



**Keynote Speech delivered by H.E. Prof. Dr. Rahmat Mohamad,
Secretary General, AALCO, at the Regional Conference on International
Humanitarian Law in East and Southeast Asia, Kuala Lumpur, Malaysia,
25-27 March 2015**

His Excellencies, Distinguished guests, Ladies and Gentlemen,

I am deeply honored to deliver this keynote speech at this very important forum. At the outset, I would like to thank the International Committee of the Red Cross (ICRC) and the Ministry of Foreign Affairs of Malaysia for inviting me to participate in this conference. I am certain that that the outcome of the deliberations herein would immensely contribute to the current debates on International Humanitarian Law (IHL) and its practice.

Given the escalation of internal armed conflicts across the globe, this conference themed on strengthening IHL on East and Southeast Asia is timely and highly relevant. Also, non-state armed groups like ISIS are reportedly gaining foothold in different regions spanning continents and are increasingly becoming a serious threat to international peace and security. The respect for rules of war during armed conflict is an imperative and I strongly believe that a regional approach to the enforcement of IHL is the best way forward to realize this goal. The proximity of regional arrangements to events involving violations of IHL will help to ensure timely action is taken and to lower the cost involved in bringing perpetrators to justice. Such arrangements are better placed to make full and effective use of local knowledge and expertise in pursuing investigations and

prosecutions. Their permanent presence will contribute to a more holistic approach to the enforcement of IHL.

Even though it has not ridden itself completely from sources of conflicts and tension, Southeast Asia has enjoyed a rather long period of peace and stability. ASEAN has played a pivotal role in shaping and contributing to regional security. Hence ASEAN would naturally serve as the platform of choice for any substantive deliberation on the enforcement on IHL in the region. The ASEAN Regional Forum (ARF) serves as a good platform to conduct discussions on the feasibility of a regional mechanism for the enforcement of IHL. ARF remains the most important security dialogue framework in Asia since its creation in 1994. As a forum for security dialogue, ASEAN envisioned the ARF to ultimately address *inter alia* approaches to conflict resolution too. Understandably, this is a sensitive issue to many in the region as it is perceived to undermine the norm of noninterference and respect for state sovereignty. Hence any discussions on a regional arrangement to implement IHL norms should take into consideration sensitivities of the Member states.

Ladies and Gentlemen, in this speech I would like to touch upon the following issues that are currently debated in international forums and is expected to have a huge influence on the future of IHL. **Firstly**, I will talk about the proliferation of non-state actors and how their presence and actions pose new challenges to IHL. Predominant among non-state actors are groups that propagate violent extremism and terrorism (like ISIS, Al Qaeda and Boko Haram) and private military contractors. **Secondly**, I will deal with cyber warfare and role of IHL in the conduct of state and non-state actors in such engagements. **Thirdly**, I will talk about the increased use of drone technology and its implications on IHL. **Fourthly**, the relevance of Arms Trade Treaty in ensuring greater respect for IHL will be highlighted. **Finally**, before concluding, I will talk about the ICRC-

Swiss initiative to ensure compliance with IHL and their engagements with AALCO in this regard.

Ladies and gentlemen, in the 17th century, Grotius spoke about *temperamenta ac belli* (humane moderation during war). But Indian and Chinese civilizations have discoursed on the issue some five thousand years ago. That rules of interstate conduct were found in ancient civilizations has come to be accepted in recent times. For instance, the multicultural roots of the laws of war were revealed by judge Weeramantry in his famous dissenting opinion in the Advisory Opinion on Legality of Nuclear Weapons case (1996). That the fundamental tenets of humanitarian law are ensconced in the cumulative wisdom of all human civilizations—occidental or oriental, is beyond contention. All that the Battle of Solferino of 1859 and Red Cross movement have done in prompting such a widespread compassionate response has principally been to revive, intensify, build upon and sustain, on a continuous basis, those traditional precepts.

Ancient Greek mythology talks about two different gods of war — the wise and insightful goddess Athena and the bloodthirsty, unrestrained god Ares. Athena represents all those virtues modern IHL espouses and Ares in her antithesis. Judge Nagendra Singh quotes a stanza from the ancient India epic *Mahabharata* highlighting the restraint shown by Arjuna who refrained from using the *Paasupastra* (a “hyperdestructive” weapon granted to him by Lord Shiva, the god of destruction), because warfare then was restricted to conventional weapons. Such use of unconventional weapons “was not even moral, let alone in conformity with religion or the recognized laws of warfare”.¹ Similarly, looking back over Chinese history, it is easy to find many successful rulers and

¹ NAGENDRA SINGH, *INDIA AND INTERNATIONAL LAW* 6 (1969).

strategists who liked to cultivate “virtue” and considered that not only military strength but also humanity and morality were decisive factors in winning a war.²

Ladies and Gentlemen, virtues associated with combat, exemplified in the Greek and Indian myths, are universally concretized overtime. Modern states are obligated to emulate these virtues through custom and treaty in international law. Yet the gap between precepts and practice is widening. The international armed conflict in Libya in 2011 amply demonstrated this point. During the conflict between NATO forces aligned with rebels on the one side and pro-Gaddafi forces on the other, both sides reportedly violated human rights and humanitarian laws on a large scale. The alleged violations include rape, extrajudicial killings, ethnic cleansing and bombings of civilians. It is an irony that the UN sanctioned NATO intervention was ostensibly to protect Libyans from the atrocities of the tyrannical regime of Col. Gaddafi. The legitimacy of the non-state actors NATO aligned with is also questionable in international law.

1. Non-state Actors and Violent Extremism

The proliferation of non-state actors and internal armed conflicts, especially in the Middle East and Africa, sets new hurdles for IHL. It is oft-repeated in humanitarian legal discourses that fundamental norms of IHL are binding on non-state actors too. This idea is supported by the “principle of legislative jurisdiction”, pursuant to which the agreements which a State enters into are automatically binding on all (non-state) actors within its jurisdiction. However, the apparent redundancy of consent is the main flaw of this theory. Deconstructing the State by submitting that State governments can bind the

² He Xiaodong, *The Chinese Humanitarian Heritage and the Dissemination of and Education in International Humanitarian Law in the Chinese People's Liberation Army*, INT'L R. RED CROSS (2001), available at <<https://www.icrc.org/eng/resources/documents/misc/57jqyz.htm>>

people because they represent the people only takes us so far. In reality, there are no groups that feel less represented by the State than armed opposition groups. These groups often are not convinced about the inherent legitimacy, substantive and procedural, of IHL, to prompt them to adhere to its fundamental rules and engage in acts of violence with legal impunity.

Violent extremism, now a popular term in the international discourse, propagated and practiced by non-state groups is particularly worrisome. These non-state extremist groups appear to be quintessential corporeal manifestations of Ares— unleashing indiscriminate violence and cruelty on innocent people. The world bears witness to the newest form of their atrocities eschewing borders and authority; finding refuge and support in fragile states, in vulnerable communities and among the disenfranchised.

Violent extremism, in its most grotesque forms, dovetails with inhuman and barbaric cruelty and intolerance and blatantly disregards human rights of civilian populations. Chilling accounts of brutality from Iraq, Syria and its neighboring regions and Nigeria are the most recent instances. Abductions, enslavement of minority populations, arbitrary executions, cold-blooded massacres and acts of terrorism committed with impunity in a state of anarchy are antithesis to the much cherished ideals and values of modern civilizations. These acts patently violate fundamental tenets of IHL. True that Common Article 3 of Geneva Conventions squarely mandates non-state actors to treat civilians and those placed 'hors de combat' humanely and prohibits cruel treatment and torture under any circumstances. However, non-compliance and lack of established mechanisms to hold them accountable invalidates its purpose and spirit.

The legal concerns associated with violent extremism prominently feature in the agenda of AALCO. AALCO Member States have deliberated on the legal aspects of violent extremism in our previous Annual Session at Tehran. In the upcoming Annual Session in April 2015 at Beijing, Member States are expected to consider

adoption of a set of “Asian-African Guidelines” detailing their duties and obligations in pursuance of effectively thwarting this menace. Naturally, fundamental precepts of IHL relevant to the issue will be deliberated in the process.

2. Privatization of Armed Conflict

Privatization of armed conflict is another serious concern to ponder upon. The integration of private contractors in military-related activities at national and international levels has increased exponentially over the last two decades. The implications of this proliferation of private security and military companies for international humanitarian law and human rights are only beginning to be appreciated. The lack of clarity in their status in international law and the exact nature of their work is a serious impediment in holding them accountable under international law. There exists a broad legal framework for the inclusion of private military companies in UN Peacekeeping forces in legal instruments such as the Convention on the Privileges and Immunities of the United Nations and the Convention on the Safety of United Nations and Associated personnel. Their scope is, however, limited. The proliferation of operations by private military companies necessitates specialized rules to prevent any ambiguity in the classification of the rights and responsibilities of such entities.

3. Cyberspace and IHL

Furthermore, the emergence of cyberspace as the “fifth domain” of war poses a set of novel challenges to IHL. In the 2014 Annual Session of AALCO, this concern *inter alia* was stressed upon by China and Iran in their statements. No doubt, IHL applies to state and non-state activities in all domains during times of war— and cyberspace is no exception. This is affirmed in the Tallinn Manual (Tallinn Manual on International Law Applicable to Cyber Warfare), which is the

result of a recent NATO-commissioned study. In fact, its two chapters (chapters IV and V) exclusively deal with the application of IHL to cyber warfare. The Manual recognizes that cyber operations alone may constitute armed conflicts depending on the circumstances – notably on the destructive effects of such operations. But cyberspace is a transnational virtual structure without defined boundaries and implementation of international law remains problematic.

4. Drone Technology—Implications on IHL

Similarly, the use of Unmanned Aerial Vehicles (UAVs) in armed conflicts has increased significantly in recent years raising several humanitarian concerns. Owing to the recent advancements in technology, many developed states, especially the United States, have been deploying drones that are remotely controlled. The enemy can be neutralized or destroyed with the use of a cluster of computers which could be located far away from the battlefield. This strategy of fighting war is not only cost effective but also saves the many lives which are endangered if they are deployed on the battlefield. Advocates of the use of drones argue that they have made attacks more precise and that this has resulted in fewer casualties and less destruction. But it has also been asserted that drone attacks have erroneously killed or injured civilians on too many occasions.

It is important to note that although the operators of remote-controlled weapons systems such as drones may be far from the battlefield, they still run the weapon system, identify the target and fire the missiles. They generally operate under responsible command; therefore, under international humanitarian law, drone operators and their chain of command are accountable for what happens. The fact of their being thousands of kilometres away from the battlefield does not absolve drone operators and their chain of command of their responsibilities, which include upholding the principles of distinction and proportionality, and

taking all necessary precautions in attack. Drone operators are thus no different than the pilots of manned aircraft such as helicopters or other combat aircraft as far as their obligation to comply with international humanitarian law is concerned, and they are no different as far as being targetable under the rules of IHL. The recently released UN Special Rapporteur's Final Report on drone strikes highlights the unacceptable levels of civilian casualties and makes recommendations to the Human Rights Council aimed at clarifying and promoting compliance with the relevant principles of international law, including international humanitarian and human rights law.³ There is no specific weapons treaty that addresses the legal concerns posed by the proliferation of drone or UAV technology. The Arms Trade Treaty (ATT), which has recently come into force, also does not expressly cover "unmanned" weapons.

5. Arms Trade Treaty

The interface IHL and ATT is one of the major discussing points of this conference. Every day, millions of people suffer from the direct and indirect consequences of the irresponsible arms trade: thousands are killed, others are injured, many are raped, and forced to flee from their homes, while many others have to live under constant threat of weapons. The poorly regulated global trade in conventional arms and ammunition fuels conflict, poverty and human rights abuses. The problems are compounded by the increasing globalization of the arms trade – components being sourced from across the world, and production and assembly in different countries, sometimes with little controls. Domestic regulation of the arms trade has failed to adapt to these changes. While existing national and regional controls are important, these are not enough to stop irresponsible transfers of arms and ammunition between countries.

³Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson, < <http://justsecurity.org/wp-content/uploads/2014/02/Special-Rapporteur-Rapporteur-Emmerson-Drones-2014.pdf>>

These humanitarian concerns are reflected in many provisions of the ATT. The preamble recognizes the consequences, in humanitarian terms, of the illicit and unregulated trade in conventional arms, as well as the fact that the vast majority of persons adversely affected by armed conflict and other forms of armed violence are civilians. It acknowledges the challenges that victims typically face and their need for care, physical rehabilitation and social and economic inclusion. A critical element in the treaty is the explicit recognition of each State's duty, notably under the 1949 Geneva Conventions, to respect and ensure respect for international humanitarian law. It is worth noting that the treaty iterates a similar principle: respecting and ensuring respect for human rights. All these affirmations support the treaty's express purpose: to reduce human suffering.

After more than 10 years of campaigning, the first international Arms Trade Treaty has now become a reality and 61 States have signed and ratified it. However, it is a matter of concern for us that only a few Member States of AALCO have signed and ratified ATT. They include Japan, South Africa, Nigeria, Sierra Leone and Senegal. Many Member States are yet to sign the Treaty. Many of them have voiced their concerns about the implications of the treaty on their sovereignty. Some Member States like Pakistan has repeatedly pointed out that the Treaty seeks to address only the transfer of weapons and not its development, production and deployment and this is internationally inequitable against States that do not produce such armaments.⁴ India is of the opinion that that the text of the treaty is silent about prohibitions on terrorism and non-state actors. India also feels that the Treaty may be used as an instrument in the hands of exporting states to take unilateral force majeure measures against importing states parties without consequences.⁵

⁴ See The Statement by Pakistan at the UN Diplomatic Conference on Arms Trade Treaty 9 July 2012, available at

<http://www.un.org/disarmament/ATT/statements/docs/20120709/20120709_Pakistan_E.pdf>

⁵ See Why India abstained on Arms Trade Treaty, available at <<http://mea.gov.in/articles-in-indian-media.htm?dtl/21503/Why+India+abstained+on+Arms+Trade+Treaty>>

Further, AALCO Members, in their individual capacity, have pointed out the inadequacies of the Treaty during negotiations. One of the AALCO Member States, for instance, have pointed out that the Treaty has no explicit mention of sale of weapons to countries committing aggression. One of the Arab Member States, speaking on behalf of the Arab Group, lamented that “foreign occupation” does not find any mention in the principal provisions of the Treaty. AALCO Member States also expressed concerns that the text of the Treaty overlooked the right to self-determination, which is enshrined in the UN Charter and the International Covenant on Economic, Social and Cultural Rights (ICESCR) and International Covenant on Civil and Political Rights (ICCPR).

I personally believe, even without some of the big exporters and importers on board, the ATT still has an enormous value. It creates a new international norm for arms exports that will shape the way all states view arms exports, even those that have not signed yet. All states will be measured against the norm, and to a certain extent held to account. Consider the Landmine Treaty— this treaty has reduced casualties from landmines by more than two thirds, and reduced the trade in landmines to almost zero, despite the fact that the United States, China, India and Russia have not signed it. Implemented effectively, the international Arms Trade Treaty has the potential to promote justice, peace and security and is in the interests of all states, and those who suffer from the scourges of armed violence and conflict.

6. Compliance- ICRC and AALCO

Before concluding, I would like to say a few words about the issue of compliance of IHL. Unfortunately, the fairly evolved robust normative structure of IHL is not adequately complemented by adherence by the States on the agreed upon principles. Finding ways and means to ensure greater respect for IHL is thus one of the most pressing humanitarian challenges. Incidentally, the Geneva Conventions of 1949 are an exception among multilateral treaties in that they do

not establish a Conference of States Parties or another similar type of institutional forum, in which States can discuss the application of IHL or current and emerging challenges to compliance with it. This was recognized by States and other actors in Resolution 1 adopted at the 31st International Conference of the Red Cross and Red Crescent in late 2011. The Conference invited Switzerland and the International Committee of the Red Cross (ICRC) to identify ways and means to “enhance and ensure the effectiveness of mechanisms of compliance with IHL”. In follow-up to Resolution 1, Switzerland and the ICRC launched a joint initiative to facilitate implementation of this mandate.

In furtherance of this initiative, the ICRC is in constant touch with AALCO Secretariat to jointly explore ways to set off discussions among AALCO Member States to ensure greater respect of IHL. The Secretariat has had several interactions with the representatives of the ICRC in this regard. Even though IHL as such does not feature in the current agenda items of AALCO, AALCO Secretariat has been working on various closely related issues—the latest being the legal aspects of violent extremism and international law in cyberspace. In fact, AALCO’s relationship with the ICRC started way back in 1998 and it was formalized in 2002. Since then, the organizations have been holding several joint conferences and workshops in the areas of mutual interest.

In many of these interactions with ICRC, a critical concern of a few AALCO Member States on the usage of the term “compliance” as opposed to “implementation” was highlighted. To them, the term is judgmental. It connotes external imposition and may imply intrusion into sovereign rights of the States. They see “implementation” as more value neutral. They are concerned that a “compliance” mechanism may be employed as a pretext to justify intervention in their internal affairs. Given this apprehension, I urge that future deliberations on the subject should pay sufficient attention to this aspect. AALCO Secretariat is open to discuss this issue with the ICRC.

I sincerely hope that our joint deliberations on IHL and other related issues produce favourable outcomes encouraging the Member States of AALCO to positively consider the issue in their future deliberations. Personally, the discussions that happened in this conference so far has been very enriching and has prompted me engage in deeper reflections on IHL and its effectiveness in the Asian-African region.

Once again I thank the ICRC and the Foreign Ministry of Malaysia for inviting me. I wish you success in all your future endeavours.
