General Assembly resolution to establish the ICC, would compromise the independence and status of the proposed Court.

The principle of complementarity, the 'core' on which an international criminal justice system will be based was debated at length. A definite trend emerged towards a presumption for national justice system as the principle was very abstract and novel in nature. Except the case of genocide, which most member States felt reflected customary international law, other crimes still faced definitional ambiguities. Could the definition of aggression, clearly an 'aggression by a State be the basis for individual criminal responsibility? By what criteria could a 'serious violation of law' be distinguished from a "grave breach"? Which crimes fell within the ambit of crimes against humanity? Many such issues remained unanswered and hence a need was felt for further study and consideration.

An envisaged Court must adhere to the "international rule of law" maxims of "nullum crime sine lege and "nullum poena sine lege". There was unanimity on this issue that there can-neither be a crime nor a punishment, unless there is a law, which so declares. The Committee debates also reflected strong views on the role of the Security Council in the proposed international criminal justice system. Not all member States were appreciative of the Security Council role in establishing Ad Hoc Tribunals in the former Yugoslavia and Rwanda. A time bound tribunal created by a Security Council resolution, fell short of constitutional propriety and well defined procedures.

An appraisal of the Ad hoc Committee debates show the following trend (i) in the comity of nations, there is a constant reminder that sovereignty entails a right to establish an independent legal system, (ii) political unwillingness to experiment with a new international criminal justice system without jurisprudential precedents, is legitimate and hence created a presumption in favour of national justice system; (iii) to promote wider acceptance of the proposed Court, the Court must be seen to strengthen international law, upholding the highest moral traditions and independence; (iv) there was consensus that considerable progress had been made on key issues such as complementarity, jurisdictional law and judicial co-operation. But further work needed to be undertaken.