

## **REPORT ON THE ICRC-AALCO CONFERENCE ON CUSTOM AS A SOURCE OF HUMANITARIAN LAW, HELD IN NEW DELHI ON 8<sup>TH</sup> AND 9<sup>TH</sup> DECEMBER, 2005**

A two-day conference on “Custom as a Source of Humanitarian Law” was held on 8<sup>th</sup> and 9<sup>th</sup> of December 2005 at Hotel Taj Mahal Hotel, New Delhi. The Conference was jointly organized by Asian African Legal Consultative Organisation (AALCO) and the International Committee of the Red Cross (ICRC) to mark the publication of the ICRC study “ Customary International Humanitarian Law” (Cambridge University Press, 2005). A galaxy of eminent academicians and practitioners, including representatives from 19 Asian Member States of AALCO attended the Conference.

The ICRC published its study on Customary International Humanitarian Law (Customary Law Study) in March 2005. The Customary Law Study was prepared by the ICRC at the request of the 26<sup>th</sup> International Conference of the Red Cross and Red Crescent Movement in December 1995. The study, which was prepared with the assistance of a group of IHL experts from over 50 countries, attempts to codify the customary rules of IHL that are applicable in international and non-international armed conflicts. It was intended to overcome some of the problems related to the scope and application of international humanitarian treaty law. By publishing this study, the ICRC aims to improve the understanding and dissemination of IHL in order to enhance respect for, and compliance with, IHL rules. The study resulted in the formulation of 161 rules, which have been categorized in six parts: these include the principle of distinction, specifically protected persons and objects, weapons, treatment of civilians and *persons hors de combat* and implementation. The publication is divided into two volumes: Volume one is a comprehensive analysis of the customary rules of international humanitarian law applicable in international and non-international armed conflicts. Volume two contains a summary of relevant treaty law and an exhaustive analysis of State practice covering each aspect of international humanitarian law.

The inaugural session was chaired by Mr. Larry Maybee, ICRC Regional Legal Adviser, South Asia, New Delhi. Mr. Vincent Nicod, Head of Regional Delegation, ICRC, New Delhi, welcomed the delegates on behalf of ICRC and AALCO. In his welcome speech he traced the origins of IHL to the epics of earlier ages, namely, Ramayana and Mahabharatha. He emphasized on the teachings of Holy Quran and the Prophet while analyzing the origin of international humanitarian law.

Mr. E. Ahmed, Minister of State for External Affairs, Government of India, delivered the inaugural speech. He expressed the view that IHL contributes to the maintenance of international peace in so far as it seeks to limit the effect of armed conflict. He further added that customary law, which does not require the cumbersome process of negotiation, signature and ratification, is the oldest and original source of International Law as well as of law in general. He observed that India has a very old tradition on respect of Rules of war. In ancient India the law on the subject was clearly understood and widely known. He stated that the modern day rules pertaining to principle of distinction, unnecessary suffering, military targets, prohibition of acts like treachery and attacking of persons hors de combat and humane treatment of prisoners of war find place in our ancient epics like Mahabharata. India is a party to the Four

Geneva Conventions and have enacted the Geneva Conventions Act to ensure national implementation of the Conventions.

While delivering the introductory address the Secretary-General of AALCO, His Excellency Ambassador Dr. Wafik Zaher Kamil, pointed out that since its inception AALCO has given equal importance to issues of human rights and humanitarian law along with other topics of international law. Amb. Dr. Kamil highlighted the close association AALCO has with the ICRC over a period of time. Amb. Dr. Kamil said that AALCO had organized a Special Meeting on “ The Relevance of International Humanitarian Law in Today’s Armed Conflicts”, with the full cooperation of the ICRC. He also recalled the special meeting that AALCO had organized on “ Inter-related aspects of International Criminal Court and IHL” during the Tehran session in 1997 and the seminar on the various aspects of international humanitarian law on November 200 in New Delhi on the occasion of AALCO’s Constitution Day. He highlighted the significance of the customary international law in the present context. He stated that the identification of customary law is essential for reaching states as well as non-state actors. This exercise also helps to identify the process of hardening in to custom of the norms stated in the Conventions, which will also enhance respect for these norms and thus their effectiveness. He observed that therefore the task undertaken by the ICRC and completed with due diligence in a decade time is a praiseworthy effort from the point of view of international law in general.

However, he underlined that identification of customary principles in international law is a difficult exercise involving complex issues such as State practice and *opinio juris*. Thus it becomes necessary to analyze each issue relating to customary nature of a principle in the particular context in which it arises. It is a fact that Additional Protocols have not been adhered to by good number of States. This situation might lead to certain interpretative variations on the customary principles compiled in the present study. Differences of opinion bound to occur as it has been the case with customary international law in general. However, this in no way belittles the significance of the Study. He observed that though the customary principles contained in the study may not be an authoritative assertion, which States shall comply with, they would certainly help as an important guide for the application of customary international humanitarian law.

Prof. V. S. Mani, Director, Gujarat National Law School, India, delivered the opening address. While praising the monumental effort of ICRC, Mr. Weeramantary former Judge ICJ expressed the view that though it is popularly believed that treaty law has precedence over customary law he believed otherwise. This, he added, is because of the reason that the very strength of treaty law stems from customary law and rules of treaty law emerge from customary law in the first place.

“The ICRC Study on Customary International Humanitarian Law - An Assessment” was the topic for discussion for Panel 1. Prof. Amitabh Matoo, Vice Chancellor, University of Jammu chaired the Panel. Speaking on the contents of the ICRC Study Dr. Jean-Marie Henckaerts, Legal Advisor ICRC, Geneva, expressed the view that the study which has followed ‘inductive methodology’ has taken into account

various aspects of state practice which include military manuals, case-laws- national and international, legislations, official statements, reservations, reports on specific military operation etc. Stressing the importance of the study Dr. P.S. Rao, Former Additional Secretary and Legal Advisor, Ministry of External Affairs, Government of India, said that this work is bound to be an invaluable source on customary international humanitarian law. He observed that that the study should be commended not only for the clarity of most of the principles it convincingly identified as the customary principles of international law, but also for reiterating the value of custom as a source of international law. Having stated this, he emphasized that it is but fair to say that the debate about the customary nature of one principle or the other referred to in the Study would still be around us in the years to come. He gave an account of problems inherent in the implementation of IHL; protection of environment in times of armed conflict; role and status of the principle of precaution in the context of IHL; and the legality of the threat or the use of nuclear weapons. He also elaborated International Law Commission's work on the status of treaties on environment during the armed conflicts. He stated that there are some recent developments, which appear to make States more accountable and transparent than before. States are under increasing pressure to be more transparent and humane in the treatment of persons who are under any form of detention and thus denied of their freedom. The judicial process is invoked in every jurisdiction to safeguard basic human rights and fundamental guarantees. While praising the work of ICRC, Prof. Djamchid Momtaz, President of the International Law Commission opined that, the importance of the principles of international humanitarian law has reached a stage where individuals are held accountable for violations of it.

Questions were posed by Mr. Tharchen, Royal Kingdom of Bhutan; Prof. V.S. Mani; Pof. Yogesh Tyagi, Professor of International Law, Jawaharlal Nehru University; Shri C. Jayaraj, Secretary General, Indian Society of International Law; Prof. Lakshmi Jambholkar; Prof. Hingorani and a host of other eminent personalities who attended the Conference.

Second day of the Conference began with the Keynote Address by Judge Philippe Kirsch, President, International Criminal Court on the topic "Customary Humanitarian Law, Its Enforcement and the Role of the International Criminal Court". H.E. Amb. Dr. Wafik Zaher Kamil, Secretary General, AALCO chaired the Session. Amb. Dr. Kamil in his introductory remarks gave an account of Judge Kirsch's expertise in the field of International Criminal Court, international humanitarian law and international criminal law. He also gave an introduction to the topic for the Keynote address and AALCO's interaction with the ICC. Judge Phillippe Kirsch in his Address gave a detailed account on the importance of customary international humanitarian law; the need to enforce international humanitarian law; and the relationship between customary international humanitarian law and the International Criminal Court. He observed that the ICC is situated within the existing framework of conventional and customary IHL. The interrelationship between customary IHL and the Court is evident in a number of ways. The drafters of the Rome Statute drew heavily on customary law in defining the crimes within the Court's jurisdiction. In deciding cases, judges will apply established principles of the international law of armed conflict. Because of its complementary

relationship with States, the ICC may also spur the further development of customary international law.

Dr. A Rohan Perera, P.C., Legal Adviser, Ministry of Foreign Affairs, Sri Lanka chaired the first session of the day. Justice J.S. Verma, former Chief Justice of India, and former Chairperson, National Human Rights Commission of India spoke on length on “Relevance to the Ratification of IHL Treaties by States”. He commented on how national institutions implement IHL in the absence of ratification of IHL treaty law by a particular country. The basic principle of common law is that in the absence of the Statutes we should rely on equity, justice and good conscience. He cited the major Supreme Court rulings as an evidence to show how Indian judiciary respect international treaty obligations. *Vishaka* case can be cited as a judicial legislation. This judgment relies on CEDAW and customary law. He said that Court have interpreted Article 21 of the Indian Constitution in such a manner everything related to human dignity under its ambit. Referring to Gujarat riots, he stated that National Human Rights Commission has laid down that the State is responsible for all the violations occurring and those violations committed by the non-State Actors. Mr. Christopher Harland, Legal Adviser, ICRC; gave a presentation on the “The Relevance of National Implementation of IHL”. He gave a comparative view on the war crimes under the International Humanitarian Treaty Law; the Rome Statute of the International Criminal Court; and the Customary International Humanitarian Law Study. Professor Françoise Hampson, University of Essex, United Kingdom spoke on the topic “Relevance for the prosecution of violations of IHL”. She said that there is a close relation between the implementation and enforcement of IHL.

Second Panel was chaired by Sri. C. Jayaraj, Secretary General, Indian Society of International Law, New Delhi. Brigadier Titus K. Githiora, Chief of Legal Services, Department of Defense, Kenya made his presentation on “Implications on General Military Operations”. He said that the most enthusiastic advocate of peace is soldier because he is the worst sufferer in case of war. He stated that customary rules are important for the conduct of war. Notion of command responsibility applies both in international and non-international armed conflicts. The balance between the military greed and humanitarian needs should be maintained. He highlighted the significance on environment protection in case of armed conflicts. Ms. Daphna Shraga, Principal Legal Officer, Office of the Legal Affairs of the UN, New York presented her views on “Implications for Peace Operations”. She said that for the first time the question of application of IHL during peacekeeping operations was laid down during Korean War. United Position is that customary humanitarian law is not applicable to peace-keeping operations. UN peacekeeping forces cannot be a party to a conflict, hence Geneva Conventions are not applicable. For four decades UN consistently denied the applicability of IHL to peacekeeping forces. However, UN internally uses IHL principles. In the Status of Forces (SOFA) IHL provisions are included. Professor Zhu Wenqi, of Renmin University, Beijing, presented his paper on “Implications for Non-International Armed Conflicts”

The Third Session of the day was on the theme, “The Legal Framework for the Treatment of Persons in Armed Conflict”, chaired by Dr. Ali Reza Deihim, Senior Legal

Officer, Islamic Republic of Iran and Formerly Deputy Secretary-General, AALCO. He welcomed all the panelists and briefly explained the background of the subject. Prof. L.R. Penna, formerly Senior Professor of Law, University of Singapore, Ms. Jelena Pejic, Legal Adviser, ICRC, Geneva and Prof. Nurhalida Mohammed Khalil, University of Malaya were the speakers of the session.

Prof. L.R. Penna presented a paper on “Fundamental Guarantees in International Law”. In his presentation, he critically reviewed Chapter 32 of the publication. He said that the scope of the Chapter 32 is residual and much wider than Article 75 of I Protocol. The applicability of guarantees in International Armed Conflict and Non-international armed conflict are different and also their positions. If we apply the same in strict sense, it will be superfluous. Further, the Additional Protocol should see in *rationae personae*. He pointed out that most of the treaties require state parties to apply the human rights wherever they have “jurisdiction’, treaty bodies and state practice require ‘effective control’. For that he referred Article 2 of International Covenant on Civil and Political Rights (ICCPR) and he cited examples of Guantanamo bay lease agreements and how United States exercised complete jurisdiction and control over the area. He also gave example of Kuwait, pertains to belligerent occupation which is recognized as customary international law. Finally he identified the rules of fundamental guarantees in this study.

Ms. Jelena Pejic, presented on the topic of “Detainees rights under International Humanitarian Law”. She outlined the rights of a detainee under both international armed conflict and non international-armed conflict situation. The procedural principles and safeguards that governs detention is that, although this type of deprivation of liberty is often practiced in both at international and non-international armed conflicts and other situations of violence, the protection of the rights of the persons affected by it is insufficiently elaborated by International Humanitarian Law (IHL). Further, she linked the human rights law and IHL by interpreting the Article 75 of Additional Protocol I. However, in the emergency situations, such as the right to life and the prohibition of torture and other cruel, inhuman or degrading treatment or punishment, cannot be derogated from under any circumstances. Still there are grey areas and there is no legal framework in applying the rules of IHL and it should be explored, for instance, in the case of non-combatants.

Prof. Nurhalida Mohd. Khalil, in her paper titled “of the treatment of persons in armed conflict and the Universal Declaration of Human Rights”, emphasized the convergence in acts of violence promulgates the need for the protection of victims of armed conflicts. Basically, she tried to explore how human rights could further help to develop the rules and principles of IHL in terms of treatment of persons in armed conflict. For supporting that, she analysed human rights law provisions and IHL provisions and its applicability in the situation of armed conflict.

In the closing remarks, Judge Christopher G. Weeramantry, Judge, International Court of Justice said that the status of publication is neither a source of law and nor a binding one, nevertheless, it had enhanced the perspectives of understanding the IHL as a whole. The publication is handy, useful and a compendium tool on IHL. He further

pointed out that, Judges in national courts very often quite unaware of the developments in international law. So, ICRC should compile a short handbook and distribute it to domestic judges, diplomats, educational institutions etc. He had given a call to ICRC to appoint a panel of experts to bring out a detailed study of writings in all the major religions with respect to rules of war since all the religions are repository of IHL. He urged the need of ICRC's advisory service to various national jurisdictions. He had insisted human rights law and IHL to be promoted.