XI. SPECIAL MEETING

XI. VERBATIM RECORD OF THE SPECIAL MEETING ON 'THE RELEVANCE OF INTERNATIONAL HUMANITARIAN LAW IN TODAY'S ARMED CONFLICTS', WEDNESDAY, 18TH JUNE 2003

Amb. Dr. Wafik Z.Kamil, Secretary General: Excellencies, ladies and gentlemen Good morning to all of you. A short introduction about our chairman for today's meeting. Dr.Kak-Soo Shin is the Director General of the Treaty Bureau of the Korean Foreign Ministry and also very well known in the field of international law and in particular international humanitarian law. I am sure that under his chairmanship and guidance this special meeting will be a great success. So thank you very much.

Dr. Kak-Soo Shin: Good morning Excellencies, distinguished delegates, ladies and gentlemen. It gives me great honour and privilege to take up the role of the moderator of today's meeting. I would like to warmly welcome all of you to this Special Meeting on the Relevance of International Humanitarian Law in Today's Armed Conflict at the 42nd Session of the Asian-African Legal Consultative Organization. As you are all well aware, the subject of our today's special meeting is International Humanitarian Law. It is of considerable importance to us as the Asian-African regions are unfortunately largely exposed to armed conflict, in particular with recent advance in technology weapons are becoming more sophisticated causing growing casualties to large number of innocent civilians. I am convinced that this gathering will provide us with an invaluable opportunity to discuss these issues that confront us more urgently than ever.

Now let me introduce to you the three panelists and our special guest the Vice President of the ICRC, who, I am sure, will be making insightful presentations at today's meeting. From my left, Mr.Lavoyer, Head of the ICRC Legal Division and next to him is Judge O-Gon Kwon from the International Criminal Tribunal for the former Yugoslavia and Mr.Secretary General and from my right the Vice President of the International Committee of the Red Cross, Dr.Jacques Forster and next to him is Professor Marco Sassoli, International Law Professor at the University of Quebec a Montreal and then Deputy Secretary General of the AALCO. I believe that the panelists are amongst the most prominent scholars and practitioners in the field of international humanitarian law today.

Before starting our special meeting, I would like to explain the procedure of today's meeting. We have four sessions on the civilian aspects of international humanitarian law. Before listening to the presentation by the panelists, I will give the floor to the Secretary General of AALCO and Dr.Forster for welcoming remarks and the key note address and then we will start with the sessions and each session we will listen to the presentation for about 15 – 20 minutes and then the floor will be open for question and answer. The floor will be open not only to the delegates but also to the other participants. So in this way we will complete the whole process of today's special meeting.

I hope that today's meeting will give us good opportunity to look at the various aspects of international humanitarian law in the context of today's armed conflict. Let us begin by inviting the Secretary General of AALCO to give welcome remarks. I now give the floor to the Secretary General.

Amb. Dr. Wafik Z. Kamil, Secretary General: Mr. President, Hon'ble Ministers, Mr. Jacques Forster, Vice President of the ICRC, Excellencies, ladies and gentlemen.

I welcome all of you to today's Special Meeting on "The Relevance of International Humanitarian Law in Today's Armed Conflicts" being held in conjunction with the 42nd Session of the AALCO with the full cooperation of the International Committee of the Red Cross (ICRC). Special thanks are also due to the Government of the Republic of Korea for the excellent arrangements for the meeting. I would also like to thank, on behalf of you, the Panelists who have spared their valuable time and traveled long distances to be here with us to enlighten us on this very important topical item.

Although we have been working closely with the ICRC for many years in the past, the signing of Cooperation Agreement between our two Organizations, which happened on 17 December 2002, has formalized our cooperation and placed it on a firm footing. The primary objective of this Cooperation Agreement is to work together for the promotion and development of international humanitarian law. Therefore, today's meeting is an attempt in this direction and similar future efforts would follow which, it is hoped, may result in substantial contribution to the field of international humanitarian Law.

The theme of the Special Meeting is "The Relevance of International Humanitarian Law in Today's Armed Conflicts". Article 2 para. 4 of the United Nations Charter prohibits war except in situations where States can resort to force in the exercise of their right to self-defence. However, armed conflicts whether of international or internal character unfortunately continue to take place. This unwanted situation warrants a legal mechanism to regulate the use of force and such purpose is served by international humanitarian law under the present system of international law.

An effort initiated by Henry Dunant, who witnessed the plight of war victims in the battle of Solferino in 1859, received a general response resulting in the normative and institutional framework over a period of time. International humanitarian law as enshrined in the four Geneva Conventions of 1949 and their two Additional Protocols of 1977 remains as guiding principle in the situations of international and internal armed conflicts.

International humanitarian law governs situations of armed conflict and seeks to mitigate the effects of war. For that purpose it limits the choice of means and methods of conducting military operations and also obliges the belligerents to spare persons who do not or no longer participate in hostile actions. In effect it obligates the parties to the armed conflict not to resort to absolute war. Common Article 3 of four Geneva Conventions and Additional protocol II specifically deal with situations of internal armed

conflicts and their significance has increased manifold as the contemporary world witnesses more number of internal armed conflicts for various reasons.

It is significant to note that international humanitarian law also covers the protection of cultural property, which is covered by the 1954 Convention for the Protection of Cultural Property. This comprehensive though not exhaustive set of treaties covers a broad spectrum of issues involving armed conflict. However Humanitarian law is not just limited to treaty law alone, as large sections of Geneva Conventions have attained the status of customary law binding on States.

The guiding principle of international humanitarian law is that irrespective of legality or illegality of use of force there are certain principles, which need to be observed by the parties to an armed conflict. The underlying assumption is that an armed conflict whenever resorted to, would result in loss of life, injury and damage to the property. Therefore use of force has to be limited to only those who are consciously and actively engaged in the conflict and others should not be affected by it. Thus even if a party to the conflict has resorted to war in violation of the law governing the use of force, it in no way legitimizes the non-compliance of international humanitarian law principles by either of the parties to the conflict. Therefore, it may be said that humanitarian law is that branch of law, which regulates situations of armed conflict, which are, many a time, the result of the violation of another branch of international law.

Keeping these factors in view, it becomes imperative on the part of States and others involved in an armed conflict to comply with humanitarian law as it contains basic humanitarian standards that are the cherished values of humanity. It is these values, which place humanitarian law above other legal and policy considerations and made applicable to States as well as to non-State Parties to an armed conflict.

Today's special meeting is going to cover four important topics of contemporary relevance. The first topic on 'Conduct of Hostilities and Protection of Civilian Population' is of immense significance as the underlying value of protection of civilians is that armed conflicts should be limited to combatants and innocent civilians should not be targeted. The fourth Geneva Convention of 1949 specifically deals with the protection of civilians codifying basic standards of protection. These welfare standards have been further strengthened and extended in Additional Protocol I to the Geneva Conventions of 1949.

Recent developments in the field of international criminal law have direct relevance to the international humanitarian law, as these were the result of grave violations of humanitarian principles during armed conflicts. Establishment of special tribunals in the cases of former Yugoslavia and Rwanda and the establishment of International Criminal Court involved many jurisprudential issues apart from policy preferences. Thus, today's discussion on the topic may help in understanding the implications of these developments.

Another important recent development that forced the international community to rethink about many legal formulations is the fight against terrorism that gathered momentum after September 11 attacks. Some of the delegates attending today's meeting will recall the very enlightening special meeting on "Human Rights and Combating Terrorism" which was held in co-operation with the Office of the High Commissioner for Human Rights (OHCHR) in conjunction with the 41st session last year in Abuja. The major challenge here is with regard to the implementation of human rights and humanitarian law principles, which have evolved over a long period of time in pursuit of humanity. Therefore, today's discussion on the topic of 'International Humanitarian Law and the Fight against Terrorism' will throw a new light on the issue.

Similarly, discussion on the role of national commissions in the implementation of international humanitarian law also attains utmost significance as these commissions involve in various forms of internal disturbances.

As we have with us eminent panel of experts it is expected that the presentations and discussions that follow would help in clarifying complex issues as all the topics are of contemporary relevance as they are being discussed at various international fora.

In earlier occasions also we had special meetings in conjunction with our annual sessions on migration, intellectual property rights and terrorism and human rights, deliberations on which were felt very useful. I am sure this is also going to serve the similar purpose.

Thank you very much. I welcome all of you and I hope that this meeting will be a great success enlightened by all the panelists who have come to direct us about these issues. Thank you.

Dr. Kak-Soo Shin: Thank you very much Amb.Kamil for your enlightening statement. Now I would like to invite Dr. Forster, Vice President of the International Committee of the Red Cross to deliver his key note address. Before giving him the floor I would like to introduce him to you very briefly.

Dr. Forster started his career in the Federal Department of Foreign Affairs of Switzerland. He has been working in the International Committee of the Red Cross since 1988 and he is also currently the Professor of the Graduate Institute of Development Studies in Geneva. He was also the Chairman of Inter-cooperation in Berlin. Presently he is the Permanent Vice President of the International Committee of the Red Cross. Now I give the floor to Dr.Forster for his keynote address.

Dr.Jacques Forster, Vice-President of International Committee of the Red Cross: Mr.President, Secretary General, distinguished delegates, ladies and gentlemen.

It is a pleasure and an honour for me to address you today. I would like to warmly thank the Government of the Republic of Korea and Ambassador Kamil for their kind invitation and warm hospitality and, in particular, to express my gratitude to the Korean

Government for the initiative to organize the present special session. I am delighted that the International Committee of the Red Cross ("ICRC") has been invited to co-host today's Special Session on International Humanitarian Law in the Asian-African Legal Consultative Organization's ("AALCO") 2003 annual meeting. This reflects a timely reaffirmation of the pertinence and importance of international humanitarian law in today's world and of the role of the ICRC in upholding this body of law.

As many of you will know, last December AALCO and the ICRC signed a cooperation agreement in New Delhi. The agreement will enter into fore upon signature by Ambassador Kamil and the President of the ICRC, Dr.Jakob Kellenberger, which is expected to take place in Geneva later this year.

While this is an important landmark in our relations, it did not take a formal agreement for AALCO and the ICRC to work together. We have been frequently and successfully associated in the past.

To give but one example, on the occasion of its 36th Session in May 1997 held in Tehran, AALCO organized a special meeting in collaboration with the ICRC on the inter-related aspects of the International Criminal Court and International Humanitarian Law in which a number of leading experts from different parts of the world participated along with representatives of AALCO Member States. This was around the time when the final version of the Statute of the International Criminal Court was being elaborated. The Tehran meeting was thus extremely useful in bringing out the intricacies of various proposals concerning the drafting of the Statute. The subsequent AALCO reports remain a rich source of authoritative comments on various aspects of the International Criminal Court and international humanitarian law.

Excellencies, distinguished delegates, ladies and gentlemen,

The ICRC particularly values this on-going lively and productive partnership. The criticism has sometimes been made that international humanitarian law is a western construct. While it might be true that the codification of this body of law in the past century –notably the Hague Regulations of 1907 and the Geneva Conventions of 1949 – was an exercise which took place in Western Europe and in which primarily European States participated, this is due to the fact that, at the time, most African and Asian countries were still under colonial rule striving to gain independence, rather than to a lack of interest in the subject.

Indeed, by the time of the Diplomatic Conference on the Re-affirmation and Development of International Humanitarian Law held in Geneva between 1974 and 1977, most African and Asian States had gained their independence and were able to participate in the negotiations and ensure that their concerns and apprehensions were fully taken into account.

This is but recent history. The values that form the core of modern international humanitarian law are the same values underlying the ethical and legal codes of past and present Asian and African traditions and civilizations.

A study of ancient African civilizations reveals elaborate norms regarding the conduct of hostilities. In addition to restrictions on methods of combat, there existed powerful ethical codes to protect non-combatants: respect for women was imperative as they were the origin and source of life. The child represented innocence and the future. The elderly were considered to be close to the spirit of the ancestors.

In Asia, Sun Tzu, in *The Art of War* - the classic Chinese text on military strategy, written around 500 B.C. – included numerous humanitarian imperatives to be respected during combat.

The *Code of Manu* in ancient India, which formed the basis of the law, morals and customs of the people of India, developed between 200 B.C. and 200 A.D. also referred to the protection of war victims and prescribed the means and methods of injuring an enemy. The famous Indian epics – Mahabharta and Ramayana – are replete with humanitarian norms to be respected in times of war.

The same is true of Islamic concepts incorporated in the verses of the Holy Koran, particularly certain Ayats of the second and third Suras. These are founded upon the words and deeds of the Messenger during the hostilities imposed upon him and upon rules derived from the five fundamental principles of the Islamic legal system which instructed the armies of Islam.

In view of all this, how can it be argued that upholding human dignity among the clash of arms is not a universal value?

The proven commitment of the Asian-African Legal Consultative Organization to international humanitarian law, reflected, *inter alia*, in today's meeting, is evidence of these shared values and the reason why the relationship is particularly precious to the ICRC.

Excellencies, ladies and gentlemen,

Tragically, a large proportion of today's armed conflicts are being fought in the countries of the "South" and, more precisely, in the countries of Africa and Asia. This is where the largest number of victims of armed conflicts are to be found and where there is the greatest need for their protection through the respect of international humanitarian law. As an institution bringing together States of Africa and Asia, AALCO is a unique ally for the ICRC in achieving the protection of these vulnerable persons.

Today 161 States are party to the Additional Protocol I and 156 to Additional Protocol II – still fewer than the virtually universal acceptance of the 1949 Geneva Conventions which count 191 States parties.

Most of the States in Africa and the Middle East have responded very positively to the Additional Protocols of 1977; out of the sixty-one countries in this region, fifty-seven are party to Additional Protocol I and forty-eight to Additional Protocol II. In Asia the ratification record is a little more disappointing. Out of twenty-three countries, only ten are party to Additional Protocol I and nine to Protocol II. There is a similarly low level of ratification of other instruments of international humanitarian law.

The acceptance of a binding legal regime in times of peace is the first step in ensuring protection in times of armed conflict. I therefore look to the members of AALCO to take the initiative to persuade their Governments to ratify, and implement instruments of international humanitarian law and to respect them.

States are not alone in striving to respond to the needs of persons affected by armed conflict. While the primary obligation to protect and assist does lie with national governments, in the Geneva Conventions the international community expressly mandated the ICRC to relieve the plight of war victims if the responsible State is either unable or unwilling to do so. In the 140 years since its establishment in 1863 the ICRC has developed important expertise to achieve its mandate: the protection of the vulnerable in situations of armed conflict.

Its activities range from the pre-emptive, such as the dissemination of international humanitarian law to armed forces in times of peace to much more operational work in terms of the provision of protection and assistance in the heat of battle. In the field, once it has negotiated access from the parties to the conflict, the ICRC typically carries out a wide range of activities. These include making representations to the belligerents to remind them of their obligations under international humanitarian law and to put an end to violations; the provision of assistance to those most in need, including shelter, food and water, and medical care, activities to re-establish family links and, of course, its traditional visits to persons deprived of their liberty for reasons related to the conflict.

Just to give you a brief idea of the extend of its operations of the ICRC last year let me just say that our institution:

Presence

- maintained a permanent presence in 79 countries. In particular it had
  - 30 permanent delegations in Africa;
  - 14 in Asia; and
  - 11 in the Middle East

Personnel

- had a total of just under 12,000 employees, between headquarter staff, expatriates and local staff

Finance

- had a field budget of approximately 674 million Swiss francs.
  Operations in Africa accounted for approximately 41% of this Budget; and
  Operations in Asia accounted for approximately 21%

Visits to detained persons

- visited 448,063 detainees held in 2,007 places of detention in 75 different countries

Restoration of family links

- collected and distributed, with the invaluable assistance of National Red Cross and Red Crescent Societies, 978, 724 Red Cross Messages enabling members of families separated as a result of conflict and disturbances to exchange news or to be reunited.
- Established the whereabouts of 1,635 persons for whom tracing requests had been filed by their families.

Assistance

- 43 of the ICRC's 75 operational and regional delegations ran aid programmes. The bulk of the work was carried out in Afghanistan, Israel and the occupied/autonomous territories, Iraq, the northern Caucasus, Sudan and the Democratic Republic of the Congo.
- What falls within this heading?
  - activities to ensure persons' economic security, for example by the provision of food, seeds, utensils and hygienic materials;
  - activities to ensure water supplies and sewer disposal;
  - healthcare activities such as the support of hospitals and other medical centres;
  - care for the disabled, notably support for limb-fitting projects.

Excellencies, ladies and gentlemen,

In addition to the operational side of its work, the ICRC is also the promoter and guardian of international humanitarian law – the body of law which underpins many of its activities in the field.

As the body of law expressly developed to apply in times of armed conflict, be it international – i.e. between two or more States – or non-international – i.e. between a State and an organised armed group or between two or more such groups – international humanitarian law protects persons not or no longer taking a direct part in hostilities and limits permissible means and methods of warfare.

How does it do this?

First, it lays down minimum protection and standards to be applied in situations where persons are most vulnerable during armed conflict: not only when combatants are captured, wounded or sick, shipwrecked, or when civilians are interned, detained, displaced or in occupied territory but also in the battlefield during the actual fighting by prohibiting the use of certain weapons which cause superfluous injury or unnecessary suffering.

Secondly, international humanitarian law strives to prevent situations which exacerbate vulnerabilities, such as displacement, the destruction of civilian property and of objects necessary for the survival of the civilian population and the separation of families.

Finally, it lays down additional protection for persons who are particularly at risk, such as children, women, separated families, detainees and refugees.

What do I mean when I say that the ICRC has been recognized by the international community in the Statutes of the International Red Cross and Red Crescent Movement as the "guardian and promoter" of international humanitarian law?

This role encompasses three principal activities. First, the promotion of accession to international humanitarian law instruments and their implementation into national legal systems – an activity mainly carried out in times of peace.

Secondly, monitoring respect for the law in the field in times of armed conflict. This is done by means of confidential interventions to the belligerents. Exceptionally, however, if this mode of discrete persuasion does not put a stop to violations, the ICRC may resort to public condemnation.

Finally, the promotion of developments of the law to ensure it meets the needs and realities of modern conflicts. To give but one example, the ICRC has recently initiated a dialogue among States party to the 1980 Convention on Certain Conventional Weapons to adopt an instrument to address the scourge of explosive remnants of war. The list of recently concluded treaties of international humanitarian law and its enforcement highlights the dynamism of this body of law. The ICRC is proud to have played an active role in these developments.

Excellencies, ladies and gentlemen,

Before I leave you to your deliberations, which I will follow with great interest, I would like to share with you briefly what I consider to be the greatest challenges ahead of us.

First and foremost, obtaining as wide a ratification and national implementation as possible of the principal instruments of international humanitarian law: the four Geneva Conventions of 1949 and their two Additional Protocols of 1977, as well as the treaties

restricting or prohibiting the use of certain weapons such as the 1980 Convention on Certain Conventional Weapons and its four Protocols, the 1993 Chemical Weapons Convention and the 1997 Antipersonnel Mine Convention to name but a few. Mention should also be made of the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict, which celebrates its fiftieth anniversary next year, and its Protocol of 1999 as well as the 1998 Statute of the International Criminal Court.

The ratification of treaties is an essential first step but of itself is not enough. One of the most basic obligations under these instruments is the requirement to enact national legislation to give effect to them in the domestic legal system: national implementation. Of the AALCO States which have ratified the Geneva Conventions and Additional Protocols, only twenty African States and fifteen Asian States have either enacted national legislation or amended their penal laws as necessary to adequately to give effect to their obligations.

To assist States in discharging their obligations in this respect the ICRC established the Advisory Service on International Humanitarian Law. This service provides advice on the legal and administrative measures which States are required to take. Currently, the ICRC has two legal advisers in Africa and three in Asia working exclusively for this Advisory Service. They are at your disposal and I encourage you to contact them.

In this respect it gives me great pleasure to commend the Government of the Republic of Korea for its recent establishment of a National International Humanitarian Law Commission. I trust this will be an encouragement to other States in the region to follow suit.

The second great challenge is making the legal protections enshrined in these instruments a reality on the ground, both in the conflicts which capture the headlines and in those which drag on for years, almost forgotten. If we look at the plight of civilians in war in the majority of cases their suffering is not due to an absence of law, nor to the uncertainty as to the obligations of the belligerents. Instead, their suffering is due to a lack of political will to respect the law.

How can this respect of the law be improved? First, and quite simply, by spreading knowledge of the rules to authorities, to combatants, including, of course, organized armed groups, and to civil society.

Secondly, by the adoption of preventive steps in times of peace, such as the implementation of relevant treaties into national laws, military manuals and other instruments.

Thirdly, in the heat of conflict, by the mobilization of all those who can contribute to the better respect of the law. The representations made on a daily basis by ICRC delegates in the field to those participating in hostilities are often a life-saving contribution.

Finally, there exists a further and, hitherto, under-utilised mechanism for improving compliance. Under common Article 1of the Geneva Conventions and of Additional Protocol I all States parties undertook to "respect and ensure respect" for their provisions in all circumstances. It is generally understood that these words lay down a responsibility for States which are not parties to a particular armed conflict to ensure respect for international humanitarian law by the belligerents. While the role and influence of third States and international organisations – be they universal or regional – are crucial for improving compliance with the law, resort to these provisions has been inconsistent at best.

Recognising both the potential of this commitment and the difficulties experienced in making it an effective tool in ensuring respect for the law, the ICRC is organizing five regional meetings this year to focus on the question of how to improve compliance with international humanitarian law. Meetings have already been held in Cairo, Pretoria and Kuala Lumpur and two will be held in Mexico City and Bruges later this summer, bringing together experts to how this obligation to ensure respect for international humanitarian law can be operationalised.

The meetings held to date have proved very encouraging and have permitted a sharing of lessons learned and an evaluation of existing mechanisms. They have fostered thinking as to how to enhance use of the current system and to envisage possible new procedures for the supervision of compliance with international humanitarian law. Particular emphasis has also been laid on the question of improving the accountability of organized armed groups.

The findings and recommendations of the meetings will be presented to the International Conference of the Red Cross and Red Crescent which will be held in Geneva in December of this year. This Conference, which brings together the components of the International Red Cross and Red Crescent Movement, namely, the ICRC, the International Federation, national Red Cross and Red Crescent societies, and States parties to the Geneva Conventions, will be an important opportunity to re-affirm the relevance of international humanitarian law. I hope to see many of you in Geneva in December .

Excellencies, ladies and gentlemen,

The Asian-African Legal Consultative Organization as an advisory body to its Member States and as a forum for Asian-African cooperation in legal matters has greatly contributed to the development of international law. On behalf of the International Committee of the Red Cross, I look forward to continuing this positive and fruitful cooperation in meeting the challenges before us.

I wish you a most interesting and productive Session. Thank you very much for your attention.

President: Thank you Dr.Forster for your enlightening and inciteful speech covering a wide range of current issues on international humanitarian law. I believe that your statement will offer us a good basis for today's discussion.

Now I would like to start the first session titled "**Conduct of Hostilities and Protection of Civilian Population**". The presenter of the first session is Professor Marco Sassoli. He has been the Professor at the University of Quebec a Montreal since January 2001. Previously he was a
Clerk at the Swiss Federal Court in Lozanne and he is Executive Secretary of the International Commission of Jurists in Geneva. He also worked at the International Committee of the Red Cross for 13 years in Geneva, Middle East and the former Yugoslavia. Within the ICRC he was the Head of Delegations in Jordan and Syria, the coordinator of the activities in protecting the former Yugoslavia and Assistant Head of the Legal Division. He has written many papers and monographs on a wide range of issues of international law in particular international humanitarian law and international law of human rights. Now I would like to invite Professor Marco Sassoli to take the floor.

Prof. Marco Sassoli, Professor of public international law at the Universite du Quebec a Montreal, Canada. Thank you Mr.Chairman. Excellencies, Ladies and Gentlemen,

May I first of all welcome you, good morning, bonjour, salam alaikum and then thank the organizers and in particular the Ministry of Foreign Affairs of the Republic of Korea to have allowed me to be here and to have this, I must say for me, most exciting opportunity to speak to the distinguished members of the Asian-African Legal Consultative Organisation . I have to confess that when I was a student in the north , AALCO was for me a symbol, a symbol for two things, first, that the majority of humanity must have a decisive weight in taking decisions for our world and also in the legal field and AALCO tried to do that, and second, that international law is not only defending the interest of the powerful, as some of my students think, but that it can also be a means to achieve more justice in the international community.

First of all I will very briefly outline the framework and definition of international humanitarian law.

1. Definition of International Humanitarian Law (IHL)

The branch of international law limiting the use of violence in armed conflicts by:

a) sparing those who do not or no longer directly participate in hostilities;
b) limiting the violence to the amount necessary to achieve the aim of the conflict, which can be only to weaken the military potential of the enemy.

2. International and non-international armed conflicts
3. IHL applies independently of the causes and the legitimacy of the conflict
4. Categories of rules on the conduct of hostilities
    a) Rules (equally) applicable to fighting enemy combatants

i) On means of warfare (i.e. prohibited or limited weapons)
ii) On methods of warfare (e.g. prohibition of perfidy)

b) Rules aimed at avoiding that civilians be harmed: the protection of the civilian population against the effects of hostilities.

The starting point of the rules aiming at protecting the civilian population is the principle of distinction articles laid down in Protocol 1 but this is without any hesitation a rule of customary international humanitarian law that at all times a distinction must be done between the civilian population on the one hand and combatants and military objectives on the other hand and that the belligerents must direct their operations only against military objectives. The starting point on targeting is that only military objectives may be attacked. Second, even if a military objective is attacked, it may be unlawful and that is the case when excessive civilian incidental losses must be expected from an attack against a military objective.

If an attack is lawful because it is directed at a military objective and does not entail disproportionate civilian losses then still precautionary measures have to be taken to avoid or in any event minimize civilian losses. Now these are the basic rules and on several issues in contemporary conflicts there can be discussions and I shall come back to some of these issues but I would like first of all to mention that the problem for the victims of most wars is not that the concept of military objectives is controversial, that it is difficult to evaluate what is the proportionate civilian loss, that it is difficult to know whether the necessary precautionary measures were taken.

The greatest difficulty unfortunately is that very often civilians are deliberately targeted while the law is there to avoid that civilians are incidentally affected by what belligerents should logically do attacking the enemy armed forces. Unfortunately the reality in many conflicts is that the parties want to target civilians, the genocidal conflicts, the inter-ethnical conflicts and there obviously the law works less than in other situations and the solution is not merely a legal one and therefore I think we cannot discuss a lot here because the rules are very clear , there is no controversy whether this is prohibited or not but it is a problem of implementation and education.

There are however, and I shall limit my remarks to those issues, some controversial legal issues. The definition of military objectives, you have that in Article 52(2) of Additional Protocol I that military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization offers a definite military advantage and all this in the circumstances ruling at that time. So the emphasis is that there must be a military advantage. Some people say that this should be revised. They say that today's warfare does not aim at weakening the military potential of the enemy but changing the will of the Government and indeed they are right , there are some more efficient ways to change the will of the Government than to attack the army because in many countries the army is not at the centre of the political system. They say that the enemy is a system and you have to attack somehow a note which describes the enemy to continue the war. They say that under the concept of military objectives in the war like

the war against Afghanistan, United States could run out of targets because simply there are no more military objectives or in Yugoslavia for instance, if you fight only by aerial warfare it might be that the enemy does not give up, but there is no more military objective. I would, answer to that, that this might be true but it is never necessary to attack something else than what is directly connected to the military because every conflict can be won by attacking only the military, because once you have overcome the armed forces of a country you can occupy the country and you have won the conflict. While any other concept has a difficulty, first of all, it is not so clear what affects the will of an enemy country . I mean the aerial bombardments of Germany in the Second World War or the aerial bombardments of Yugoslavia, did they really make President Milosevic, or Adolf Hitler to change their mind? It is not so clear.

Finally, the US have overcome Saddam Hussein only by occupying Iraq and not by bombing Iraq. In any way it is never necessary to overcome anything else than the armed forces of the enemy. In addition, the difficulty would be to define 'what may you then attack'. What permits the enemy to continue to war. How to find a definition which guarantees the minimum of humanity which is practicable and which refers to factors which can be determined objectively in the heat of the battle. I don't see any other solution than to strict limitation to the military, the direct connection to the military effort of the enemy because everything else you can make speculations about it and if everything which may affect the enemies will can be attacked, then why should not hospitals be attacked , because it might be that in some countries if all the hospitals are destroyed the Government will then give up, how do we know? Would we then justify such attacks? Now even if one accepts the limitations of military objectives, the question arises when is the target still military. Under recent US military manual they replace definitive military advantage by war-sustaining capability that if this is a factor then in a gorilla war, the enemy of the gorilla war may simply kill all the civilians because the gorilla cannot continue the war without the support of the civilian population, so it is a very dangerous concept to say everything which permits the enemy military to continue the war is a military objective.

Then I would say, sorry for my colleagues at the Harvard University, why not bomb Harvard University. During the war against Iraq I think international lawyers be it about *jus ad bellum*, be it about *jus in bello* who were based in US Universities greatly contributed to the will of the American people to make that war because they explained that this is a legitimate war. I don't think this is a justification for bombing and then they have got a media and this is the problem of actuality. In the course of the war and in the war in Iraq probably the only controversial point from a legal point of view was whether the media might be attacked. In most cases the US, NATO and Kosovo claimed that if you remember the famous Belgrade Television tower that this is a military objective , which the media are not, if they were then you could also attack CNN and Washington Post and so on and then why not Universities and why not Kindergartens? The problem is once you go beyond the direction connection to the military effort, there is no more limit in my view.

Another problem which is more tricky is infrastructure potentially useful for the military. I think there we have to be flexible and not be bound by traditional ideas. Traditional ideas, for instance, railway lines are military objectives. Well, at least not in America. I can guarantee you the armed forces will never use railways and therefore they are no longer military objectives. They don't have even passenger trains. The same is true for bridges. Under the traditional concept of the military, the bridge is a typical military objective. I would say no, let us apply the definition of Article 52. It must be in the circumstances of the time a certain bridge must have a military advantage to destroy that bridge, and not from the beginning of every conflict every bridge is a military objective and if there is only air warfare like in Kosovo and most Yugoslav troops were already on the Kosovo side of the Danube , I don't think the bridge over the Danube is a military objective because where was the definite advantage of destroying those bridges.

Which persons may be attacked? (a) Combatants all the time until they surrender, even if they sleep they may be attacked. (b) Civilians who directly participate in hostilities as long as they do so. As you may know, the ICRC is holding expert consultations on what that means directly participating in hostilities and for how long does a civilian lose protection . It will be very interesting to see the results of those consultations. I would simply say one should not make an analogy with the situation of armed forces. One may not say that because of certain activity is normally made by armed forces it means that it is a direct participation . In all armed forces all over the world in the regular armed forces, it is the military personnel who is cooking for the soldiers but I would say clearly to cook for soldiers is not a direct participation in hostilities and for how long does a civilian lose protection because he or she directly participates. Then too the fact that soldiers may be attacked even between two participations while they relax, does not mean that civilians may be too attacked when they have participated and before they will participate again. The problem is that we have here to find again a criteria easy to apply in the heat of the battle based on facts which can be established and there while members of armed forces distinguish themselves upon the civilian population it is possible to have them as legitimate targets all the time whilst civilians directly participating in hostilities do not distinguish by definition, they do not distinguish themselves and therefore it is incredibly dangerous for the whole civilian population if simply suspicion that a civilian has participated or will participate can justify attacks upon such civilians. Obviously they may be arrested and tried but attack is something very different.

So the definition of civilian is everyone who is not a combatant, and some civilians if they unlawfully directly participate, as long as they directly participate, lose the protection, but only the protection against attacks, once they are arrested they are again protected civilians. Even the worst terrorist is necessarily if he or she is not combatant, a civilian, but civilians who commit terrorist acts may and must be punished for such acts but that does not mean that they lose their protection.

So the attacks which are prohibited are attacks not directed at military objectives but against the civilian population aiming at spreading terror against civilian objects or even attacks against civilian population by way of reprisals or attacks which are

indiscriminate, which use weapons which cannot be directed at a determined military objective or which treat several military objectives together as if it was one single military objective or attacks leading to disproportionate incidental civilian losses.

Civilian objects are protected because it is lawful to attack only military objectives. There are some civilian objects which are specially protected which means they may even not be attacked once they have become military objectives with some exceptions but there is for cultural objects, for works and installations containing dangerous forces, for objects indispensable to the survival of the civilian population, there is a more restrictive regime which protects them even if that can become some how useful for the military and finally the natural environment is protected against widespread long term and severe damage.

The attacker, you know the distinction between *jus ad bellum* and *jus in bello*, so the attacker does not mean the one having violated the UN Charter. The attacker may also be a country fighting in self-defence. It is simply to one making a military operation has to take even in lawful attacks precautionary measures. The attack must be cancelled if it becomes apparent that it is a prohibited one. Advance warning must be given unless circumstances do not permit. When a choice is possible, the objective causing least danger to the civilian population must be selected. So to come back to my old example of a railway line, to interrupt a railway line, you can do that by interrupting the railway somewhere in the country side or destroying it in the middle of a town. Then, you must do in the countryside because it will put less civilians in danger. Those who plan or decide upon an attack must verify whether what they attack is actually a military objective. They must choose the means and methods which minimize civilian losses and they must check whether excessive civilian losses must be expected.

And then comes something more controversial which is the precautionary measures against the effects of attacks to be taken by the defender. Defender is not necessarily the country fighting in self-defence that may also be the aggressor but the defender is the one who is subjected to an attack. Then traditionally and even more today the United States says that the distinction between civilians and combatants is a shared responsibility between the attacker and the defender and interestingly enough the only country sharing this opinion is Iraq. In the war against Iran they made the same point. Everyone else including myself would underline that the two are not on the same level. The defender has a clear obligation not to use civilians as shields against attacks directed at military objectives. From a legal point of view this is easily to understand because if I have a right that my civilians are not attacked, I may not abuse that right to put my military objectives under protection anywhere they would not be protected. So it is clearly unlawful to use civilians as shields but the obligation to remove the civilian population and civilian objects from the vicinity of military objectives or an obligation not to locate military objectives within or near densely populated areas already as it is formulated in Protocol Additional I in Article 58 says the Parties to the conflict shall to the maximum extent feasible endevaour to remove the civilian population and so on from the vicinity of the military objectives. So, it is formulated in a much weaker way, the obligation of the defender than the obligation of the attacker, and then the preparatory

works of those articles clearly show that many States made the quite justified points that simply they cannot defend their country if they have to remove all the military objectives and combatants from concentration of civilians, which mean that big towns you cannot defend them. When the enemy approaches you have to retreat with your forces and leave the town to the enemy which most of the countries in the world are not prepared to do that and this is my main point. I find this really dangerous for the civilian population because it is impossible to be respected in densely populated areas and then it becomes an alibi for the attacking forces because the attacking forces are also human beings who do not want to deliberately kill civilians but they feel somehow relieved of their responsibility because they say it is a shared responsibility and now that there are some civilians I will kill when I attack a town, this is the fault of the defender who did not remove the civilians from the town. While humanitarian law is just made to protect the civilians where they are.

This leads me also to mention briefly the issue of protected zones based on agreement between the parties and on good faith implementation but which are necessarily only a subsidiary means to protect the civilian population. Humanitarian law mainly wants to protect the civilians where they are and that is important. The military have to make their war around the civilians and not to have to remove all the civilians so that the military may make the war everywhere except in a specially protected area that is essential for the protection of the civilian population, but in some situations it can be useful to have specially protected zones where the parties guarantee that they will not have military objectives and where there is therefore no reason to attack them which should not be a mix up with the protected areas set up by the Security Council to protect a certain area against enemy occupation because humanitarian law protected zones may be occupied by the enemy. They may simply not be attacked.

Briefly, I see three main difficulties of implementation. The concept of military objectives is somehow an invitation to pay lip service to the law. Anyway the law is in many instances an invitation to hypocrisy because if you say, for instance, the famous Belgrade Television Tower, the British Prime Minister said, frankly and honestly that it was because the Yugoslav media supported President Milosevic, while the lawyers obviously said oh! don't tell that, say it is also a military transmission station and then it would be perfectly lawful to attack that television tower and so in more recent conflicts, parties and all parties to all conflicts, they simply present the fact which would, if they were true, perfectly justify their attacks. They always say oh! this was a military transmission post and even the Belgrade television tower was apparently also a military transmission post and the Baghdad Information Ministry was also a military transmission post and so if this is true and how shall I know it was lawful to attack them. I think in this field, fact finding would be useful to improve the respect of humanitarian law . Those who claim that something which doesn't look like a military objective is nevertheless a military objective, could justify themselves by agreeing to an enquiry by the existing International Fact Finding Commission under Article 90 of Protocol I and perhaps will then find out that they were right and this would greatly contribute to the credibility of humanitarian law.

As far as the proportionality rule is concerned, it is very difficult to apply that rule, how much life is a certain military advantage works. It is very difficult to compare military advantages with human lives and in addition generally the probability to kill civilians and the probability to get the military advantage are not the same. So the proportionality rule is not very operational and I think that it could be possible to define with military experts a criteria and indicate the best practices how to assess the proportionality of a certain risk of civilian losses connected to a given attack and finally the proportionality principle and precautionary measures , I think but that is very personal opinion that it would be very important to have procedures to assess whether they were respected. There is widespread skepticism . My students for instance when they followed the recent war in Iraq, they were convinced that the Americans did not take the necessary precautionary measures. I am not so sure. I am not so anti-American. I think they did, they took precautionary measures but how do I know whether I am right or my students are right. It would be important to assess that. Mistakes can happen even if you take all precautionary measures. We know that from friendly fire incidents . I mean in Afghanistan the US has bombed the Canadian soldiers. I assume that they did not do that on purpose. They took all kind of precautionary measures, it nevertheless happened. In Iraq, they bombed their own soldiers, they bombed British soldiers which proves that even if you take precautionary measures mistakes can happen, but how do we know. I think the first thing would be to keep records.

There is a targeting procedure in all armed forces and simply it would be important to keep the records of those procedures which would also be very useful in the case of possible future war crime trials for the prosecution or for the defence because sometimes someone accused of deliberately attacking civilians could present all the records saying , look what precautionary measures I took, it is the best proof that I did not want to kill civilians. Obviously they will not be published immediately, nevertheless I would think it could be very useful, if after sometime they were made public, because it could enhance the credibility of humanitarian law.

Today, too many people think like my students that anyway they don't respect that law, while perhaps if we had the records, we would see that they tried their best to respect the law and one important thing would be to inform about the results of enquiries. I do not know whether the ICC has better information. I simply see that every time civilians are affected or killed, belligerents promise enquiries but we never know what comes out of these enquiries while to come back to my example of the friendly fire incidents, for instance when the Canadian soldiers were killed by the Americans, there were enquiries and we know what comes out of these enquiries . From the point of view of the law, to kill friendly soldiers or to kill enemy civilians is one as bad as the other and therefore the same enquiries procedures and same publicity about the results of the enquiry should be applied.

I shall not speak about the subject of whether the law should be adapted to the needs of contemporary conflicts at least in the field I was mentioning, I don't think the law has to be adapted , the law has to be simply respected and anyway one would never agree on one law which should nevertheless always be the same for all and those who did

not even accept the last revision of the laws of war in Protocols Additional I and II are, I think not very well placed to ask now for new revisions which they would any way not accept.

My last remark is, we hear very often that contemporary conflicts are different. The war against terrorism is different, or my Palestinian friend say, look the fight against foreign occupation is different. We cannot respect these rules at the letter but we have to do it differently. I don't think today's conflicts are new. If we look into history, for instance, in Europe the horrors for the civilian population in the thirty years of war were worst than in any conflict we can see today in Africa, even in the Democratic Republic of Congo. It is very comparable what happens. There it was also the civilian population was directly targeted. Those who think that the conflict are completely different are simply because they are for the first time affected. I mean the American public realized for the first time what act which they qualify as war mean after the September 11 attack, whilst most of the population all over the world unfortunately experienced such attacks for the last 50 years and therefore for them it would not really be very new thing.

To conclude, I think that we can find some refinements of the existing law on the protection of the civilian population against the effect of hostilities. It might also be, this is my preferred issue, that we find some practical measures for implementation and for rendering the law more credible for showing when it is respected and when it is not respected, because skepticism reduces willingness to respect the law. If I am fighting against an enemy and I have the same opinion that my students have that anyway it is not respected, I will be tempted not to respect it either. So, it would be very useful to show that very often the law is respected.

Apart from these practical measures I think the problem is implementation, respect, education and my preferred issue is always to make people really accept that this law has to be respected in all wars independently of the legitimacy of the wars . That this law is exactly made for a war fought in self-defence, for the war against terrorism, for the war against foreign occupation and that no such reasons may justify any departure from the letter of the existing international humanitarian law.

Thank you very much.

President: I thank Prof. Sassoli for his lucid, informative and illustrative presentation on the issue of protection of civilians in times of hostilities. Well, considering the time constraint, I don't want to summarize his statement. For those who want to take the floor from the seat without the microphone system, we prepared two wireless microphones, so anybody who wish to take the floor please raise your hands. For the sake of efficiency, I would like to take four or five questions consecutively and then ask Prof.Sassoli to respond to that. Now I give the floor to the distinguished delegate from the Islamic Republic of Iran.

Islamic Republic of Iran: (In French. Taken from interpreter's version). I learned a lot from the presentation. I have two questions. First is the question of relief operations,

which tend to protect civilian population. Many of internal conflicts have religious, tribal and regional origin. Relief operations encounter lots of problems. What professor thinks about this problem? Second one is the question of reprisals against civilian population. Geneva Convention does not say anything about reprisals.

President: Thank you. I now give the floor to the distinguished delegate from Kuwait.

Kuwait: Thank you Mr.President. First of all I would like to thank Dr.Forster for his statement and Professor Sassoli for his very informative lecture. It is not a question, it is just a note that I think in my opinion the problem is not lack of international treaties or conventions but I think the problem is by those people who plan such wars and those people who engage in it by not implementing the international humanitarian law and I think that is the problem. Thank you very much.

President: Thank you. Next speaker is the delegate from the People's Republic of China. I now give the floor to Madam Xue.

People's Republic of China: Thank you Mr.Chairman. First of all I would like to thank Dr.J.Forster for his excellent statement. I want to reiterate that China attaches great importance to the cooperation between China and ICRC and from this treaty status of the treaties on international humanitarian law you can tell that China is a party to most of the treaties. I am sorry to see that in the brochure I did not find China in the book on international implementation. Perhaps the mistake is on our part, may be we failed to respond to that . But I would encourage our people back home to act to provide the necessary information to the book so that to enhancing our cooperation in this regard.

But from legal aspect, I would say for national implementation, there is a treaty, there is a practical aspect to that, is regarding international treaties in domestic law, the status of international treaties in domestic law may not have necessarily adopt a national legislation to implement. In some cases a treaty can be directly implemented in our national legal practice. That is the first point.

My second point is a comment on Prof.Sassoli's very illuminating speech on the international humanitarian law in times of warfare. I would want to make a very quick comment on that. I think that when we think of IHL, we have to see one important aspect in international relations that now a days we see more and more use of force and we all know as international lawyers, Article 2, paragraph 1 and 4 of UN Charter are actually among the fundamental principles of international law and for use of force we must give very strict interpretation and application to the principle. In other words, under the non-use of force principle only two exceptions are allowed, one is self-defence and other is collective security system. To maintain world order, we must strictly adhere to the fundamental principles of international law. When the cold war was over, we thought that we are in time of peace but unfortunately we have seen more and more international hostilities and conflicts and in that aspect I would rather see ICRC out of job in warfares but we see it has been kept so busy and it is really unfortunate aspect of international affairs. So, now nevertheless, armed conflict occurs, so what we can do and still we

have to uphold strictly the rules of international humanitarian law. So it is really the international community has come a long way to come to this stage that we ban the war to use it to pursue a national front policy. So it is not we say, whether it is not right to say to change the way of Government , it is totally prohibited under international law to over-throw a sovereign government and that is the basic starting point for us to consider international humanitarian law. I thank you.

President: Thank you Madam Xue for your comment. I now give the floor to the delegate from the Sultanate of Oman.

Oman: (In Arabic. Taken from interpreter's version). I thank Prof. Sassoli. I submit my questions. First one is, in the light of definition of civilians. Do the settlers in the occupied land be considered as civilians and should not be targeted. Second question is, do the political leaders of the resistance movements could be the targets as civilians or combatants. Third is, what will be the solution if peaceful solution is not of any benefit. Fourth question is directed to ICRC. What are the difficulties of ICRC in Palestine? Is ICRC allowed to conduct operations?

President: Thank you Minister of Legal Affairs of Oman. Prof.Chee Member of the International Law Commission asked for the floor. I now give the floor to Prof.Chee.

Prof. Choung Il Chee, ILC: Thank you Mr.Chairman. Instead of asking a question, I would rather like to share my thought with you, in this spirit I will raise the question. First of all, after the Second World War Field Marshal Kaital was hanged for issuing order No.1 which was designed to shoot all gorillas in German campaign in Soviet area. Now today's warfare takes place involving Additional protocol I, II without military clause identification so it is a sort in exterior of a civilian fighting against civilians type of conflict. Now we will have to minimize the casualty, prevent that sort of warfare. But what is the criteria you can use in this? I am again going back to Kaital's death. It seems that hanging was a sort of a punishment for something he did. Second question is that you said something about cooking. I was not involved in military activities. Now you remember the word that what Napolean said army travels on stomach . So it is a important source of supply for the military so that this possibly involves as far as I can see that in a large perspective military activities in the sense of supplying food for the soldiers and so forth. The third question remark rather I would like to make, during the second world war the German bombing civilian population in London in retaliation British bombed and only Germans were punished and not the British and there is something about it. Assuming that International Criminal Court is going to function within a short time , you think that in such situation both sides should have been punished instead of just Germans, Sir. Thank you.

President : Thank you Prof.Chee. We are already 30 minutes behind schedule. So, I would like to close the speakers list and then ask Prof.Sassoli to respond to many questions raised from the floor. Prof.Sassoli you have the floor.

Prof. Sassoli : Thank you very much. Relief operations should improve. We have relief operations only to benefit to civilians. It is almost impossible to know that they are not going to benefit military. Now come back to reprisals. Reprisal or retaliation constitutes measures of national law if it is in non-international armed conflict.(In French. Taken from interpreter's version).

(In English). The distinguished delegate from Kuwait, I fully agree with you that the problem is implementation and not the insufficiency of the law. I simply made some proposals, some small things where the law could be perhaps improved but rather to get it better implemented or to be seen to be implemented.

This is also a point which was I think exemplified by your intervention, distinguished delegate from Peoples Republic of China, that I think it would be important that States show that they respect the law, that they make propaganda and say look how I did it, look how I implemented it. While I notice still very often for instance, states having a very good programme on training the armed forces but it is secret on training of humanitarian law. I think that should not be secret but one should rather make propaganda with that because it would increase the willingness of the potential enemy to do it equally.

I, as an international law professor, obviously fully agree with your description of the *jus ad bellum* and I agree with your finding unfortunately the *jus ad bellum* the UN Charter is often not respected and then we need humanitarian law and I would appeal to all of us, I think we are all lawyers, that we understand our role as lawyers once there is an armed conflict situation not like an attorney who tries to avoid that his client comes to prison and finds good argument, but as part of the justice system and of the international system and therefore not always to find a justification why not to respect humanitarian law but rather to advise the political and military leaders how to respect the law and show them that they can attain their objectives while respecting the law and the law can even help them to better attain their objectives.

The distinguished delegate of Oman asked very technical questions. On the settler issue, obviously settlements are prohibited by the fourth Geneva Convention but it is not because they are prohibited that the settlers are not protected. We have to see specifically and independently of this prohibition of settlement whether a settler directly participates in hostilities or not. It is not simply because he or she is a settler that he or she is directly participating in hostilities. If they take up weapons then they directly participate in hostilities and they are legitimate targets. There is a certain parallelism between the situation of the settlers and the situation of the military leaders of resistance movements in the sense that they can potentially become legitimate targets but I do not think they are legitimate targets before they directly participate and I would say political leaders are not legitimate targets because they do not directly participate in hostilities. As far as the right under *jus ad bellum* it would resist with arms, yes, it exists to resist a foreign occupation with arms that is a right under *jus ad bellum* just as self-defence for a country. But according to the essential distinction between *jus ad bellum* the 'hak al harab'. The 'hak al harab' says , yes it is lawful to resist to foreign occupation but

'kanoon al harab' says such resistance has to comply with humanitarian law and humanitarian law does not prohibit to take weapons but humanitarian law prohibits to use weapons indiscriminately or deliberately against civilians. The question to the ICRC I will leave it up to them.

Finally Prof.Chee , thank you for giving me the opportunity to make something a little more precise about cooking. Soon we will be hungry so it is a god subject and I would say, well the food for the armed forces is cooked , this is a military objective but the people who cook are not combatants and they may not be targeted individually, it would be very dangerous to extent the concept of direct participation to cooking for the soldiers, because then it is also to produce clothes for the soldiers and to find water for the soldiers ,then unfortunately nearly everything especially in a gorilla war becomes direct participation. So I would say an individual who cooks for the soldier is not directly participating in hostilities. Thank you.

President: Thank you Prof.Sassoli. Dr.Forster has also asked for the floor to respond to some queries from the floor. I now give the floor to Dr.Forster.

Dr.Forster : Thank you very much Mr.Chairman. I would like just to say to the distinguished representative from China that we would very gladly discuss after the meeting or during the break the question which you raised concerning the booklet.

Now as to the question raised by the distinguished representative from Oman, yes, I can give also a very clear answer as to the ICRC presence and activities in Israel and in the occupied territories. There has been a presence of the ICRC and operation of ICRC in the occupied territories since 1967 in an uninterrupted way and we have been present all the time. What we have been doing and what we are doing now , I mean traditionally, we have had what we call protection activities mainly that is monitoring as I was saying in my presentation, respect for the law, making representations to the parties to the conflict whenever problems arise and that would be with a view of protecting the civilian population in the occupied territories and the autonomous territories now, also traditional activities of visiting detained persons , persons detained in relation with the situation and we have been visiting people detained by the Israel authorities regularly and what we have also been doing is to facilitate visits by family members to these people detained from the West Bank for example Gaza., the people detained in Israeli prisons. These are the traditional I would say protection activities which we have been conducting all through this period which is now for 36 years.

Now recently, I will be short, since the beginning of what is called the second 'Indefadah' , there has been, as you are aware, a sharp deterioration in the social and economic situation of the population in the West Bank, particularly in the cities. So we have started, about a year ago, a programme of assistance to the population, the rural population on the one hand and the urban population on the other hand, in order to help these population cope with the very difficult economic situation. You know that the rate of unemployment due to the limitation , the restriction imposed by the occupying authorities has reduced the present economic activity. So we have started this assistance

programme. But the answer to your question, yes, we are present and we are deploying the full range of our activities. Thank you.

President: Thank you Dr.Forster. I think that this brings us to the conclusion of the first session. I believe that this morning session was quite productive and interactive between the presenter and the floor. I hope that we can proceed along these lines in other sessions. Let us have a 20 minute coffee break and we will begin the next session at 12.00 noon. The meeting is adjourned. Thank you.

Judge O-Gon Kwon

I. INTRODUCTION

It is a great honour for me, essentially a criminal proceduralist, to be invited here today to speak on the subject of "Repression of War Crimes by States and The International Criminal Courts", amid the other panelists, who are renowned specialists in the area of international humanitarian law.

As was dealt with in depth yesterday, during the Session dealing with recent developments of the International Criminal Court, or ICC, the international community witnessed the swearing-in ceremony of the first 18 judges of the ICC in March of this year. The Report of the Asian-African Legal Consultative Organization, has described the inauguration of the ICC as being the most important development in international law since the creation of the United Nations in 1945. The Report further states that:

> [t]he establishment of the Permanent Court is a historic achievement as it epitomizes the quest of international community for rule of law and is an important step forward towards the advancement of human rights and implementation of international humanitarian law. It represents a significant development of the international accountability for serious international crimes and makes individuals criminal responsible for their actions. The Court, it is hoped would prove to be a powerful deterrent to those who commit such atrocities.

While I agree with the preceding statement in the Report, as a practitioner immersed daily in an endeavour of an international criminal court that is described by many as the precursor to the ICC, my intention this morning is to be able to highlight some of the issues international criminal courts may face based upon my observation and experience at the International Criminal Tribunal for the former Yugoslavia, or as commonly known by its acronym, the "ICTY".

In this regard, please allow me to share with you my thoughts on the relationship between the states and the international criminal courts, particularly with the ICC in mind. I shall follow this with a few of the possible challenges, which I feel the

international criminal courts may face within their structure, specifically in terms of trial management. Finally, I will conclude by sharing my views on the future of the international criminal courts and in particular, the ICC.

II. RELATIONSHIP BETWEEN THE STATES AND INTERNATIONAL CRIMINAL COURTS

I. ICC Jurisdiction

The subject matter jurisdiction of the ICC is similar to those of the other ad hoc tribunals like the ICTY, namely genocide, crimes against humanity and war crimes. In addition, when the State Parties of the ICC agree to a definition for the "crime of aggression," it will constitute the fourth subject matter jurisdiction category, which is not present in the other existing ad hoc tribunals.

Moreover whereas ad hoc international tribunals such as the ICTY has limited territorial jurisdiction, the jurisdiction of the ICC is not limited to the territory of a specific State or region. Rather the ICC will have jurisdiction over crimes allegedly committed on the territories of all the State Parties and on the territory of a non-State Party, if such non-State Party has accepted the jurisdiction of the court. The ICC also has jurisdiction over crimes committed by nationals of State Parties on other territories. Finally, if a case is referred to the Court by the UN Security Council acting under Chapter VII of the UN Charter, no consent is needed: the Court will have jurisdiction over crimes even if they are committed on the territories of non-State Parties or by nationals of non-State Parties. As such a vast scope in terms of territorial jurisdiction has never been attempted by any international criminal court, it will be of great interest to see the arising developments.

One of the most important distinction between the ICC and the existing ad hoc tribunals, including the ICTY, comes from a jurisdictional aspect of the two courts in terms of the relationship between the respective international courts and the national courts. Namely, the ICTY has concurrent jurisdiction with primacy over the national courts, while the ICC has complementary jurisdiction.

In other words, only when national legal systems are unwilling or unable to exercise their jurisdiction, can the ICC take over the matter. Consequently, the Court will determine that a case is inadmissible if it is investigated or prosecuted by a State which has jurisdiction over it. The Court will also determine that a case is inadmissible if it has been investigated by a State which has jurisdiction over it. The Court will also determine that a case is inadmissible if it has been investigated by a State which has jurisdiction over it and the State decided not to prosecute the person, unless this decision resulted from the "unwillingness or inability of the State genuinely to prosecute." Even with regard to matters referred to the ICC by the Security Council under Chapter VII, the statute of the ICC does not give priority jurisdiction to the ICC over national courts, unless such unwillingness or inability on the part of the national courts is shown (Article 17). Further a case is not admissible if the person has been tried already, unless the

purpose of the domestic trial was to shield a person from criminal responsibility. Finally, a case can also be declared inadmissible if the case is not of sufficient gravity to justify further action by the court.

I find this principle of deference of the ICC to the national court significant and in some sense inevitable, because first and foremost, each State has an interest in remaining primarily responsible and accountable for prosecuting violations of its own laws. As long as local courts conscientiously and effectively undertake the task of repressing war crimes, there would not be a need for an operational international criminal court. It is only when the national systems cannot or do not should an international court take over. Though there are *jus cogen* principles that no state should derogate from, I say this with my understanding that the laws and remedies of each legal system is the consummation of its respective moral and social beliefs. Nevertheless, with this deference in mind and appreciating its value, I would like to discuss the realities that do not always permit such deference. Now I turn to sub-chapter 2.

2. National Court vs. International Criminal Courts: Distribution of Works

As the Rome Statute specifies, the ICC may take over when States are unwilling or unable to prosecute the war criminals. However, I predict that such cases will not be rare since States are often not capable of pursuing their war criminals during or immediately after international or internal conflicts, with their own judicial infrastructure so damaged in terms of resources, personnel and facilities. This was the case of Bosnia and Herzegovina at the time when the ICTY was established. Further, we can also expect situations where the relevant States have no desire to pursue war crimes at all, as was the circumstances of the other Balkan countries. In such cases, international criminal courts, being it an *ad hoc* tribunal or a permanent court, have no choice but to take on the task of ending impunity and to deter any such similar crimes.

However, even if an international court is to be operational as an *ad hoc* or permanent court, I would like to emphasize that such a court should concentrate on the so-called "big fishes" – the military and civic leaders who planned, initiated and were in charge of executing the major campaigns and strategies that violated laws of war and humanity. The mid-level and lower level individuals who participated in war crimes such as soldiers, guards, aides – should be for the most part handled in national courts.

On this note, it is interesting to mention that neither the statute of the ICTY nor the ICC is explicit in concentrating on the big fishes. It is only the Special Court for Sierra Leone, another *ad hoc* tribunal, which is unique in that it limits its jurisdiction to "prosecute persons who bear the greatest responsibility."

The past and the current Prosecutors of the ICTY have accomplished a commendable feat in investigating and bringing many significant indictments against the main actors of the Balkan conflict. Mrs.Biljana Plavsic, the former President of Republika Srbska has been convicted and sentenced to imprisonment. Mr.Slobodan Milosevic is currently standing trial while in the latest ICTY developments, specifically

in the Trial Chamber that I belong to , Mr.Milan Milutinovic, the former President of the Republic of Serbia, is in custody of the UN Detention Unit, awaiting trial. Certainly there are others at the highest level of alleged responsibility with confirmed indictments still at large, namely Radovan Karadzic, President of Republika Srbska and Ratko Mladic, the former Commander of the Bosnia Serb Army. But there can be no doubt that the Prosecutor has been actively seeking the capture and surrender of these two individuals at large.

Yet I still see indictments brought by the Prosecutor that I do not deem the ICTY, given the functions of an international criminal court and the limited resources and large number of cases in the docket, is the best forum for. Perhaps it was inevitable due to the limited powers and cooperation available that the first trial of the ICTY involved a small café owner, in a small town who committed atrocities against his neighbours. However, I am a staunch believer in the notion that international criminal courts should primarily deal with those in the upper echelon of the command structure.

In this sense, I agree with the observation of a former judge of the ICTY, Judge Patricia Wald from the United States that too many of these mid-level violators may have been indicted by the ICTY[1]. Historically this is understandable because in the early years of the Tribunal, the major war criminals in the Balkan conflict had not been apprehended or surrendered. When they finally did begin to come under ICTY custody, the pipeline was to a degree already filled with the earlier indictments of less prominent war criminals, the consequences of which have inevitably been serious delays in the court process. This is contrasted with the circumstances at Nuremberg half a century ago when captured Nazi leaders were already in custody, the main trials were over in about a year and up to a thousand lesser violators were tried subsequently and separately in single judge trials by the four Allied command members in their own tribunals.

The ICTY has taken many measures to resolve these serious delays. Some of the specific measures have included the introduction of *ad litem* judges, with the latest development being the Security Council Resolution 1481 of 19 May of this year, which allows for the enhancement of the powers of the *ad litem* judges by allowing them to preside over pre-trial proceedings in cases other than those that they have been appointed to try.

There is also the 'Exit Program', currently being developed in conjunction with the Office of the High Representative of Bosnia and Herzegovina, taking into consideration our goals to wind-down the Tribunal by 2008. It is hoped that this program will allow the ICTY to defer some of the cases to the national courts. Specifically, the 'Exit Program' is to come up with a plan, enabling the effective domestic prosecution of war crime cases in Bosnia Herzegovina. Tentatively the 'Exit Program' is to involve a 'specialized chamber' within the newly established Court of Bosnia and Herzegovina

[1] Testimony of Patricia McGowan Wald, Committee on International Relations, U.S. House of Representatives, Hearing on U.N. Criminal Tribunals for Yugoslavia and Rwanda: International Justice or Show of Justice

with an initial phase, including a temporary international component (i.e. international judges, prosecutor, and court management). Eventually, the plan is for the 'specialized chamber' to be entirely of a national component of the Court of Bosnia and Herzegovina. Presently, only the very basic outlines have been drawn; much more work needs to be done on the details, such as objective standard of deferral, facilities, and funding of the program. We are looking forward to the developments.

In addition to the Exit Program for Bosnia Herzegovina, there are also preparations underway in conjunction with the Republic of Serbia, for Serbia to be able to prosecute war criminals in its national court system. In the latest development earlier this month, a law authorizing the creation of a special war crimes prosecutor's office was sent to the Parliament of Serbia for "urgent consideration." If the law is adopted, not only would such special office be created but a special police unit would deal exclusively with tracking down and uncovering war crimes suspects. Once the structures are set up, there should be an additional avenue to transfer some of the smaller cases from the ICTY.

In short, I think so far as future *ad hoc* international criminal courts are concerned, more thought should be given at the inception to achieving a goal of trying a realistic number of the most serious offenders within a finite number of years, after which the national courts or a permanent court would take over[2].

3. Immunity and General International Law

Perhaps on a slight tangent, I would like to speak to you on the issue of "immunity and general international law' since I have spoken to you about the importance of international criminal courts to pursue those at the level of highest responsibility. High Government officials may make claims of immunity. However, the effects of such claims were clear. For instance, the ICTY and International Criminal Tribunal for Rwanda statutes both provide that the "official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility or mitigate punishment". (Article 7.2 and Article 6.2). The Statute of the Special Court for Sierra Leone is similar (Article 6.2) as is the Rome Statute of the ICC which states under the heading "Irrelevance of official capacity" (Article 27.1) that "Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person" (Article 27.2)[3].

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[2] Testimony of Patricia McGowan Wald, supra note 1

[3] In the cases of these accused of senior position, the concept of superior responsibility p[lays an important part in international criminal law, which makes a superior liable for the criminal conduct of subordinates, when he had reason to know that the subordinate was about to commit offences or had already done so and failed to take measures to prevent the conduct or punish the offenders.

These Statutes reflect customary international law. In fact, the history of this principle can be traced to the development of the doctrine of individual criminal responsibility after the Second World War, when it was incorporated in the Nuremberg and Tokyo Charters, (Articles 7 and 6 respectively). Indeed, in the Nuremberg Judgement it was said:

"The principle of international law, which under certain circumstances, protects the representative of a State, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings […] the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under international law."[4]

However, in this regard, noteworthy is the recent International Court of Justice ruling that a Belgium Court (DRC v. Belgium, 14 February 2002) violated customary international law when it allowed a Belgium judge to issue an arrest warrant against the Minister of Foreign Affairs of the Democratic Republic of Congo, under Belgium law that gave universal jurisdiction on Belgium courts for genocide, crimes against humanity and war crimes.

To provide some background to those who may be unfamiliar with the ICJ ruling in Belgium case, the ICJ held that under international law, the incumbent Minister of Foreign Affairs abroad enjoy immunity from criminal jurisdiction and the inviolability from "any act of authority of another State which would hinder him or her in the performance of his or her duties". The court recognized that granting of such immunity stems from the need to ensure effective performance of their functions on behalf of their respective States.

However the ICJ emphasized in the same judgment that "immunity from jurisdiction enjoyed by the incumbent Ministers of Foreign Affairs does not mean that they enjoy impunity in respect of any crimes which they may have committed irrespective of their gravity. Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts", one being procedural in nature while the other is substantive.

Accordingly, the ICJ held that despite such immunity under international law, the following held true for an incumbent or former Minister of Foreign Affairs:

(i) such persons could be held responsible in their own countries;
(ii) the State which such persons represent could decide to waive that immunity;

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[4] Trials of War Criminals before Nuremberg Military Tribunals under Control Council law NO. 10; see Report of the International Law Commission, commentary (3) to Article 7.

(iii) after such persons ceases to hold the office of Minister of Foreign Affairs, a court of one State, provided that the State has jurisdiction, may try such persons in respect of acts committed prior or subsequent to such person's period of office, as well as in respect of acts committed during that period of office in a private capacity; and

(iv) incumbent or former Minister of Foreign Affairs may be subject to criminal proceedings before certain international criminal courts where they have jurisdiction.

However, the extent of the immunity and how it applies to others have not been clarified, and it would be an interesting subject matter to follow.

4. State Cooperation

Looking back at the history of the ICTY, it is only after Mr.Slobodan Milosevic, the former President of the Federal Republic of Yugoslavia, was transferred to the UN Detention Unit at The Hague, that the ICTY became prominent to the public eye, giving the world an impression that some sort of justice relating to the conflicts in the Balkans was being pursued. This was a contrast to the impression of the ICTY in its earlier stages.

In other words, to say that not much trust was initially placed on the side of the ICTY's success is not too far of a venture. Borrowing from the words of my colleague, Judge David Hunt from Australia , the ICTY was "intended to fail". As Judge Hunt stated, the international community's original intention in establishing the ICTY was for its appearance value – that the international community was taking some sort of action, although not military, in response to the explosion in the former Yugoslavia[5].

Nevertheless, under dynamic leadership and much effort by those involved, the ICTY, since its first trial in 1995, has proved itself a capable and well-functioning court. However, it was only with the transition in the political climate and resulting state cooperation that much progress was made.

Thus, as seen through the experience of the ICTY, it is crucial for an international criminal court to operate with state cooperation if it expects to successfully fufill its functions and duties. Put simply, the international criminal court has to rely on the cooperation of State and international organizations, since the international criminal courts do not have any effective enforcement mechanism.

As all of you are aware, since the ICTY was established by a Security Council Resolution of the United Nations acting under Chapter VII, United Nations Member States are obliged to cooperate with the Tribunal. Unfortunately, such cooperation with the ICTY by some of the states has not always been forthcoming.

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[5] David Hunt, Information Technology in an International Criminal Court, Speech delivered on 21 October 2002 at the 3rd AIJA (Australian Institute of Judicial Administration) Technology for Justice Conference at Sydney, Australia.

The ICTY has encountered and are still encountering non cooperation. These have included the elusive arrest of some important accused at large such as Mr.Radovan Karadzic and Mr.Ratko Mladic, denial of access to official documents that do not compromise state security interest, or to simply serve an arrest warrant when the authorities are fully aware of the whereabouts of the accused.

However, it is hoped that state cooperation will not be one of the major challenges for the ICC as faced by the ICTY. Since the ICC is a treaty based organ and the States have made the conscious and deliberate decision to cooperate with the ICC by signing and ratifying the Rome Statute, there should presumably not be problems in terms of state cooperation. However, the reality may turn out differently.

The ICC Statute provides that in the case of non-cooperation from the States, the court may refer the matter to the General Assembly of State Parties or where the Security Council referred the matter to the ICTY, to the Security Council (Article 87.7). What should happen thereafter is still unclear. Thus the world will have to wait and see what actions can be and are taken should circumstances of non-cooperation from States arise.

III. TRIAL MANAGEMENT

1. Fair Trial

The most important hallmark of a criminal procedure is the administration of a fair trial. Accordingly only a fair trial can guarantee the legitimacy of an international criminal court. Any proceeding in an international criminal court falling short of the minimum standard of fairness will be subject to criticism, correctly, that the proceeding is nothing more than private revenge by the victors. With such a perception, international criminal courts cannot expect to play one of its crucial roles – as a deterrent to future violations of international humanitarian law. As Justice Murphy of the US Supreme Court wrote in his dissenting opinion In Re Yamashita:

> "[a]n uncurbed spirit of revenge and retribution, masked in formal legal procedure for the purposes of dealing with a fallen enemy commander, can do more lasting harm than all of the atrocities giving rise to the spirit. The people's faith in the fairness and objectivity of the law can be seriously undercut by that spirit."[6]

Bearing this in mind, that the principle of a fair trial should be given utmost priority when striking the balance among various interests in an international criminal proceeding, I will turn to challenges that the ICTY has encountered in terms of trial management and eliminating undue delay. By doing so I hope to highlight what may be challenges for other international criminal courts, including the ICC, and to begin a discourse on possible solutions.

2. ICTY and Trial Management

[6] 327 US 1, at 41 (1960).

Perhaps lengthy trials at the ICTY are somewhat unavoidable given that the arising legal and factual issues are complex in and of themselves. However rather than the complexity *per se*, the fact that the ICTY held the first war-crimes trials since those following World War II had meant that much had to be wade in uncharted waters. In other words, precedence and practice had to be established during the course of the proceedings.

The establishment of precedents and practice are not simple endeavours of a newly established international court, let alone a newly established national court. The effort is not simply a compromise of the main two branches of legal systems – the common law and the civil law system. Rather the jurists of each legal system bring forth their respective versions of a common law or civil law system in order to create a working amalgam of diverse legal systems. So far, much groundwork has been laid by the experiences, including the trials and errors, of the ICTY and other *ad hoc* international criminal courts. Yet I believe there is still much that needs to be done.

Another challenge faced by the ICTY stems from the distance between the location where the trials are held and the region where the alleged crimes occurred. Cumbersome tasks, which include the arrangements that need to be made for the usually large number of witnesses, some with protective measures, to travel to The Hague, are constantly encountered. Thus the coordination that is needed between all relevant parties comes under much strain.

Finally, the fact that different languages are used in the ICTY has also been proven to be a challenge. Though the working languages of the ICTY are English and French, the court proceedings must be interpreted into Bosnian/Croatian/Serbian and occasionally Albanian. Further, outside of court proceedings, hundreds of thousands of documents are tendered by both parties and the chambers must all be appropriately translated. Future international criminal courts, including the ICC will likely face similar challenges.

The foregoing synopsis of my experience at the ICTY, in terms of trial management, was intended to introduce a few of the practical matters that make meeting out international justice a monumental and consequently time-consuming endeavour. Nevertheless I sincerely believe that experiences of the ICTY and other *ad hoc* tribunals in dealing with various challenges can be utilized so that more effective solutions can be developed. Moreover, efforts to find better solutions to deal with lengthy trials should be continued.

3. Aspects of the ICC and Trial Management

A. Victim Participation and Reparation

Under the ICC Statute, unlike the ICTY, victims may participate in the proceedings without being witnesses by submitting their views and concerns to the Court.

The Court can permit such submission at stages of the proceedings it determines to be appropriate and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial (Article 68). Accordingly, the ICC will have to develop prudent practices to permit such victim participation, while conducting fair trials.

Also unlike the ICTY, the ICC has a provision allowing for reparations to victims (Article 75). Such reparation can either be made directly from the convicted person or a Trust Fund. I foresee much challenge in regard to this measure beginning with "what is a victim" and "what kind of restitution, compensation and rehabilitation will be given?" I am in agreement with my colleague Judge Richard May when he stated that "in the event that the ICC interprets "victims" in a broad way, the reparation proceedings may in fact become a much larger part of the work of the ICC that anticipated."[7]

B. Flexibility of Rule Change

The responsibility of creating and amending the Rules of Procedure and Evidence of the ICTY lies with the judges. In contrast, the ICC Rules of Procedure and Evidence were adopted by two thirds majority of the members of the Assembly of States Parties (Article 51). And any subsequent amendments must also be adopted by a two-thirds majority of the Assembly of States Parties, thus lacking the flexibility in rule change compared to the ICTY. Therefore there may be a need to integrate a system so that procedural delays in the amendment process do not interfere with the effective operation of the ICC.

C. Check Mechanism on the Powers of the Prosecutor

Finally, similar to the ICTY, the ICC Statute allows for the possibility of the Prosecutor to initiate investigations in *proprio motu.* This power is granted in addition to the court's jurisdiction over cases referred by the States and the Security Council (Article 13(c) and 15).

However, in the instance that the investigations are initiated in *proprio motu*, the Prosecutor must receive pre-trial chamber's authorization before he or she is allowed to proceed with the investigation (Article 15). In other words, a type of "check" mechanism of the powers of the Prosecutor exists in the ICC, by allowing the pre-trial chamber to exercise a degree of control over the Prosecutor's investigation. Such "check" mechanism does not exist in the ICTY, until the end of the Prosecutor's investigation when the indictment is presented to the reviewing judge for confirmation.

In relation to "check" mechanisms, I would like to take this opportunity to share with you some thoughts on further mechanisms that may be entertained for future international courts and the ICC.

Speaking from my experience at the ICTY, I am of the opinion that the indictments brought to the Tribunal often consist of too many counts and include too

[7] Richard May, The ICC: Jurisdiction and Practical Aspects of Trial Management (Unpublished)

many crime sites or incidents, negatively affecting the manageability of the case and causing undue delay. Certainly, the rules of the ICTY allow the Trial Chamber to set the number of witnesses the Prosecution may call and determine the time available for the Prosecutor to present her evidence. Nevertheless I have found such measures insufficient, when the indictment itself is too vast in scale. Thus I would encourage more effective "check" mechanisms. This is not to say that my strong encouragement to the Prosecutors of the ICC to remain active in exercising its prosecutorial discretion; in sifting and selecting the cases which he or she determines to pursue – wavers.

IV. CONCLUSION

Your Excellencies, Ladies and Gentlemen, as a conclusion, I strongly advocate that each national system should be the primary actors in addressing war crimes that comes under its jurisdiction. I encourage each State to pass and enforce, or better enforce if already passed, laws that address violations of international humanitarian law. However, it is often the case that after an international or internal conflict, respective legal systems are not able to adequately deal with such violators. Thus I believe it is of great importance to support a permanent international criminal court, namely the ICC, which can be ready to take on the task if necessary.

Moreover, recent events have reminded us that the conflicts of today no longer arise between clearly delineated States and its military forces. Rather, the conflicts are increasingly against factions that are difficult to identify and clearly neither external nor internal in nature. Inevitably, this brings the increased likelihood of victims being civilians. Therefore, it is all the more necessary to have mechanisms that deter atrocities before they occur, as it sends a message that impunity will not be tolerated, and/or address the atrocities if we are not successful in our effort. The global community shares this obligation – a viable and vital obligation to our posterity which can be met *inter alia* by having a permanent international criminal court.

As Mr.Cherif Bassiouni, President of International Human Rights Law Institute and Chairman of the Drafting Committee of the Rome Diplomatic Conference stated:

> "[t]he ICC will not be a panacea for all the ills of humankind. It will not eliminate conflicts, nor return victims to life, or restore victims to their prior conditions of well being and it will not bring all perpetrated to justice. But it can help avoid some victimization and bring to justice some of the perpetrations of these crimes. In so doing, the ICC will strengthen world order and contribute to world peace and security. As such, the ICC, like other international and national legal institutions, will add its contribution to the humanization of our civilization".

And finally as the Secretary General of AALCO, H.E.Amb. Dr.Wafik Kamil, stated, the ICC 'should perform its functions in an objective, impartial, independent and just manner and should be free from political prejudices and double standards."[8]

For this to be achieved, I find it crucial for the African and Asian nations like the members here today, who have traditionally not been able to actively participate in the determination of global matters, to take this opportunity to do so. Borrowing from a proverb in the Kalenjin language of Kenya, we will be "adding wisdom to knowledge."

Excellencies, ladies and gentlemen, thank you for your attention.

President: I thank Judge O-Gon Kwon for his succinct and stimulating statement on the division of work between various judicial bodies at international semi-international and domestic levels as well as some practical issues that might arise in the operation of the international criminal court. Now we have roughly ten minutes before 1.00 o'clock but with your permission I would like to extend for another 10 – 15 minutes to get questions from the floor. Yes, the delegation of the Sultanate of Oman has asked for the floor. I now give the floor to the delegate from Sultanate of Oman.

The Delegate of Oman: (In Arabic. Taken from interpreter's version). My question is that these courts do not trial except those victorious countries want for trial. Some superpowers are not parties to the International Criminal Court. What is its effect? In respect of International Criminal Tribunal for former Yugoslavia, all accused were not arrested in former Yugoslavia.

President: Thank you Minister. Now I give the floor to the distinguished delegate from India.

The Delegate of India: Thank you Mr.President and thanks to Judge O-Gon Kwon for his very learned lecture on ICTY. I have some concerns on the exit policy and the so called that international court should be just limited for the big fishes though we may have some concerns on the setting up of international courts themselves but once the courts have been set up, I think if they are meant for the big fishes only then in fact you are promoting impunity because big fishes don't operate alone and they can operate with the complexity and assistance of the small fishes and if the small fishes are given the signal that they are free to be tried by the national courts and presuming that the national courts will be willing to try them, then I don't think we are helping the courts very much. Thank you.

President: Thank you. I now give the floor to Judge Kwon.

Judge O –Gon Kwon : Thank you Mr.President. I will first try to answer the question of Mr.Minister from Oman. I don't agree with the observation that ICTY is dealing only with the losers of the war. We have lot of Croatians accused and also Bosnians, of

[8] Statement given at the 57th Session of the General Assembly of the United Nations (November 2002).

course there are more Serbians accused but recently we received Mr.Orich who is responsible for massacre not by the Serbs but against the Serbs and also we had a Muslim General called Mr. Hallelovic and when our Tribunal dealt with the General from Croatia Mr. Berbaco there was a big rally against our Tribunal in …… So, it is the criminal policy of the prosecutor , so I am not in a position to make any comment on the job but I can say at least we are trying to deal with them to give them equal treatment as much as we can.

The second question, may be it concerned with the United States resenting from the ICC, but I am not an expert but I think speaking for myself I also think it is regrettable that the United States has resented from the ICC but first and foremost given the complimentary jurisdiction of the ICC, the United States concern is sort of groundless in my opinion, so I would like to strongly encourage the United States to re-examine the stand and participate in the global effort to create an effective international criminal court .

I think that wrap up most of the questions. I missed the name of your last question of the ICTY was not dealing with the Bosnian and Herzegovina and if the Minister could help me, who you referred to?

The Delegate of Oman: In Arabic (translation not available).

Judge O-Gon Kwon : Thank you Minister. I think I dealt with those two people in my presentation who are Mr.Karadzic and Mr.Mladic . The international community and the prosecutor of the ICTY has been doing their best to arrest those two criminals but actually as I mentioned in the part dealing with state cooperation, we did not get much cooperation from the Republic of Srbska where he is believed to be hiding. I think that is all I can say.

Finally to the question of Indian representative, the ICTY is very much criticized on its too much big budget. We are spending more than ten hundred million dollar a year which is around one tenth of the whole United Nations budget and we have more than 1200 employees. So, as an *ad hoc* tribunal we are criticized to spend too much. That is the practical reason to start to think about the completion strategy or exit programme . So, that presupposes that we have a specialized chamber which is in full function and functions effectively , then we can transfer some of the smaller prominent accused to the national courts. So that does not mean that we give impunity to the smaller fishes and I can add to this to what I said already is that one of the purposes of the war crimes trials are to keep history of what happened during the war, during the atrocities to remember and to deter future atrocities that can be performed very much in the cases involving big fishes rather than small fishes. That is my observation. Thank you.

President: Thank you Judge Kwon. I see no other delegate wishing to take the floor. Is there anyone wishing to take the floor? Yes, Pakistan, you have the floor.

The Delegate of Pakistan: Thank you Mr.Chairman. I am sorry the microphone was not working. Well, my question is that on the one hand the international community is becoming more and more conscious of the international humanitarian law and the need to the application of international humanitarian law and then there is this trend of setting up of international tribunals to try war crimes and crimes of genocide and crimes against humanity and there is this effort of defining the crime of aggression.

On the other hand, we find that the fundamental principles of international law and charter are being violated and use of force in violation of these principles is increasingly been resorted to. The very concept of causes really has undergone radical changes and today we talk of resorting to war on the ground of certain States possessing some weapons or having some sort of regimes which are not acceptable to other States and then we also have this concept of pre-emptive actions resorting to use of force against sovereign States just to prevent some criminal elements from operating from that state. So in this situation, what do you think are the chances of the international community having confidence and commitment to the observance of international humanitarian law and the impunity for criminals and crimes against humanity etc. Thank you Mr.Chairman.

The Delegate of President: Thank you. The next speaker on my list is the delegate from the Republic of Korea. Now I give the floor to the distinguished delegate from Republic of Korea. You have the floor Sir.

The Delegate of Republic of Korea: Thank you Mr.Chairman. I would like to address a question. How much does the ICTY enjoy self-independence from the control of affluence of Security Council of the United Nations especially because it is established by the Security Council and also from the United States of America? Thank you.

President: Thank you . I now give the floor to Judge Kwon to respond to the two questions.

Judge O-Gon Kwon: I don't think I got the second question. First I will deal with the first question which seems to be related to the crime of aggression on which I am not an expert and I purposely avoided dealing with that issue in my presentation. So I think other panelists will be more able to deal with the crimes of aggression on that matter. I defer that question to the esteemed panelists and if the delegate of Republic of Korea could reiterate the question once again please.

The Delegate of Republic of Korea: How much does the ICTY enjoy self-independence from the control of affluence of the Security Council of United Nations and United States of America?

Judge O-Gon Kwon: I am not accustomed to using this microphone which is different from mine. I don't think the ICTY is not independent in relation with the United Nations or the United States of America. Of course we are being funded by the United Nations so in that aspect we have to depend on the Security Council and the Fifth Committee and so

on but that is it. I don't doubt there is any dependency on any other country or other international organisations in terms of trial. As long as trials are concerned and also prosecution it is independent of any other organ. I would say this without any doubt and with confidence.

President: Thank you Judge Kwon once again for your presentation and answering questions. I think there is no other speaker who wishes to take the floor. So , I would like to conclude the second session and propose to have the lunch break. Thank you very much for your attention and cooperation. The meeting is adjourned. Our meeting will resume at 2.30 p.m. Thank you.

President: Good afternoon. Now I would like to begin the third session. As you know, the title of the third session is international humanitarian law and the fight against terrorism. Mr.Jean Philippe Lavoyer from the ICRC will make his presentation on this subject . Born in Switzerland Mr.Lavboyer studied law and was admitted to the Bar in 1976. He worked as a Legal Adviser for the Swiss Government from 1978-84. From then onwards he has worked for the International Committee of the Red Cross. He spent about seven years in the field making field missions in South Africa, Somalia, Afghanistan and Kuwait. He worked as a Legal Adviser in ICRC Headquarters in Geneva from 1998 and Deputy Head and from 2001 as Head of the Legal Division. Mr.Lavoyer has participated in many international conferences dealing with international humanitarian law. He has been teaching international humanitarian law extensively and has written many articles in this field. I am pleased to invite him to take the floor.

Mr.Jean Philippe Lavoyer, Head of the Legal Division, ICRC. Mr.Chairman, Mr. Secretary General , Excellencies, ladies and gentlemen,

I am particularly pleased to be able to address this important conference today, and I wish to warmly thank AALCO and in particular its very dynamic Secretary General Amb.Kamil for giving me this opportunity.

I am also very grateful to the Korean Authorities for having proposed this special session. In this respect I wish to thank especially Dr.Kak-Soo Shin, Director General of the Treaties Bureau at the Korean Ministry of Foreign Affairs and Trade, for his very active support in the field of international humanitarian law.

As a preliminary remark I would like to say that I will use the expressions "international humanitarian law" or "humanitarian law' in the same way. They have in fact the same meaning as the terms "law of war" or "law of armed conflicts".

In my presentation I wish to make some comments about one of the major challenge the world is facing today which is terrorism. I would like to look at the relevance of humanitarian law with regard to terrorism and counter terrorism. How relevant is humanitarian law in the post-September 11 reality". Is this body of law adapted to face this challenge? More generally, I would like to discuss the question whether humanitarian law is still relevant in today's armed conflicts.

The question about whether humanitarian law adequately protects the victims of war is not new. It is actually thanks to this debate that this body of law could develop, from the first very rudimentary Geneva Convention of 1864 to the very elaborate rules of the Geneva Conventions of 1949 and their Additional Protocols of 1977.

This debate has certainly intensified since the end of the Cold War, with an increasing number of violent internal armed conflicts, all too often with religious and ethnic components which have exacerbated these conflicts. There have also been conflicts where State structures disintegrated to a point where "war lords" were able to take the fate of entire populations into their hands. All too often, civilians became the very targets of the war and were not just affected indirectly as "collateral damage".

Yet, the debate took on another dimension after September 11. What happened? Starting on that date, the United States announced that they were "at war" with the group at the origin of these attacks and with terrorism more generally. Indeed, the nature and the result of these attacks on the World Trade Center and the Pentagon were similar to that of armed conflict. The use of the word "war" may therefore have been quite a normal reaction.

In that context, "war" was understood as meaning "armed conflict". This raised a number of delicate questions. Had a worldwide armed conflict started? How should it be characterized, given the traditional definitions of an armed conflict? What would be the consequences of such an armed conflict? Who would be the parties to such a conflict? What exactly is Al Qaeda? When would such an armed conflict come to an end?

This debate – which is still going on – as we know, has led to some confusion and uncertainty about humanitarian law fuelled by assertions that it was not applicable to or adequate in the "war against terrorism" and that it constituted an obstacle to justice. One particular issue has rendered the discussion even more difficult: It is the very notion of 'terrorism' and 'terrorist'. As is well known, there is no general agreement on what exactly these terms cover.

Excellencies, ladies and gentlemen,

What are the new challenges in the so-called "war against terrorism?"

On 7 October 2001, the "war against terrorism" took on a very concrete dimension when a United States- led coalition launched a military campaign against Afghanistan. This armed conflict has been generally recognized as being of an international nature, including by the United States. This meant that the four Geneva Conventions of 1949 were applicable, as well as customary humanitarian law.

The fact that the regime in Kabul had only been recognized by a handful of countries was not an obstacle to this legal qualification. In parallel, the internal armed

conflict, which had started several years before, continued between the Northern Alliance and the Taliban regime.

It should be noted that in view of the ICRC, this qualification changed with the establishment of a broad based, internationally recognized Government on 19 June 2002. The international armed conflict between the Coalition and the Taliban and Al Qaeda came to an end at that date, while the internal armed conflict continued, the coalition merely supporting the new Afghan authorities against remaining Taliban and Al Qaeda groups.

One of the issues which became the object of much discussion was the legal status of those captured by the Coalition, in particular those detained in Guantanamo Bay. The United States administration was quick to label them as "unlawful combatants". In a much publicized statement of 7 February 2002, the United States, although accepting the applicability of the Third Geneva Convention, concluded that none of those captured fulfilled the conditions for prisoner of war (POW) status.

This approach has been criticized because it failed to take into account the general presumption that a fighter caught on the battlefield during an international armed conflict is a POW. In case of doubt about the legal status of a captured person, a competent tribunal should make a determination. That has, however, not yet occurred.

It has to be recognized that a distinction may have to be drawn between the armed forces of the Taliban and Al Qaeda. Whereas it is certainly difficult to deny POW status to the Members of the Taliban army as a whole, the situation is more complex for Al Qaeda.

In this latter case, their members could be considered as members of a militia forming part of the Taliban armed forces or of another militia that would have to respect a number of conditions. In those two cases members of Al Qaeda would qualify as POWS, provided they fulfilled the necessary conditions. However, it is difficult to come to clear conclusions, as the precise relationship between the Taliban and Al Qaeda remains to be determined.

It is regrettable that no such competent tribunals were called upon to decide about the legal status of the prisoners on an individual, case by case basis, as the United States had done in other wars, like the Vietnam War or the Gulf War in 1991, or even very recently in Iraq.

Quite naturally, part of the debate focused on the question of what legal status was to be given to those who did not qualify as POWS. What legal regime would protect them?

Humanitarian law provides a comprehensive protection: if a person does not fall under the Third Geneva Convention, then he or she is covered by the Fourth Geneva

Convention. However, this latter Convention contains some exceptions, one of them being nationality.

For the few cases that do not fall under this Convention, there still exists a safety net composed of common Article 3 to the Geneva Conventions and of Article 75 of Additional Protocol I of 1977. Article 75, which contains a number of important legal safeguards, is generally considered to reflect customary international law, including by the United States.

In addition, international human rights law and United States domestic law apply to those detained in Guantanamo Bay. Therefore, all those held by the United States cannot be without legal protection. We are convinced that those prisoners have a right to a hearing to determine their status or the charges against them. Indeed, no one can be put outside the law, whatever he or she may have done.

In the course of the debate it has been frequently alleged that humanitarian law was no longer adapted to present day situations. One criticism was that humanitarian law as an obstacle to justice, that it did not allow the punishment of those captured in the "war against terrorism". This affirmation is simply wrong.

As we heard this morning already, the Geneva Conventions and Additional Protocol I contain a list of extremely serious violations of humanitarian law, called "grave breaches". According to the principle of universal jurisdiction, States party to these treaties have the obligation to search for and prosecute those suspected of having committed such violations, wherever the act has been committed. They can also hand them over for trial to another State.

Attempts have been made to show how badly adapted the Geneva Conventions are to such situations. However, this criticism failed to understand the very nature of the POW status. It must be recalled that POWs are not criminals, unless they have committed violations of humanitarian law.

One should also not forget that respect of the Third Geneva Convention has a very important practical aspect: if a State treats POWs well, this will tend to increase the likelihood of the adversary treating the POWs in his hands well, too, although there is no legal rule of reciprocity.

The military campaign against Iraq, led by the United States and the United Kingdom, which started on 20 March 2003, was undisputably another example of an international armed conflict. The applicability of humanitarian law to this conflict was clearly reaffirmed by the United States and the United Kingdom, as well as by Iraq.

The legal qualification of other incidents of violence is, however, much more difficult. Accordingly to the United States, the "war against terrorism" started well before 11 September 2001 and continued afterwards.

It includes a number of events, such as provoking an explosion in the World Trade Center about ten years ago, attacks on the American Embassies in Nairobi and Dar-es-Salam, the attack on the ship "USS Cole" in Yemen, attacks in Karachi, the attack on a hotel in Mombasa, the bombing in Bali, and just a few weeks ago, attacks in Ryadh and Casablanca.

In Yemen – last October – an American drone launched a missile that killed alleged members of Al Qaeda, that would be part of counter-terrorism.

According to the United States, all these events are linked and are part of a protracted "global war". As such, they would form part of an international armed conflict, to which humanitarian law would apply. This sweeping definition of armed conflict has often been questioned and has been considered by many commentators to be too broad.

This whole debate has probably suffered from a fundamental misunderstanding about the role of humanitarian law in the "war against terrorism". Because of the tendency to equate the notions of "war against terrorism" and "armed conflict", humanitarian law has been expected to provide answers to situations which *prima facie* fall outside its scope of application.

All too often, a confusion has taken place between the rules governing the use of force, which are contained in the Untied Nations Charter – the *jus ad bellum* Professor Sassoli has referred to repeatedly this morning, and the rules which apply once an armed conflict has started – the *jus in bello* – which is humanitarian law which is applicable whether the use of force was legal or not, as Prof. Sassoli also indicated. It should be recalled that violations of humanitarian law as such can never be the basis for the use of force and that even an alleged "just war" would not imply any exemption from the application of humanitarian law.

Let me add here quickly that the ICRC's mandate only covers the *jus in bello*, i.e. international humanitarian law. To take a position on questions of the legitimacy of the use of force - which are of a highly political nature – would seriously put at risk the ICRC's ability to work as a neutral, impartial and independent organization.

The proposition that the "war against terrorism" constitutes an armed conflict raises several difficult challenges. Clearly, the "war against terrorism" does not fit well into the existing categories of armed conflict. This "war" cannot be considered to be international, as it is not between States. Neither can it be considered to be a war of national liberation.

It could be worthwhile to examine if the "war against terrorism" could be considered to be a non-international armed conflict. Several questions arise: Where does the conflict actually take place? Who are the parties to such a conflict? The general answer would be : on one side a State or a coalition of States, and on the other side a trans-national armed group. The difficulty, however, is to define this party with some degree of precision.

Is it Al Qaeda? But who exactly is Al Qaeda? Another challenge is determining the beginning and the end of such a conflict.

As you can see, these are important, but also very difficult questions. I don't think we have many answers at this stage.

The notion of "armed conflict" has taken more than a hundred years to develop. Before changing this essential notion of humanitarian law, it is suggested that a very careful analysis be undertaken, balancing the advantages and shortcomings of such an exercise.

The "war against terrorism" has often been compared to the "war against poverty", or the "war on drugs". Probably a similar "war" existed during the Cold War between the two superpowers. This term has become a widely used slogan without any real legal connotation.

It is certainly important and useful to discuss these issues, but under existing humanitarian law, it is not easy to consider the "global war against terrorism" as being a "global armed conflict". Under the existing framework humanitarian law applies when the level of force used amounts to an armed conflict.

This approach limits the scope of humanitarian law to those situations it has been intended to regulate. As I have already indicated, that level of force was reached in the military operations against Afghanistan and against Iraq.

In this debate it should be kept in mind that armed force will usually not even be the best tool in the fight against terrorism. Other means, like police and judicial cooperation between States as well as domestic law enforcement are usually much more adapted and efficient. Indeed, terrorist acts are first and foremost crimes. As we all know, several international conventions have been adopted over the years to respond to international terrorist crimes.

It should be further recalled here that the notion of armed conflict implies the equality of the parties involved. This means that the parties have the same rights and obligations under international humanitarian law. To deviate from this essential principle would be to put into question the whole fabric of humanitarian law.

To consider a trans-national armed group a party to an armed conflict could therefore raise difficulties of a more political nature, as it could amount to give some form of legitimacy to the group.

Excellencies, ladies and gentlemen,

Let me now say a few words about what humanitarian law says about terrorism.

Given the scope of application of humanitarian law, terrorist acts are only covered if they occur in situations of armed conflict. But even then, the reader of the Geneva Conventions and their Additional Protocols could, at first hand, be disappointed, as the term "terrorism" and "terrorist" are hardly used in humanitarian law treaties.

According to a provision of the Fourth Geneva Convention ,

> " Collective penalties and likewise all measures of intimidation or of terrorism are prohibited".

The 1977 Additional Protocols contain the following important provision:

> "The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence, the primary purpose of which is to spread terror among the civilian population are prohibited."

Additional Protocol II also prohibits acts of terrorism against persons who do not take a direct part or who have ceased to take part in hostilities during an internal armed conflict. However, no definition is provided of what exactly constitutes "terrorism".

More generally, the term "terrorism" is still subject to diverging interpretations, as could be seen during the negotiation of a Comprehensive Convention on International Terrorism, which is taking place at the United Nations in New York.

This being said, humanitarian law contains important rules which clearly prohibit acts which are commonly considered as falling under the label "terrorism".

As an example, humanitarian law prohibits the taking of hostages. Furthermore, and this was already mentioned this morning , one of the cornerstones of humanitarian law is the principle of distinction, according to which military attacks have to be directed only against military objectives.

As Prof. Sassoli pointed out this morning,, these are objects that make an effective contribution to military action and whose destruction offers a definite military advantage. It is therefore prohibited to attack the civilian population. Indiscriminate attacks, which fail to make this distinction, are also prohibited. So are attacks against military targets that cause excessive loss of life and damage to the civilian population.

Besides these general prohibitions, humanitarian law also contains specific provisions aiming at the protection of objects indispensable to the survival of the civilian population (like food, agricultural areas, livestock and drinking water), the protection of cultural objects and places of worship, the protection of works and installations containing dangerous forces (dams, dykes and nuclear electrical generating stations), as well as the protection of the natural environment.

The intentional violation of many of these and other rules amounts to a grave breach of the Fourth Geneva Convention or of Additional Protocol I. This is particularly the case for direct or indiscriminate attacks against the civilian population. Perpetrators of such acts may also fall under the jurisdiction of the International Criminal Court.

When committed against civilians, these acts are serious violations of humanitarian law. However, an attack directed against military personnel or against a military objective is lawful. Indeed, members of the armed forces are allowed to participate in an armed conflict and to attack the adversary.

However, if a member of an armed force has recourse to perfidy, he would commit a violation of humanitarian law. Examples would be the feigning of civilian status or feigning an intent to negotiate surrender. It is also prohibited to order that there shall be no survivors.

If an attack is carried out by a civilian whether against other civilians or against military personnel , that person can be prosecuted and punished merely for having committed a hostile act. Civilians lose their protected status as civilians if they participate directly in the hostilities and as Prof.Sassoli indicated they lose this immunity only during the time of their direct participation in the hostilities. In addition civilians may of course also be tried for any violations of humanitarian law they have committed.

"Unlawful", or rather "unprivileged combatants", are civilians who take part in the hostilities and who can therefore be punished for that, even if they have not committed any violations of humanitarian law.

The Geneva Conventions and their Additional Protocols also contain rules that protect persons who find themselves in the hands of the enemy as wounded or captured combatants (i.e. prisoners of war) or as civilians. Notably willful killing, torture or inhuman treatment and deprivation of the rights of fair and regular trial vis-à-vis such protected persons represent grave breaches of these treaties.

Humanitarian law is therefore an efficient tool of international law which unambiguously addresses and prohibits all acts commonly considered as terrorist if committed during an armed conflict.

Excellencies, ladies and gentlemen,

We have to ask ourselves if, more generally – i.e. beyond the issue of terrorism – existing humanitarian law is adequate to respond to the protection needs generated by today's armed conflicts. In a fast changing world such a question is not only normal, but it is necessary.

First, one has to reply to all those who have asserted that the development of humanitarian law has come to an end with the Geneva Conventions of 1949. No one

would minimize the importance of the Additional Protocols of 1977. They have greatly reinforced the protection standards contained in the Geneva Conventions, particularly in the field of the conduct of hostilities. Protocol II may be rather rudimentary, but it has notably strengthened the rules applicable in non-international armed conflicts.

Contrary to a widely held view, humanitarian law has gone through a very dynamic development, especially in recent years.

In 1980 the Convention on Certain Conventional Weapons (CCW), with its three Protocols was adopted. It has become the cornerstone of humanitarian law in the field of the prohibition or restriction of weapons.

In the last ten years, several important treaties have been adopted and the Vice-President of the ICRC has already alluded to them :

- in 1993, the Chemical Weapons Convention;
- in 1995, the prohibition of blinding laser weapons(through a Fourth Protocol to the CCW);
- in 1996, an amendment of Protocol II to the CCW;
- in 1997, the Ottawa Treaty banning antipersonnel mines;
- in 1998, the Rome Statute for the International Criminal Court;
- in 1999, a new Protocol reinforcing the protection of cultural property (new Protocol to the 1954 Convention);
- in 2000 the strengthening of the protection of children against recruitment into armed forces or armed groups.

Furthermore, as you may remember, in 2001, the scope of the CCW was extended to non-international armed conflicts, which was a clear indication of States' concern to improve the protection of victims of those conflicts, the number of which has quite dramatically increased.

In the same year, that is in 2001, discussions started on "explosive remnants of war". In 2000, the ICRC launched an initiative aiming at regulating unexploded munitions, in particular cluster bombs, based on its assessment in the field, which showed that many years after the end of an armed conflict, great numbers of civilians still became the victims of "explosive remnants of war". This initiative was supported by many States.

It is hoped that the negotiations will come to a close as soon as possible – we hope this year – with the adoption of a Fifth Protocol to the 1980 CCW Convention. As we are meeting in Seoul this week, Government experts are continuing their negotiation in Geneva.

Humanitarian law has therefore been far from static. These developments show that this body of law has strived to keep abreast with developments of modern warfare.

When considering the question of the relevance of humanitarian law in today's world, one has to keep in mind that this law constitutes a careful balance between military imperatives and considerations of humanity. To tilt that balance unilaterally towards more humanity would risk rendering humanitarian law meaningless. Either States would refrain from adhering to such new rules, or their armies would fail to respect them.

On the other side, to tilt the balance towards reduction of humanitarian safeguards would deprive humanitarian law from its very *raison d'etre*. The best guarantee for respect is to keep the law realistic.

Based on its long experience in armed conflicts, the ICRC firmly believes that the existing rules on the whole provide sufficient protection to those affected by armed conflict. It is therefore crucial to forcefully reaffirm their relevance.

I would like to mention here one recent example which is the ICRC initiative called "Biotechnology, Weapons and Humanity", that aims at reaffirming the prohibition of biological weapons contained in the 1925 Geneva Protocol and the 1972 Biological Weapons Convention.

Last September, the ICRC launched an Appeal during an informal meeting of government and independent experts that took place in Montreux, Switzerland. Biotechnology has a huge potential to help mankind, but its possible hostile use could have very dramatic consequences. These prohibitions therefore need to be clearly reaffirmed.

However, there is also a need to further clarify some basic concepts. Let me give you a few examples where we believe that some clarification would be needed.

Notions like the concept of military objective, the principle of proportionality and the precautions to be taken in an attack are described in Protocol I in a rather general way and are therefore difficult to apply. It would therefore be useful to try to find a consensus on the interpretation of these notions that are of particular relevance for humanitarian law.

Another example concerns chemical weapons. Both the 1925 Geneva Protocol and the 1993 Chemical Weapons Convention prohibit the use of incapacitating chemicals. However, the latter treaty permits the use of chemical agents for law enforcement. This could lead to their proliferation and could undermine the existing prohibition. It is therefore very important that States clarify the meaning of the Convention's law enforcement exemption.

Before a call is made to change the law, every effort has to be undertaken to apply it in good faith, even to situations that were not foreseen originally. Indeed, the main problem today is not a lack of rules, but proper implementation of existing rules.

Respect and implementation of the law is always a challenge. But non-respect of humanitarian law can easily take on dramatic dimensions. Implementation of humanitarian law has to occur in three phases, which may overlap.

First, it is important that States ratify the relevant treaties and implement them at the national level through the adoption of laws and regulations. States have to adopt the necessary legislation in order to make it possible, e.g. to prosecute suspected war crimes or to protect the emblems of the red cross or red crescent.

The ICRC's *Advisory Service on International Humanitarian Law* is at the disposal of States in order to reinforce their activities in that field.

States must also teach the law, in particular to their armed forces.

Secondly, States and – in internal armed conflicts – organized armed groups have to apply the law once involved in an armed conflict. The obligation to apply the law is not, however, limited to the parties to an armed conflict. As the Vice-President of the ICRC has already indicated this morning, it includes other States, which have to respect and also to ensure respect of the Geneva Conventions and of their Additional Protocols.

Article 89 of Protocol I has added some precisions to common Article 1:

> "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."

The lack of readiness of States to contribute to ensure respect of humanitarian law, e.g. by denouncing violations or by exerting pressure on the parties to a conflict, can only be regretted.

And thirdly, States have an obligation to search for and prosecute all those suspected to have committed grave breaches of the Geneva Conventions and the Additional Protocols.

When we look at the three phases, we have to acknowledge that in the more recent past, progress was made with regard to the first and third phases, i.e. in the field of prevention and repression of violations. However, how to increase respect of humanitarian law during armed conflicts remains the main challenge.

The question of the adequacy of humanitarian law was discussed in early 2003 in the framework of an initiative of the Swiss Government and the Harvard Program on Humanitarian Policy and Conflict Research. The meting took place near Boston from 27 to 29 January 2003.

A group of States and independent experts, as well as the United Nations and the ICRC, had an informal debate on issues linked to the conduct of hostilities, the legal

status of combatants and civilians, the beginning and end of application of humanitarian law and, finally, the implementation of humanitarian law.

The conference identified a number of topics deserving further examination and clarification, but at the same time it also strongly reaffirmed the validity of current humanitarian law and the necessity to apply it.

Furthermore, in 2003, the ICRC is organizing several expert meetings with a view to generating an in-depth debate on current challenges facing humanitarian law.

Regional expert meetings already took place in Cairo, Pretoria and Kuala Lumpur. Others are planned in Mexico City and in Bruges (Belgium). The ICRC also organized an expert meeting in The Hague, jointly with the Asser Institute.

In addition, the ICRC is organizing a Round Table with the International Institute of Humanitarian Law in San Remo (Italy). It will take place at the beginning of September.

During these expert meetings, a particular emphasis is put on the question of implementation of humanitarian law by States and organized armed groups. Other issues are the crucial concept of direct participation in hostilities and the interplay of different bodies of international law in situations of violence, i.e. between international humanitarian law, international human rights law, international refugee law, international criminal law and domestic law.

The outcome of these meetings will be presented to the next International Conference of the Red Cross and Red Crescent in December. This Conference should be yet another opportunity to forcefully reaffirm the importance and relevance of humanitarian law.

At the same time, development of humanitarian law has to continue in specific domains. The restriction or prohibition of weapons is a good example. There is probably also space for the development of mechanisms for better application of humanitarian law.

A recent good example was the creation of the ad hoc Tribunals for the Former Yugoslavia and Rwanda and of the International Criminal Court. However, to open up the Geneva Conventions and the Additional Protocols would entail considerable risks and uncertainties. Great care would have to be taken not to weaken existing protection standards.

One area which would certainly need further analysis with a view to a possible development of the law are the rules that apply in non-international armed conflicts, which are quite rudimentary at least in treaty form.

In this regard, attention should be drawn to the study which the ICRC has conducted on customary humanitarian law. Its results should significantly improve the protection of the victims of internal armed conflicts.

Indeed, many important rules that formally only apply to international armed conflicts – in particular those relating to the conduct of hostilities – were found to apply also in internal armed conflicts. This means that even States not Parties to the relevant treaties are legally bound by the customary law rules.

The ICRC was mandated to carry out this study in 1995 by the 26th International Conference of the Red cross and Red Crescent. It is in so far unique as it is the first time that such a broad analysis was undertaken. The study will be available this autumn and will be presented to the International Red Cross and Red Crescent Conference.

Quite evidently, the main problem today is not so much a lack of rules, but rather a lack of political will to implement existing rules. States are encouraged to transform into reality the different facets of implementation of, and compliance with humanitarian law, starting with adhering to humanitarian law treaties, in order to make its rules universal.

At present, 191 States were bound by the Geneva Conventions, whereas 161 States are Parties to Protocol I and 156 States Parties to Protocol II.

The level of ratification to several other humanitarian law treaties is, however, still rather low, and States are strongly encouraged to make a special effort to consider becoming bound by these treaties.

I wish to draw the attention of the Member States of AALCO more particularly to the following treaties:

- the two Additional protocols of 1977;
- the Convention for the Protection of Cultural Property of 1954 and its new Protocol of 1999;
- The Convention concerning Certain Conventional Weapons of 1980, with its four Protocols and the amendment of the Convention of 2001, extending the scope of application to non-international armed conflicts;
- The Ottawa Treaty banning antipersonnel mines of 1997, and
- The Rome Statute for the International Criminal Court of 1998.

I am convinced that the record within the AALCO community can be substantially improved in the coming years.

Excellencies, Ladies and Gentlemen,

I would now like to come to some conclusions, which I will formulate in 4 points.

1. Humanitarian law occupies an important place in the system of international relations. Together with human rights law and refugee law, its aim is to protect human dignity. Humanitarian law endeavours to protect persons that are affected by armed conflict. In the face of new challenges, arising in particular from acts of terrorism, the specific role of that body of law must be well understood. Terrorism is a complex issue and humanitarian law applies when the violence used amounts to an armed conflict. It must be determined which law applies in a given situation. Humanitarian law should not be expected to apply to the whole "war against terrorism".

2. Humanitarian law clearly prohibits acts of terrorism if committed during an armed conflict. The principle of distinction is at the very heart of humanitarian law and prohibits attacks on civilians. Persons in the hands of the adversary must be treated humanely and benefit from judicial guarantees. In the fight against terrorism humanitarian law must be respected at all times. No one can be placed outside the law.

3. On the whole, existing humanitarian law adequately responds to the protection needs of present day armed conflicts. It represents a careful balance between military imperatives and the protection of human dignity. However, it is important that the general debate on the relevance of humanitarian law in today's armed conflicts continues.

If it appears desirable to further develop humanitarian law in certain fields, as has occurred in the last few years, the main focus should be on the proper implementation of, and compliance with humanitarian law, in peacetime, during armed conflict and after the war has come to an end. Any attempt to put into question humanitarian law can only be made after it has been determined that it is the law that is lacking and not the political will to apply it.

4. The ICRC, as promoter and guardian of humanitarian law and based on its broad field experience, is continuously analyzing the reality of armed conflicts on all continents. It is organizing several expert meetings on current challenges on humanitarian law that will prepare and inform the debate at the next International Conference of the Red Cross and Red Crescent.

Based on its assessment of the needs of the victims of armed conflicts, it is well placed to prepare clarifications or developments of humanitarian law. However, it will not participate in the development of humanitarian law if this is an excuse to lower existing standards.

I thank you for your attention.

President: I thank you very much Mr.Lavoyer for his well organized and thought-provoking presentation on this very challenging and tricky topic of terrorism and international humanitarian law. I expect that many delegates will have questions about his presentation. I recognize that the delegation of Republic of Korea is asking for the floor. I now give the floor to the distinguished delegate from the Republic of Korea.

The Delegate of Republic of Korea: (for some time in French) Mr.Chairman, I would to like to ask Mr. Jean Phillippe Lavoyer, the legal nature of the international terrorism. International terrorism, according to your presentation is very difficult to recognize. So this kind of habit was not well recognized as the legitimate international war. So, my question is, I should like to ask you whether international terrorism like the ..(in French) can be regulated under the international humanitarian law and the terrorism and terrorist activities can be punished in terms of and on the ground of regional violation of international humanitarian law. To be continued, I would like to ask my colleague Madam Ahn to speak.

Ms. Ahn: My question is a little bit different from my colleague sitting next to me. You said that war against terrorism *prime facie* falls outside the scope of application of IHL. But the most salient feature of the armed conflict is the so-called war against terrorism. So, under the Geneva Conventions and Additional Protocols, terrorists are not given the status of combatants so if the terrorists are treated as criminals and not given the protection under the Geneva Convention but they are still expected not to commit extra-terrorism under the international humanitarian law. Then I fail to see where the incentive lies for the terrorists not to target civilians but to target the armed forces only. So if the war against terrorism falls outside the scope of the international humanitarian law then don't we have a lacunae in that respect then it is not the lack of political will but the lack of applicable law that needs to be addressed. So, just labeling terrorists as criminals and saying that they should be dealt with by international and domestic police action does not solve the problem. So in that respect I wonder whether you think that we may need to develop further the IHL to cover the issues related to war against terrorism. Thank you.

President: Thank you Madam Ahn. Now I would like to give the floor to the distinguished delegate from Sudan.

The Delegate of Sudan: (In Arabic. Taken from interpreter's version). I would like to tell what Sudan has done against terrorism. Sudan has ratified all regional conventions. It has promulgated an Act preventing terrorism. There should not be any double standards in combating terrorism. We should not link any religion or race with terrorism. Sudan is in favor of cooperation between Asia and Africa in combating terrorism.

President: Thank you distinguished delegate from Sudan. The next speaker on my list is the representative from the Islamic Republic of Iran. I now give the floor to Prof.Mumtaz.

The Delegate of Islamic Republic of Iran: (In French. Taken from interpreter's version). I come back to the question of qualification; war against terrorism. Various instruments are little bit poor. I say something about enriching these instruments. The imputability of the act. I am talking about draft article 8 of the responsibility of States adopted by the International Law Commission. States re responsible for acts on its

territory. The terrorist acts are also covered. But some times we cannot say State is responsible.

President: Thank you Prof.Mumtaz. Next speaker is Kuwait. I now give the floor to the distinguished representative of Kuwait.

The Delegate of Kuwait: (In Arabic. Taken from interpreter's version). The Stare of Kuwait has been suffering from terrorism. We have to cooperate actively at the international level in the fight against terrorism.

President: Thank you distinguished representative of Kuwait. Now we have two speakers on the list. Due to the time constraint, I would like to close the list of speakers for the Session, but if there is anybody wishing to take the floor for this session we will have another session and I would like to ask them to take the floor at that time. Now I give the floor to the distinguished delegate from Indonesia.

The Delegate of Indonesia: Thank you Mr.Chairman for granting me this opportunity . I have small questions, but it is very important to all of us here. After the Bali bombings Indonesian Government faced some problems how to cope the Bali bombings because several years before we have repealed our law. And then the bombing is there then we have a vacuum of law to implement to cope with the blast and after two weeks around then the Government promulgated a presidential decree covering against terrorism and later on it has become now a law after the consent of our parliament, but when the Government promulgated this law some say here and there from our community is opposing about the definitions of terrorism or the acts of terrorism or who are terrorists because some people see that may be the terror arise from internal conflict. But you see the people that have been murdered are not only Indonesians but there are many foreign nationals. Arising from this discussions among our scholars we see some need that is it possible , and this is my question, to have a common or a universally accepted definitions or perceptions on terrorism. Whether is it the scope of national one or local entities. Is it possible to define terrorism or terrorist under the humanitarian law or does our world have to find the definition , if the definition is not already there. I thank you Mr.Chairman.

President: Thank you. I now give the floor to the distinguished representative of Uganda.

The Delegate of Uganda: Thank you Mr.Chairman. Mine goes to Prof.Lavoyer and I am following closely from the next speaker . The fact that we don't have an agreed definition and also the fact that there is no international, can I call it office, that can decide that this is terrorism, this is not, and in view of the fact that the list for the United States is increasing every day, so, Professor how soon do you think you can have this common understanding and who can decide if one nation decides to list everybody, what will happen in the end, who will be the arbiter?

President: Thank you Madam. Now I will give the floor to Mr.Lavoyer to respond to six questions from the floor.

Mr. Lavoyer: Thank you Mr. Chairman. Thank you to all of you who have taken the floor and I am very glad that we can have this informal and open discussion here today and the questions are indeed most pertinent not always easy and I have to admit that I don't always have the adequate answers because the issue is just extremely complex. Terrorism is a multi-faceted thing which we all have a feeling about what it is, but if I may start with the question of definition, we all think we know what terrorism is, but when we have to put it on paper, to put in law, your example is I think very telling. National laws will also become internationally quickly to the conclusion that it is extremely difficult. The best example is the negotiation which has started in New York a couple of years ago on two Conventions, namely, on the Comprehensive Convention which I think is an Indian initiative, this work has been continuing and will have to continue because obviously States were unable to come to a definition. Why is it so difficult, because probably well, terrorism is something very political. The term is politically loaded and there are indeed different view points on what terrorism is . One act can be a terrorist act for some people but not for the others, for others it could be linked to a war of national liberation for instance or against foreign occupation and you know the issues. I don't have an answer to those who ask when will it be possible to reach a conclusion. I am afraid this will take quite some time. There is another anti-terrorist convention which has not been finalized which is about nuclear terrorism, however other sectoral Conventions were adopted. We know there are a dozen of them , one recent and probably important one is about terrorist bombing where apparently it is possible to reach agreements and also about the financing of terrorism. So I will submit that together all these ten or twelve conventions are probably quite a powerful tool against terrorism which is foremost a crime but I can't offer much on this issue of definition.

There were some other extremely interesting questions, one was about should we, I think that was the delegation of Korea, should we further develop humanitarian law are there lacunae in international law. Now you can look at this from different angles. What I have tried to explain before is that terrorism as such, normally let me put it this way, is not related to armed conflict and only if it happens in the framework of an international or internal armed conflict, then it becomes relevant for humanitarian law. If we take all these incidents you mentioned Bali before, what happened was that Bali was terrible with I think more than 200 people killed and probably many more injured, does this amount to an armed conflict? I have serious doubts that what happened in Bali, in Yemen in Riyadh and in Casablanca, I have doubts that we can put it al this together to create a sort of chain and then to look at it as an armed conflict, and may be I can make link with what Professor Mumtaz just said[*]….. (in French)

One of the questions is if it is not international can it be non-international or is there something in between. Now that could be progressive development of the law possibly to have yet another category not just international and on international,

[*] Statement made in French. Translation not available with the Secretariat.

something in between. But so far I can assure you that the ICRC in particular and certainly many of you have thought about this we have done also done quite extensively to the research because we wanted ourselves to have a better understanding of what a terrorism represents but we have not come to a clear conclusion.

To speak about an armed conflict one needs to have parties and that is very essential when you have only a party on one side and on the other side you have more or less organised groups you have Al Qaeda and as I said I don't quite know who is Al Qaeda. Is it one big organization or then you have local structures. To have humanitarian law applicable, you need parties to a conflict. So I am not saying that a development should be completely excluded . I think reflection has to continue also at the ICRC we will continue to think about these challenges. It is extremely complex. So far we have not come to a solution.

I think that is usually quite powerful tool for cooperation between states, between police forces, between the judiciary and national law enforcement, then we have the twelve sectorial anti-terrorism conventions. We think these are usually the best tools and not necessarily international humanitarian law.

Also the delegation of Kuwait, I think you wanted first of all to affirm the need to fight terrorism. I don't think there was a particular question if I understood you correctly Sir, and the issue of definition, we have already discussed. So, I think I have tried, to the best of my knowledge, to respond to the questions as far as I can do. Thank you very much.

President: Thank you for your excellent presentation and detailed answers to each question. So, I would like to conclude third session and let us have 20 minute coffee break. We will resume the last session at 4.15 sharp. The meeting is adjourned. Thank you.

The role of national commissions in the implementation of international humanitarian law. Originally the panelist for this session was Prof. Salah Amer of Cairo University, but unfortunately he could not make it due to unforeseen circumstances. So, we decided to improvise this session with replacing the panelist with Mr. Lavoyer and myself. Mr. Lavoyer will deliver a general statement on the role of national commissions and I was asked to introduce to you the experience of the Republic of Korea in setting up national commissions last year. So, I would like to apologise to all the delegates for the inconvenience from the panelist not being able to come to attend this meeting. Now I give the floor to Mr. Lavoyer.

Mr. Lavoyer: (In French. Taken from summary)**.** Mr. Lavoyer then spoke about the role of national committees for international humanitarian law. He stated that such committees are valuable because the implementation of international humanitarian law at the national level is complex and requires cooperation between a number of Ministries and institutions. He then outlined the characteristics such national committees should have, as well as the composition of such committees. As there is no special procedure for

the creation of such a committee, each State is free to have a committee which satisfies its own needs; however Mr.Lavoyer suggested that the committee should be a permanent body to help ensure continuity. He noted that the ICRC is able to give advice and support for the establishment of such committees, as well as encouraging the exchange of information between different national committees and the ICRC.

President: I thank Mr.Lavoyer for his enlightening presentation on the role of national commissions and implementation of international humanitarian law. Now, I was asked to introduce to you to Korean experience . So, I will take the podium.

Well, I was approached by the Secretary General Amb.Kamil and Mr.Lavoyer to make a presentation on the Korean experience about the establishment of national commission and I told that I was not the right person to pick up this issue because there are many Asian and African countries which had already set up this kind of commission but I agreed to make the presentation in the belief that we set up this national commission very recently, so our recent experience can be helpful to other States in the region of Asia and Africa to facilitate their process of setting up national committee.

It was actually in March last year that my Government was invited by the ICRC as an observer to the meeting of experts on committees or other bodies for the national implementation of international humanitarian law. Before that in my country the Korean Red Cross was quite active in the implementation and dissemination of international humanitarian law. It has already set up an advisory committee on humanitarian law since 1970s. So it has played a leading role in the implementation of international humanitarian law in Korea but unfortunately this committee consists of mainly scholars in international humanitarian law even though it included only two officials from the Ministry of Foreign Affairs and Ministry of National Defence. So, after attending the Geneva Conference last year, the Ministry of Foreign Affairs decided to set up national committee for the purpose of disseminating and implementing international humanitarian law. In Korea actually most of the treaties whether it be bilateral or multi-lateral can be part of our law if it passes through the national assembly but practically we need a kind of consultative body to facilitate the dissemination and implementation of international humanitarian law. That is why we decided to set up this committee. So we established the Korean National Committee for international humanitarian law in October last year. So it took almost seven months to complete the establishment of this committee, after we started our work on this Committee. Korea became the 63rd country which have set up a committee and six in Asia after Japan, Philippines, Indonesia, Sri Lanka and Iran.

The main purpose of the Korean National Committee for International Humanitarian Law was to facilitate the dissemination and implementation of international humanitarian law at a national level. So in creating this Committee the Ministry of Foreign Affairs took the initiative for this endeavour. We considered two options for the composition of this committee. One option was to constitute this commission at the high level that is minister level and the other option was at the working level. We consulted with other Ministries concerned and then we decided the later option for the purpose of seeking flexibility and efficiency of the Committee. So we decided to create the

Committee composed of several government ministries such as Ministry of Foreign Affairs, Ministry of Education, Ministry of Justice, Ministry of National Defence, Ministry of Health and Welfare and Cultural Properties Administration. We also invited the Korean Red Cross to join the Committee and we also included some scholars in international humanitarian law and the Chairman of the Committee is the Vice Minister of the Foreign Ministry and Vice-Chairman is the Director General of the Treaties Bureau. So it is quite a working level body to facilitate the coordination among the Ministries concerned within the Korean Government. Our plan is to induce several ministries concerned to join the committee and to enhance the awareness of the public about the importance of international humanitarian law. We have planned to expand the membership of the Committee to the Korean mass media and may be the parliamentarians.

So after the creation of this body, it convened the first meeting in December 17 last year and next month we will convene the second meeting and according to the Statute of this Committee there are two regular sessions in a year and we can convene meetings whenever the need arises. At the forthcoming next meeting we will discuss two important issues. One whether to accept the competence of International Fact Finding Commission and Article 90 of Additional Protocol I and whether to accede to 1954 Protection of Cultural Properties Convention and its Protocol. So I hope that the Korean National Committee for International Humanitarian Law can enable my country to peacefully comply with the obligations on the many multilateral conventions relating to international humanitarian law and it will also facilitate the dissemination of international humanitarian law in the military schools and other sectors concerned.

As Mr.Lavoyer pointed out if the Korean National Committee for International Humanitarian Law successfully sets up, we will expand its activities to the regional or international activities too and in this whole process we have maintained close cooperation with the representative office of ICRC in Bangkok which covers my country.

I also would like to add that the advice service on international humanitarian law was quite useful and through that service we can collect many examples of other national commissions. That is all what I have to say in relation to our efforts to create the Korean National Committee for International Humanitarian Law.

In concluding I would like to call upon States in Asia and Africa without this kind of committee to consider setting up of this committee. Thank you.

Now I would like to open the floor for questions. Yes, Prof. Chee from ILC you have the floor.

Prof. Chee, ILC: Thank you Mr.Chairman. This National Commission that will implement international humanitarian law, is this sort of a governmental organ or combination of governmental and private sectors because to enforce international law at domestic level, definitely government is needed , that is why I asked this question.

Second question, do you a sort of model goal so that newly subscribing States may use as a reference as to how to organize this , what should be done and how often they should meet and so on . Probably this needs to be discussed, if not, I was going to suggest that you come out with some sort of model institution or something like that so that many States can use them for their reference in committing themselves to enforce international humanitarian law at domestic level. Thank you Mr. Chairman.

President: Thank you Prof.Chee. Is there any other speaker wishing to take the floor. Yes, Deputy Secretary General of AALCO.

Dr. Ali Reza Deihim, Deputy Secretary General, AALCO: Thank you Mr.President. First of all I express my sincere thanks for the very illusive elaboration of the international humanitarian law by Prof. Sassoli .

You may allow me to explain my points from the other aspect in order to see it from the one other field of international humanitarian law which is not only limited to the war crimes or defence in the war crimes namely *jus ad bellum* and *jus in bello* particularly *jus in bello* is the main point which I wanted to raise. When the question of terrorism was raised it was not limited the application of international humanitarian law only to terrorist activities rather to even the other part which was called Taliban namely according to the press conference made by the President of certain country the application of Geneva Convention according to that interpretation would not be implemented not only to the Al Qaeda rather to the Taliban. O.K. here there are two doctrines, first doctrine distinguishes between the interpretation of the common article 3, article 4 and article 5 of the Geneva Convention which the main doctrine is that we should apply Geneva Convention as regards the Taliban such interpretation that the non-legitimacy, non-recognition, non-territorial activities, assistance to the Al Qaeda terrorist activities could not deprive such group to be covered by the Geneva Conventions 1949. The main doctrine accepts this interpretation rather the first very limited interpretation. But few points of this limited interpretation could be applied to terrorist activities are avoided, which I do request Prof.Sassoli to elaborate on that, which I did not see may be it was illuded from my sight very instructive paper prepared by you Excellency. Fist is that the Al Qadea here in this group is not covered or enumerated as militia or groups which forms armed forces. This is the first restriction of according to that press release of that President.

Secondly this group is an criminal organization third point which was raised was the application of the Geneva Convention refers to if not to the threshold of nationality to the threshold of territorial integrity. That was not very explicitly mentioned but it was meant how that President referred in such a case that this was not a war within the Afghanistan, it was a war outside of Afghanistan, then it means that he referred indirectly to the territorial threshold.

And the other point which was mentioned was the legitimacy which you covered that legitimacy is not appropriate here but these two points I wish to be elaborated. But allow me to make my observation even that we cannot apply the Geneva Convention

upon the groups that President made in such a case we do accept that they are subject to the domestic law means that they are subjected to the domestic law of the United States not the international humanitarian law that is one distinction which you have made accepted or not , that is one, but my perception if so why we should see only within the site of the international humanitarian law from the war crimes.

The other thing is crimes against humanity, crimes against humanity is applicable during the peaceful and peace overwhelmed situation, means if we don't accept as international armed conflict or non-international conflict or even in selection within the internal conflicts. That is the point which I would like you to elaborate on that .

President: It seems to me that the question and comments made by the Deputy Secretary General relates to the issue of terrorism and international humanitarian law. So before giving the floor to answering this question, I would like to confine the question and answer session only to the fourth panel, that is the issue of national commission on international humanitarian law and then take up the question regarding all the fourth sessions. So I would like to ask if there are any other participants from member states to raise the question regarding the panel four. Yes, Pakistan has the floor.

The Delegate of Pakistan: Thank you Mr.Chairman. Mr.Chairman, the question of implementation of international humanitarian law is basically linked with the role of the armed forces and it is the commanders in that field or the military which is in the field which is normally to implement international humanitarian law, so therefore, what role is envisaged for the military establishment or the Ministry of Defence etc. and the national committees or commissions and what is the role you envisaged for this establishment in your national committee. Thank you.

The Delegate of President: Thank you. Yes, Islamic Republic of Iran asked for the floor. You have the floor sir.

The Delegate of Islamic Republic of Iran: (In French. Taken from interpreter's version). First, no rules concerning international humanitarian law foresee such commissions. Second question is, the efficiency of these commissions. Can we establish relationship between establishment and implementation?

President: Thank you Prof.Mumtaz. Now I give the floor to the distinguished delegate from Indonesia.

The Delegate of Indonesia: Thank you Mr.Chairman. My delegation has not much to say at the moment but to have a brief information of what we are doing now in our part of the world and before that I would like to express our appreciation to the ICRC for inclusion of Indonesia in this handbook.

We are now, our national committee is preparing a draft law on the emblem and then see that our future task will also be covering of dissemination of draft law and normally the draft law should be first not publicized but discussed in seminars involving

governmental institutions and non-governmental institutions , some of them are universities because we would like to involve experts and the renowned professors in this law and also we are of the opinion that our regional committee has given strong recommendation to our government for the process of ratification of Protocol I and II and now I think we would like to give strong recommendation, of course we have seen that not all member States of AALCO has national committees yet but it does not mean that international cooperation we withhold it because of this situation.

This is recommendation as well as a question whether the AALCO can take initiative for further international cooperation in capacity building to make a hint for member States to adjust their national condition at the end to have their own national independent committee on this respect. Thank you Mr.Chairman.

President: Thank you. May I ask the delegate from the Russian Federation whether you are going to ask about the issue on the panel 4?

The Observer from Russian Federation: I raised my hand because I found in the schedule 5.00 p.m. wrap up and question and answers and the Vice-President also raised the question. So I raised my hand in that connection because I have a question over legal character concerning one of these issues we are discussing now.

President: So, I now give the floor to the distinguished delegate from the Russian Federation.

The Observer from Russian Federation: Thank you Mr.Chairman. As I said my question is of a legal character. Somebody mentioned during the discussion this morning or in the afternoon, I don't remember that the United States concluded bilateral agreements concerning non-extradition of the citizens to the international criminal court. I heard that such agreements were concluded with 37 countries. Some of them ratified the statute, some of them not. The question is, is it juridically correct to conclude such agreements? I am asking that question taking into account the consideration of the fact that if a State signed a treaty , this treaty is supposed to refrain from the acts which could damage its object and undermine fulfillment of its goals. Thank you very much.

President: Thank you. It seems that the question raised by the Russian Federation relates to the issue of so-called mandate bilateral agreement regarding non-extradition to the ICC, but I wonder whether there is any panelist who can speak about this issue. I would like to ask Judge Kwon whether he can fill this question but before that I would like to give the floor to Mr.Lavoyer for answering the questions several questions regarding panel four. I now give the floor to Mr.Lavoyer.

Mr. Lavoyer: Thank you Mr.Chairman. Many thanks for the different questions. Concerning the question or questions, there were two questions from the representative of the International Law Commission. Your first question was, is it a government organ, what about the private sector. In fact my reply would be this organ is national commission or national committee has an advisory role, it should submit

recommendations to the Government possibly to Parliament. It is not a body which will in itself adopt legislation, obviously not, that would be Parliament so the aim is to facilitate coordination, to facilitate discussion between the different ministries and then to formulate concrete proposals which will have to be followed up by the competent State organ according to the internal constitutional order of a given State.

On the second question you mentioned, and I think it is a very good idea model rules. In fact we have thought about that we have established practical guidelines there are just finalized but we need to print them and send them out and it is a document and I have it here in its French version, it is a document which has quite a number of pages, may be 10 or 15 pages and which contains something which you were suggesting, in fact models like a model for a work plan of a commission. These are very grassroots tools for the commission, there is a model about the compatibility between internal law and international humanitarian law. If you wish I could just show it to you may be during the break. So yes we think some tools would be extremely important and would facilitate work. So I think we just about have the same idea.

There was another question from the distinguished representative of Pakistan. You have asked, well you mentioned, dissemination of humanitarian law the armed forces . Of course the armed forces are the ones that have to abide by humanitarian law. The idea to have all these other Ministries is to deal with other issues than teaching and dissemination. We had this very good example from Indonesia before you mentioned this draft law concerning the protection of the Red Cross and Red Crescent emblem. That is an issue which is of concern not only to the armed forces. I guess a number of ministries have been involved in these consultations like the Ministry of Justice , Ministry of Interior, certainly the armed forces, may be, Foreign Affairs. There are many tasks which go beyond the district role of the armed forces. I don't know if I have replied to your question but that is how I understood it. Furthermore, Prof.Mumtaz .. (in french)

Concerning Indonesia, yes, I think that is a very good example of how your commission works . You mentioned this draft law on the emblem that is a very good example and concerning the proposal to AALCO, of course I am not in a position to reply here I am not competent for that, but if I may say, the idea is quite good and again I would like to say here how much we appreciate the cooperation with AALCO on humanitarian law matters and this could be quite a good example how to further cooperate. The other questions were related to other issues. Thank you Mr.Chairman.

President: Thank you . Now I would like to conclude the first panel and then move on to the regular session. So I would like to open the floor for any questions regarding the whole four sessions. May I ask the delegates wishing to take the floor to do it right now, otherwise I will close the speakers list and ask the panelist to answer the questions that have already been raised. I see no other speaker wishing to take the floor. Yes, Japan, you have the floor, Sir.

The Delegate of Japan: Thank you Mr.Chairman. This is not a question but a very brief observation. First of all, I would like to express our sincere appreciation to you Sir and to your Government and also to Ambassador Kamil and AALCO for organizing this wonderful special session and also our gratitude to Dr.Forster of ICRC and the eminent the panelists for their excellent presentations.

I would like to make very brief observation of terrorism. In our fight to suppress the terrorism, we have adopted a dozen counter terrorism Conventions in the United Nations system. We took sectoral and criminal approach that is to say we define specific crime like hijacking, hostage taking, bombing with severe penalties, we establish universal jurisdiction, we commit to prosecute or extradite offenders in order to leave no safe heaven from justice for those offenders. And I think we have this Convention have been and will be useful in deterring the terrorism where the offenders resort to violence.

September 11 or the recent case of Casablanca where the offenders killed themselves and their purpose is to destroy a section of civil society. Their discrimination law approach would not provide results. The offenders are non-state actors. They do not codify as combatants and I think as Mrs.Ahn of Republic of Korea said I think there is a lacunae in the international law and I think we have to be thinking of how to cope with this kind of situation. I thank you Mr.President.

President: Thank you Amb.Yamada. Now I give the floor to Mr.Lavoyer because all the questions are related to the presentation by Mr.Lavoyer. I am very sorry to him for over burdening him . Yes ,you have the floor sir.

Mr.Lavoyer: Thank you Mr.Chairman. You are not overburdening me at all. They was one question by the Deputy Secretary General of AALCO concerning status questions, Taliban and Al Qaeda . I think yes we have to make a distinction between Taliban and Al Qaeda . The Taliban had their armed forces and a member of the armed forces who is captured enjoys a presumption at least to be a prisoner of war . The fact that the Taliban regime was recognized only by a few countries it doesn't make a difference. The Geneva Conventions makes it clear that even if a government is not recognized it doesn't make a difference. So I would suggest that the members of Taliban, yes, the members of the armed forces captured are prisoners of war and as I indicated before if there is a direct it could be that in certain cases it is not clear what is the legal status of a person then a competent tribunal should decide that on a case by case basis . I am referring here to Article 5 of the Third Geneva Convention which says that competent tribunal has to decide. The problem with the Taliban is that they were no such tribunals . The United States have declared that none of the Talibans even members of the armed forces were not qualified as POWs and we do have some divergence of views with the United States there because we don't think this can be done in a general way, we think a case by case approach here is badly needed. And concerning Al Qaeda there is different possibilities, it could be that Al Qaeda could be seen as a militia , being part of the Taliban armed forces or sort of closely associated as a militia or to a militia, these are matters of fact. It is always difficult to come to a legal conclusion when we don't have the facts. I don't

know for instance what was the exact relationship between Al Qaeda and the Taliban armed forces. How were they inter-relating, where they fighting together were the armed forces units including Al Qaeda members or were they completely separate. May be you have some answers to these questions. I certainly do not have any indication. So, I really have to leave it open Al Qaeda members could , according to the law, according to the third Geneva Convention they could also become POWS . It could also be that they would have to be considered as civilians who have taken arms without being allowed to do that and because they are not allowed, they could be punished just for taking up of arms. But even then I propose that they would not be outside humanitarian law . It is just not possible in the system of humanitarian law, as I said, it is comprehensive you cannot fall outside, you cannot fall between the third and fourth Geneva Convention. It is either or , either they could be prisoners of war or they could be civilians protected by the fourth Geneva Convention and in some limited cases they may not even be protected by the Fourth Geneva Convention . Sorry to be so technical here, they would then at least benefit from the very fundamental safeguards you can find in Article 3 common especially Article 75 of Protocol I. You may have in mind this very long and comprehensive article which contains extremely important guarantees in terms of treatment and due process of law. There can be a debate as I indicated on which solution should be chosen. I am not in a position to say which one is more valid. I can just indicate to you the different possibilities we see at the ICRC. Thank you very much.

President: Thank you. Now I give the floor to Judge Kwon.

Judge Kwon: I was asked to deal with the matter raised by the distinguished delegate from the Russian Federation. However, being a Judge myself, I don't find myself in the appropriate position to answer the question . Put simply I don't think I am in a position to make any comment or observation of what two sovereign countries are doing, unless there are other panelists who can deal with this matter. I think this is what I can give you as much as I can.

President: Thank you Judge Kwon. Yes, Deputy Secretary General of AALCO you have the floor.

Dr. Ali Reza Deihim, Deputy Secretary General of AALCO: There are two different response to the question raised by the distinguished representative from Russian Federation. One response is that in the Statute there are quite security and safeguard and thresholds to prevent any frivolous accusations against any states. Therefore there is no need for any special safeguard. This is first approach.

The second approach is that United States is not a party to that treaty. O.K. it has signed but it withdrew its signature then according to the Vienna Convention Treaty the third countries cannot impose any obligation against the states which are not parties to that obligations . Then this is first response.

The other response is that the main point in the Statute is the principle of complimentarity. What does it mean that United States responses in such a way. The

signature of such agreement which so far has reached to 37 doesn't mean that United States is not going to put on trial the accused perpetrators of such atrocities. Of course according to that principle which is enshrined and included in the statute the national courts of the United States are doing this job and statutes accepts only in two instances doesn't accept when it is false trial or there is not such possibility to put on trial. Then the other approach has no legal very legally technically point to raise that they are taking such approach that the signature of these so called 98 agreement is not a real consent it is to some extent the pressure of America upon the countries. Because of the you have read about the enactment of laws at the Congress but the other side gives response as was mentioned by Professor that we cannot be judged upon the real sovereign decisions of the countries. We cannot say that these countries who have signed were upon pressure. They should decide. Therefore it seems that from the legal point of view they both have something to say but from the Vienna Convention one can say that the sovereign country who is not party to that Convention can agree with the other sovereign country to sign such agreement which is not impunity in the real term, it is to some extent giving priority according to the statute to the court of national accused.

President: Thank you . It seems to me that we have already exhausted all the questions regarding the four panels.

So, as the chair I would like to summarize what has transpired during the four panelists. Thanks to the very interesting and illuminating presentations by three panelists. We can deepen and expand our understanding and awareness of the current status of international humanitarian law in today's armed conflict. We also reaffirm that the international humanitarian law is still relevant in the modern affairs even in the face of the new types of armed conflicts like the rising internal voice and terrorism. And we also recognize that it is not the lack of or lacunae in the international humanitarian law but the lack of willingness by the States to issue to compliance with rules of international humanitarian law during armed conflict.

As Mr.Lavoyer has rightly pointed out, to enhance the compliance with international humanitarian law we need to make efforts in three areas such as, first implementation at the national level and second one is application of international humanitarian law on the field in time of hostilities and third element is the repression of violation. Fortunately, in the case of first and third category we are relatively satisfied with the development but unfortunately the application of international humanitarian law on the field is below our expectation so we have to concentrate our efforts on this field. We also realized that there are some areas for further development and clarification in the field of international humanitarian law .

I agree that this special meeting offered us a good opportunity to reconfirm our full commitment to the dissemination and implementation of international humanitarian law, given the fact that we are still being faced by the rising internal wars and many civilian casualties during such armed conflicts. So I hope that the AALCO will continue to be ceased of this matter in its future activities and I also would like to propose to the delegates to keep this momentum that could be possible through this special meeting.

I know that the delegation of the Republic of Korea in close cooperation with the AALCO Secretariat and ICRC has prepared a draft resolution on international humanitarian law. I would like to propose to submit this draft resolution to the deliberation of the Drafting Committee so that the Session will discuss this resolution and I hope that the text can be distributed to the delegates tomorrow morning.

Before concluding, I would like to apologise to the panelists for pressing them to shorten their presentation due to the time constraints and I would also like to express my deep thanks to all the delegates and participants for their active engagement in the debate.

That brings us to the conclusion of this special meeting and I would like to make a few announcements for house keeping. I was informed by the Task Force that all the participants are kindly requested to leave the interpretation receiver unit on the seat when leaving the hall after the session and second one is regarding the dinner hosted by the Acting Minister of Foreign Affairs Mr. Kim. The venue of the dinner is Grant Hyatt Hotel , it is little bit away from this Hotel and we prepared the bus for transportation which will leave the hotel at 6.40 p.m. . So I would like to ask the delegates to come to the bus around 6.30 p.m.

I once again thank you for your cooperation. The meeting is closed. Thank you.