

International Humanitarian Law against the background of Custom and Humanity

by

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Dedico hoc opus parentibus meis, sine quibus non fieri potuerit.

Maximas gratias ago professoribus Shaun de Freitas et Andries Raath, meis collegis Linguae Latinae, et quidem etiam meis lectoribus “omnis Africae praelectionibus de iure et more bellorum” anno MMIX.

Deo soli gratia.

'Let us never forget that our enemies are men. Although we may be under the unfortunate necessity of prosecuting our right by force of arms, let us never put aside the ties of charity which bind us to the whole human race. In this way we shall defend courageously the rights of our country, without violating those of humanity. Let us be brave without being cruel, and our victory will not be stained by inhuman and brutal acts'.¹

¹ De Vattel 1916:289-290.

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CHAPTER 1

INTRODUCTION

War.

The mere word evokes strong sentiment among humans. The range of such emotions varies from (naïve) fascination, which usually emanates from the romanticised notion of bravely defending your fatherland – *dulce et decorum est pro patria mori*,¹ to (disillusioned) abhorrence, which occurs when mankind is confronted by the atrocities committed during armed conflicts. In fact, war (and the possibility thereof) has been condemned as one of the noteworthy shames and horrors of contemporary times.² Human savagery is unfortunately often exhibited through the death and destruction which accompany armed conflicts. Compounding the problem is the very well known fact that wars have been waged by mankind since time immemorial. Gradually, through the centuries, however, rules and principles have been created in an attempt to regulate this most inhumane of activities.³ It must be noted, however, that although law is not the only instrument with which the consequences of war might be lessened, it is the foremost method, prominently embedded in the history of civilization and tied to religion and ethics.⁴ Nonetheless, the reality is that wars are still with us. In fact, it seems that wars, especially those of a non-international nature, have increased.⁵ Also, the rules that have been established have been unable to prevent many atrocities and much suffering, and the wars have resulted in large numbers of wounded, sick, and civilians in need of aid.

It is evident that greater discourse on alleviating the plight of such persons is needed. Consequently, it is the aim of the present study to make a contribution towards the improvement of the particular branch of law that applies to armed conflicts, namely international humanitarian law (IHL) and, in the process, to strengthen the protection afforded to those suffering because of armed conflict.

Despite its failure, at times, and to prevent suffering, IHL remains important as it is seen as a

¹ See Horace, *Odes* Book III, line 13. It is a sweet and proper thing to die for one's fatherland. (Author's own translation.)

² Best 1997:vii.

³ Likewise Bugnion 2008:59.

⁴ Best 1997:vii and 1.

⁵ See UN Doc. E/CN.4/1998/87 par. 18.

suitable answer to communal violence and chaos with the ability of establishing a threshold for a global rule of law.⁶ The focus of the present study will, therefore, be particularly on the (substantial and early) source of IHL, which is arguably also an essential (and potentially *universal*) source of IHL, namely customary international humanitarian law (CIHL). In order to achieve *the aim of improving the protection afforded during times of armed hostilities through an investigation of CIHL, it is necessary to clarify the basis upon which IHL has been built. Only when the foundation of IHL has been clearly determined can CIHL be properly understood and the problems inherent to its process be adequately addressed.* However, when reconsidering the essential basis of IHL, the question immediately emerges as to *why* any group collective (whether it is an ancient society or a modern, sovereign state) will voluntarily allow itself, in principle, to be bound by legal rules in the situation of armed conflict? Concurrently with this, it could be questioned as to *what* motivated Henry Dunant and the other founding fathers of what was to become the International Committee of the Red Cross (ICRC) to work for the alleviation of suffering. Furthermore, *what* influenced legal philosophers, such as Francisco de Victoria (1480-1546), Francisco Suarez (1548-1617) and Hugo Grotius (1583-1645), and *what* informed their international legal theories? Considerations of humanity? Human dignity? What we might call natural rights? Morality? Expedience or pragmatism? Bederman succinctly states the question which the present study will also endeavour to scrutinise:

[T]he issue is whether law for the international community is exclusively the product of consent by the participants in the system (however manifested) or also of enduring truths that somehow reflect the fundamental values of that community. Put another way, are all rules in a legal community internally generated by means and institutions chosen by the participants, or is there also a metaphysic of first principles that governs the system?⁷

These are significantly important questions in the search for the foundation of IHL and will be considered in the present study from both a historical-empirical perspective and a philosophical-theoretical one.

This study is premised on the fact that moral support for IHL is analogous to moral support against rape, child molesting, racism, incest, murder and the like, and not contentious. Thus, the axiomatic point of departure is that principles and standards are inherent to the very foundation of IHL and, due to its unique nature, this branch of law has an enormously important role to play in the strengthening and promotion of the humanitarian endeavour. As such the principles and standards

⁶ Teitel 2004:233.

⁷ 2003:1537.

represent the most important and valuable instruments through which an acceptable normative standard may be postulated for IHL, which will further the aims of alleviating the plight of victims of war. However, before the potential locked up in these principles, which really constitute the basis of the entire IHL order, can be unleashed, it is necessary to make the international community aware of its infant-like craving for the safety and certainty of written materials and, then, to reconsider natural law as the starting point for every discussion on IHL.

After the foundation of IHL has been established, the investigation will turn to the sources of IHL and, especially, CIHL. Treaty law is applicable to all sovereign states who have signed/ratified it. Those same treaties may also contain provisions which are accepted to be part of customary international law (CIL) and, thus, may be applicable as such *vis-à-vis* states who are not signatories to the treaties containing the parallel rules. Some rules might not have been codified in treaties as yet, but will apply as CIL. Both types of CIL rules find application as concrete rules. These, then, are the two traditional sources of international law – treaty and customary law. It will be indicated in this study that prior to treaty law (which is a recent phenomenon in IHL especially), CIL, which was built on moral considerations, regulated armed hostilities. Hence, morality (as developed through societies on the battlefield and in theory) is the primary and original source of IHL. It has informed and influenced CIL which has influenced and informed treaty law. Now, this dissertation calls for the acceptance of the proposition that the CIL nature of treaty law has come under renewed scrutiny in light of the 2005 ICRC Study on CIHL and, in this process, the development of IHL in the contemporary order completes the circle, *hence, contemporary treaty law has led to a renewed scrutiny of CIL which should lead to a re-emphasis of morality.*

This dissertation will, therefore, confirm that morality and natural law embody the material sources of IHL which informed and permeated the formal sources like treaty law and CIL. Indeed, it will further be argued that *direct* reliance on morality and natural law, in IHL, is important. Included in these sources would be principles and standards like humanity, human dignity, charity and rules of *ius cogens* and obligations *erga omnes*. Naturally, the content of these concepts will be scrutinised, in Chapter 2, so as to circumvent the possible critique of invoking natural law precepts as empty vessels into which any (arbitrary) substantive content might be poured. Furthermore, it will be indicated that despite constituting an independent and direct source of international law, morality might also serve as a further paradigm through which to view CIL and treaty rules (as was the case with CIL constituting the paradigm through which treaty rules could be viewed). In this regard, if a rule is supported through treaty law, CIL and morality, it would have a substantial normative basis

and would demand compliance. The existing rules of international law and, especially, IHL would be strengthened significantly in the process. Morality also has the additional benefit of binding states irrespective of whether they are signatories to treaties containing parallel rules or even where the particular state has attempted to persistently object to an emerging rule of CIL. Furthermore, by acknowledging morality as a direct source of law, it could be used to supplement traditional approaches for the identification of CIL. Thus, morality would be used side by side with *usus* and *opinio iuris* in the determination of rules of CIL. (In fact, it is submitted that this is done in any case, but the hope is expressed that this would be explicitly acknowledged in order to ensure better jurisprudence.) Evidently, therefore, the essential moral foundation postulated for IHL in Chapter 2 will become very important in the context of CIHL. Only when this interrelationship has been established, can the powerful potential of CIHL be channelled to ensure that the victims of armed hostilities are properly protected (or at least as closely as possible). This, then, would also lead to a new evaluation of the most important recent scholarship pertaining to CIHL, namely the ICRC Study on CIHL. The contemporary merits of CIL are evident from the toils of the ICRC to produce the Study. The ICRC's efforts in this regard cannot be praised enough. Nonetheless, when viewed through the proposed framework of the present study, which entails a re-emphasis of the natural law foundation of IHL as well as the historically first source thereof, namely CIHL, the absence of a foundational axiomatic perspective in the Study (and its attendant criticisms) will become apparent.

The ultimate aim of the present study, therefore, is to establish the proper paradigm through which to re-evaluate and enhance the ICRC Study on CIHL. This dissertation will indicate that not only the ICRC Study itself, but also its criticisms, have become an emanation from the contemporary legal positivist endeavour. This is illustrative of a more fundamental problem in IHL which may be raised at this stage, namely that it is an inevitable consequence of the positivist method in which all law – including IHL – is taught, that legal positivism has gained the ascendancy in international humanitarian legal *practice* as well. The dominance of legal positivism from the early nineteenth century has inexorably led to a world where a high premium is placed on codifications and written materials. This trend has continued even when viewed against the well-known historical leap-frogging between natural law and legal positivism as the dominant legal theory of a particular time period. This is due to the fact that, irrespective of the intellectual culture of a particular time, codifications have still been emphasised at the expense of unwritten materials such as customary law. Weil submits that the basic trend was that without a positivist approach, the neutrality needed by international law to regulate the relations between equal but different entities would be in 'continual jeopardy'. However, emphasis of late has been placed on ethics. Thus, the arguments

maintain that international law, without *higher moral values*, is a 'soulless contrivance'.⁸ Subsequently, therefore, natural law principles have been furthered in the international arena of late (international human rights and IHL itself may be mentioned). Furthermore, this tension in the contemporary international society seems to have culminated in the dichotomous desire for natural law substantive rules and the formal establishment of these rules in positivist conventions and other written materials. Thus, for example, after World War II, natural law principles focusing on the human person gained ascendancy, which promptly led to written conventions like the *Universal Declaration of Human Rights* of 1948 and the *Geneva Conventions* of 1949. In reducing these natural law principles to codifications, they have become concrete and certain while at the same time losing some of their fluidity and suppleness. This is the concern with contemporary IHL that, due to a very evident fear emanating from domestic legal practitioners, which has been extrapolated to the international legal order, either legal certainty or control (to conduct international affairs in self-interest) is lost when reliance is placed on natural law principles. It seems as though the baby has been thrown out with the bath water – although in this instance more than just the baby is lost seeing that the true foundational basis of IHL has also been thrown out. It must, however, be frankly acknowledged that treaty law *is* important for IHL and the present dissertation acknowledges this fact. Therefore, it needs re-emphasis that the problem identified by the present dissertation relates to the *over*-emphasis of written, codified instruments at the expense of unwritten CIHL in the natural law based IHL regime. Therefore, the present study seeks to re-emphasise the natural law basis of IHL and to call attention to the craving of the international community for the certainty which positivist written legal materials provide.

Ipsa facto, when those worst off in a society are taken care of, the entire society benefits and is lifted thereby. The same is true in the international system – when those worst off (for example those suffering from or threatened by armed hostilities or natural disasters) are taken care of the entire international community gains. The present study is a clarion call for a paradigm shift in how IHL is viewed – the natural law basis thereof is not controversial and yet many have been loath to accept the inevitable truth: that IHL, since its modern creation and even from ancient times, is based on natural law principles. It is suggested that, by accepting the existence of natural law principles and standards in IHL, *protection may be extended* to the victims of various kinds of hostilities. This will be due to the fact that the focus will not be on the technical definitions of armed conflicts and internal disturbances – the protection of *humanity* and *human dignity* will also be afforded to those

⁸ Weil 1983:421-422.

suffering from violent, domestic riots. The point is not that international law will interfere with each and every internal disturbance, but that international law will furnish the natural law paradigm through which a domestic system can protect its own citizens in these instances. This essential core of natural law will obviously also apply to other armed conflicts which will also have further, more specialised, rules to regulate their affairs. It is submitted that this is not some Utopian ideal – with the advent of human rights, the protection of the individual has become an important concern for both national and international law. The time has come for states to participate in this process and assist those in need of aid, especially, during times of violent conflict.

Accordingly, in Chapter 2, this study will investigate the essential foundation of IHL (considered as a specialised branch of international law). An investigation will be conducted into the fundamental, underlying principles of the two branches that comprise IHL treaty law, namely the law of Geneva and the law of The Hague. This will lead to a broad consideration of the object and purport of IHL as a set of legal norms which will further elucidate the essential basis thereof. Hence, a brief survey will also be conducted on the functions of IHL. It will be indicated that the protection of humanity and human dignity is the core aim of IHL. Naturally, for a more comprehensive understanding of these aspects, it will be necessary to look at the historical development of IHL by ancient societies and thinkers. By re-examining the reliance placed by ancient societies on rules in warfare, IHL's true natural law foundation might be more evident as the scrutiny thereof would not be attempted through the nebulous veil of legal positivism as would be the case when the contemporary international order is scrutinised with its significant reliance on written, codified treaties. In the process, the fact will emerge that treaties are a recent phenomenon in IHL (although IHL has come to be one of the most codified areas of international law in modern times) and that customary rules were a substantial and early source for this branch of law. Therefore, the importance and centrality of CIL to IHL will already be established. Furthermore, since the scrutiny will still pertain to establishing the essential natural law foundation of IHL, it will become evident that CIL was the initial source of IHL through which that essential foundation was furthered. These findings will be strengthened through a consideration of a selection of the most eminent publicists on IHL.⁹

It is submitted that a consideration of these important writers against the historical development of

⁹ It must be admitted at the outset, however, that a vast number of scholars wrote about IHL (and CIHL). Therefore, when considering classical publicists on IHL, choices were made to ensure an illustrative rather than exhaustive list. Thus, the primary sources of Da Legnano, De Victoria, Suarez, Gentili, Belli, Ayala, Gentili, Grotius, Zouche, Rachel, Textor, Van Bynkershoek, Pufendorf, Wolff and Vattel are mainly considered with briefer reference to other thinkers.

the rules regulating warfare by ancient societies will shed further light on the true basis of IHL as legal discipline. The consideration of the works of these scholars will also serve as an intellectual paradigm against which the ICRC Study on CIHL will be measured. At the outset it must be noted that these publicists wrote their treatises in a different time period from that of the ICRC Study and, subsequently, they might have accepted various institutions in war which will be rejected outright in contemporary thought (like slavery). However, simultaneously, their approach to IHL was not tainted by the extreme legal positivism that the modern IHL has (had) to experience and perhaps, precisely because of the completely different time periods engaged, a unique evaluation of the contemporary ICRC Study might be made. A comparison between the classical writers and the ICRC Study can arguably strengthen some of the Study's proposed rules by sanctioning the rules with the acceptance of antiquity, possibly indicate omissions or improvements in either the proposed rules or the methodological approach of the Study and, most importantly, furnish an answer to the central question of whether objective, timeless and universal principles and standards exist in IHL. In considering the fundamental basis of IHL, then, the present study intends to use a dialectical model that moves to and from contemporary IHL.

Having proposed that natural law comprises the basis of IHL as legal discipline, the scrutiny will turn to a broader philosophical consideration of the nature of international law (and, of course, IHL). Although it is not the intention of this dissertation to investigate all the arguments that have been levelled against accepting international law (and IHL) as 'law', it will be necessary to refer to the basic tenets of these criticisms and to the responses to them, in order to effectively strengthen the case that this important branch of law is indeed 'law' even though it is based on natural law. This will also lead to a more elaborate discussion of the main philosophical traditions to have influenced international legal thought, namely natural law, legal positivism and the historical school of jurisprudence. Since natural law constitutes the original influence on IHL, this facet will be especially furthered by considering the effect of morality on this branch of law. It is submitted that this philosophical component is very important in the effort to advance and strengthen IHL, since a principled understanding of IHL would inevitably lead to more coherent and cogent arguments for its improvement.

Subsequently, from the scrutiny of the material and intellectual history of IHL as well as the consideration of the essential objectives thereof, it will become clear that the protection of *humanity* and *human dignity* is the essential objective of IHL (and international human rights law). This is an emanation of the centrality of natural law principles and virtues in IHL. Subsequently, then, it will

be necessary to ascertain the meaning of *humanity* as principle since natural law concepts are traditionally susceptible to criticism for being manipulable. Furthermore, since natural law virtues are frequently also criticised for being unenforceable, it will be necessary to consider possible means through which this foundational principle of IHL may be invoked directly in the IHL debate. In this regard, therefore, mention will be made of another nexus point between natural law and legal positivism in IHL, namely the Martens clause, which contains *humanity* as substantive notion in its provisions:

...populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience.¹⁰

Inevitably, due to its natural law nature, this clause has been criticised as being vague and open to various interpretations; it has also been praised as an independent source of law and even as giving force to custom, hereby potentially influencing the authority of CIHL in a constructive manner. The moral nature of this clause is also apparent. Subsequently, therefore, the Martens clause will be analysed as it may potentially serve as the ideal legal instrument, emanating from legal positivism, to serve in furthering the essential natural law nature of IHL by implementing the principle of humanity. Accordingly, the history of the clause will be briefly considered together with the various interpretations thereof. Because the Martens clause constitutes another nexus between natural law principles (and especially the central virtue of humanity) and treaty law, it will be argued that reliance thereon in the natural law based IHL regime should be inevitable. When considering the ICRC Study on CIHL, however, it will become apparent that a consideration of the customary status of the Martens clause is absent. Unsurprisingly, it will be noted that some writers (including the editors of the Study) have admitted the importance of including the Martens clause in a subsequent edition. This, it will be proposed in the present study, is an important goal. It is hoped that the present study will further the debate in this regard.

Another consideration in the debate pertaining to the implementation of humanity as the essential natural law virtue of IHL, is whether certain principles that have emerged in the international legal community might contribute thereto. Accordingly, norms of *ius cogens* and obligations *erga omnes* will be considered as possible instruments through which the core natural law principles of IHL may be furthered. In the process the interaction between these various principles and CIHL, as the historic first source of IHL, will also be considered since this could potentially enhance the ICRC

¹⁰ Preamble to *Convention (II) with Respect to the Laws and Customs of War on Land*. The Hague, 29 July 1899.

Study on CIHL and/or the consideration regarding CIHL itself.

An important publication from an influential modern writer on IHL – Jean Pictet – will be considered, as this might be defined as the predecessor of the ICRC Study, namely the *Development and Principles of International Humanitarian Law*. This work, published in 1985, reflected various *principles* of both branches of IHL treaty law, that is Geneva law and law of The Hague. A comparison between this work (written by a single author) and the ICRC Study (written by various groups of people from all over the world) should be insightful precisely because of the different approaches adopted. It will also be interesting to note the rules and principles which overlap since this will indicate an apparent transition of what were deemed to be 'principles' in 1985 into proposed CIHL 'rules' in 2005. Essentially, the principle-based nature of IHL will be reinforced through this investigation. Also, the paradigm will now be improved through which the ICRC Study will be considered.

Finally, Chapter 2 will evaluate IHL against the other branch of international law with which it has much in common and with which it interacts – international human rights law. In fact, the importance of international human rights law for IHL cannot be overstated since the broader reach of contemporary IHL has been viewed to be a consequence of its merger with international human rights law and the subsequent possibilities for a global rule of law have been hailed as the most dramatic development in international law.¹¹ By comparing these two branches of international law, the argument that the *human being* and his *dignity* is the essential focus of IHL and international human rights will be strengthened. Thus, cross-pollination between the branches will be seen as inevitable and, in many cases, desirable. The case for a principled, natural law basis of IHL will also be strengthened by comparing it to international human rights law – a branch of law, which arguably acknowledges its indebtedness to natural law more freely.

In passing, it must be mentioned that the argument offered here does not suggest that the entire international legal system is based on natural law or legal positivism (that is and has been the question for other studies) – *it argues that IHL, a branch of international law applicable in the most dire of situations, is based on natural law and should be accepted as such in order to achieve co-operation in the international community for its successful implementation.* Where certain countries are unwilling to accept such a postulation, it is submitted that it is not the truth of the

¹¹ Teitel 2002:359.

statement which is called into question, but rather policy considerations which drive the statements. However, the latter must surely recede when confronted with the suffering and plight of humanity in the face of the onslaught of armed conflicts. Surely also, helping others is the highest goal. Were not the Stoics correct when they said that the wise man is not a citizen of this or that state, but rather of the world since by virtue of being human he forms part of the brotherhood of humanity? Or, as succinctly put by the women of Castiglione who helped Dunant care for the ill – *tutti fratelli* – all are brothers!

From Chapter 2 it will become evident, as was submitted, that CIL embodies the initial conventional source of substance for IHL and that it is through CIL that the essential natural law foundation of IHL was furthered. Hence, it was (and is) through CIL that humanity and human dignity was (and is) to be protected. The historical (and contemporary) importance of CIL is, therefore, apparent. Moreover, CIL is still very important in contemporary IHL as these norms often represent the only remedy pertaining to a specific situation (especially in cases where the applicable rule is embedded in CIL and treaty law and the particular state has not yet signed the treaty).

In Chapter 3 the importance of CIL for IHL will be considered. Accordingly, it will be indicated that CIHL binds states irrespective of whether these norms are ratified or acceded to by the particular state. Therefore, customary law seems to be *universally* binding and this will be further considered as it increases the importance of the ICRC Study on CIHL. This notion stands in stark contrast to the situation with regard to treaties such as the *Additional Protocols* of 1977, which have to be ratified formally and which many states have neglected to do (especially pertaining to non-international armed conflicts). The authoritative ascertainment of customary rules (as was intended by the ICRC Study), then, would greatly contribute to the legal regime applicable during periods of armed conflict.

Subsequently, Chapter 3 will also reconsider the theoretical approach towards the ascertainment of CIHL against the background of the dissertation's natural law paradigm. It will be argued that since all forms of CIL are *not* equal, differentiation in the method of their determination becomes imperative and, thus, a mere rote recitation of the traditional CIL requirements of *usus* and *opinio iuris* in the *natural law* branch of IHL must be rejected. This does not, however, mean that the traditional CIL requirements of *usus* and *opinio iuris* have no value for CIHL. A brief investigation into these elements is required since they are relevant and important for CIHL albeit not

conclusively so. Cognisant of the natural law foundation of IHL and the fact that principles like humanity influenced CIHL, it will be argued that morality should be invoked as a complementary component in the process of elucidating CIHL. This dissertation will therefore postulate a normative, ethically based approach for the establishment of CIHL rules. It is submitted that this proposed (theoretical) method *vis-à-vis* CIHL determination will increase the protection afforded to victims of armed conflict, especially in light of the fact that a similar, more flexible approach to CIHL has indeed begun to emerge in international *fora* like the International Court of Justice (ICJ) and the International Criminal Tribunal for the Former Yugoslavia (ICTY). Subsequently, the proposed approach will also be applied to some of the ICRC Study's rules in order to enhance the findings thereof.

Consequently, Chapter 4, prior to investigating the ICRC Study on CIHL, will commence with a consideration of the ICRC as international role player. The scrutiny into the ICRC will be important to determine the extent to which the central natural law virtues, argued for in the dissertation as essential to CIHL, have permeated and shaped the functions and workings of this important IHL role player. Subsequently, the importance of humanity as the *raison d'être* of the ICRC will also be indicated. Thereafter, the ICRC Study on CIHL will be scrutinised in some depth. The events which culminated with the Study's emergence will be briefly described, and the investigation will then turn to the essential findings and insights which are to be derived from the ICRC Study. The positive and negative responses elicited by the Study from the IHL community will also be considered. It might be noted in passing that the criticisms raised against the ICRC Study will be considered in light of the proposed principled foundation espoused by the present study as well. Hereafter, the present dissertation will apply its conception of the natural law, principled basis of IHL, to the ICRC Study. This will include a scrutiny of the substantive provisions proposed by the ICRC Study, the methodological approach taken and the theoretical conception of CIHL as source of IHL through the natural law paradigm advocated for in the preceding chapters of the present study.

It is submitted that the present dissertation embodies the *only* work (as far as the author hereof could ascertain) that considers the ICRC Study from a natural law, normative frame of reference and, accordingly, the *sui generis* nature hereof is assured. Importantly, then, the current dissertation reflects the commencement of the response to the wish of Dr Yves Sandoz in his foreword to the ICRC Study where he stated: '*May it be read, discussed and commented upon. May it prompt renewed examination of international humanitarian law and of the means of bringing about greater*

compliance and of developing the law. Perhaps it could even help go beyond the subject of war and spur us to think about the value of the principles on which the law is based in order to build universal peace – the utopian imperative – in the century on which we have now embarked.¹² It is opined that, due to the axiomatic approach of the present dissertation, it specifically addresses 'the value of the principles on which the law is based' and, as such, provides a unique contribution towards IHL literature which will hopefully contribute to a renewed interest into these foundational principles of IHL.

Similarly, because of the natural law paradigm advocated in this study with which to regard IHL, it may also constitute the first step of the process to address the concern of Sassoli and Bouvier who state that '[u]nfortunately, the question of the universal nature of international humanitarian law has prompted little scholarly deliberation, unlike the body of human rights law...'.¹³ The present dissertation, by considering the historical, philosophical and classical academic movements in IHL, will provide a unique frame of reference with which to reconsider modern IHL and, of course, CIHL which, although it constitutes the most controversial source of IHL, remains an essential source of IHL in the process of establishing its universal nature once and for all. This dissertation, therefore, intends to strengthen the protection afforded to those who suffer due to armed conflicts through making a contribution to international humanitarian legal theory.

In the process, the present dissertation also expresses the hope that it might contribute in the process of strengthening, improving, enhancing and prompting further debate about the monumental effort of the ICRC. The present dissertation, therefore, also begins to fulfil the wish that the ICRC itself has expressed, namely that its study should be used as a platform to ensure scholarly deliberation and debate regarding the rules of CIHL.¹⁴

The orientation of this research will be empirical, factually and conceptually comparative, as well as critical and philosophical. The focus and research design throughout will revolve around scrutinising the essential nature and foundation of IHL, and aligning a proposed understanding thereof to CIHL. This includes analysis and proposals on the positivist-natural law debate, the role of international institutions in law-making, and an investigation pertaining to the method and various rules of CIHL proposed by the ICRC in its monumental study on CIHL.

¹² 2005:xvii-xviii.

¹³ Sassoli and Bouvier 2006:86.

¹⁴ Henckaerts and Doswald-Beck 2005:xvii.

In limine, it must be admitted that the themes under discussion in this dissertation are not easily separated; some overlap is therefore inevitable and, at times, the division of particular aspects might be artificial solely for ease of exposition. It must further be mentioned that, essentially for conformity of the text, all Latin words (including quotes) where writers use a 'j', have been rendered with an 'i'. This has been done conscious of the fact that 'j' was only introduced into the Latin alphabet during the Middle Ages and was not known in the classical Latin alphabet. Also, all Latin and French words, in quotes and otherwise, have been italicised for conformity of text. Finally, since the ICRC Study constitutes an essential backdrop to the present study and its rules are constantly referred to throughout the various chapters hereof, an appendix, containing all the black-letter rules of the Study, is inserted at the back of the dissertation for ease of cross-reference.

CHAPTER 2

INTERNATIONAL HUMANITARIAN LAW AS A SPECIALISED BRANCH OF INTERNATIONAL LAW BASED ON AND INFORMED BY THE PRINCIPLE OF HUMANITY

'What man is there who can claim that in the eyes of every law he is innocent? But assuming that this may be, how limited is the innocence whose standard of virtue is the law! How much more comprehensive is the principle of duty than that of law! How many are the demands laid upon us by the sense of duty, humanity, generosity, justice, integrity – all of which lie outside the statute books!'¹

1. Introduction to International Humanitarian Law

The present chapter purports to supply the necessary conceptual introduction to *international humanitarian law* (IHL) as it is to be understood in this dissertation. Thus, the unique nature of IHL as a specialised branch of international law will be considered, conscious of the consequences (whether positive or negative) that result due to its particular field of application. In this regard, continuous mention will be made of the influence of *principles* and *standards* on IHL since its inception. Special emphasis will be placed on the central principle of IHL, namely that of *humanity*. The natural law basis of IHL, which will become significant when the ICRC Study on Customary International Humanitarian Law (CIHL) is considered below, will also become apparent from the present chapter. Throughout this chapter the importance of IHL will be emphasised as it potentially serves as a powerful shield to prevent mankind's descent into barbarism when confronted with the inhumane circumstance of armed conflict. Therefore, this chapter will embody the foundation upon which the later chapters will be built.

As is well known, international law entails a system of rules and *principles* through which the international relationships between sovereign states and other subjects of international law, for example the United Nations, are governed. The *rights of the individual* are also of importance for

¹ L. Annaeus Seneca. 1928. *The Loeb Classical Library Moral Essays* Volume I Translation by J.W. Basore. London: William Heinemann Ltd. On Anger II, xxviii.2:225. Gentili 1933:211 and Grotius 1925:717 also quote this passage.

the international legal order.² Accordingly, the goals of the international legal order are generally to maintain peace between states, to ensure the individual's protection in a just order, and to promote social progress in freedom.³ It has been submitted that the appropriate element which unifies the international order is *the law* rather than governments.⁴ This is illustrative of a transformation in international law from a system historically based solely on the interaction between states to a system which has come to include *rights* as well. These developments are especially evident in the branch of international law which pertains to armed conflicts – IHL.⁵

International law is evidently required to establish certain minimum safeguards and elements of *humanity*, both in war and peacetime. The law which aims to do this may be termed *human law*. This comprises both the law of war and the law of human rights.⁶ Pictet defines the principle of human law in the context of military necessity and the maintenance of the public order as always being compatible with *respect for the human person*.⁷ It is precisely this law which the ICRC Study on CIHL (and this dissertation) aims to further.

² Dixon 2007:3. Dugard 2005:1 defines international law '...as a body of rules and *principles* which are binding upon states in their relations with one another'. [Emphasis added.] An older, and arguably outdated, definition of international law is that of Hall 1924:1: 'International law consists in certain rules of conduct which modern civilised states regard as being binding on them in their relations with one another with a force comparable in nature and degree to that binding the conscientious person to obey the laws of his country, and which they also regard as being enforceable by appropriate means in case of infringement'. Oppenheim 1937:4-5 defines international law as follows: 'Law of Nations or International Law (*Droit des gens, Völkerrecht*) is the name for the body of customary and conventional rules which are considered legally binding by civilised States in their intercourse with each other'. Brierly 1963:1 defines international law as 'the body of rules and *principles* of action which are binding upon civilized states in their relations with one another'. [Emphasis added.]

As Anonymous 2008:1226 states, the substantive content of international law changed after World War II, as internal affairs of states also came under the spotlight from this time on through, for example, human rights law, whereas prior to this time, international law was limited to regulate the relations between states. However, this change was illustrative of a deeper philosophical shift that occurred in the international legal arena. Accordingly, Dugard, *ibid* at 14, mentions that it was in Nazi Germany where the ascendancy of legal positivism was visible. Naturally, after the atrocities of World War II, this philosophy of law was rejected. Hence, superior principles of justice were resorted to in order to try the Nazis. Also, it was the right time to further human rights, which, Dugard, *ibid*, submits, shows a strong natural law influence. Pustogarov 1996:303-304 submits that: 'The real needs of States are constituted by international relations, which in turn are expressed in international law. At the same time, international law is not merely a device for recording the formation of relations between States, but is also a manifestation of the *moral values* of the human race'. [Emphasis added.]

³ Gasser 1993:3. These values are derived from the preamble of the *Charter of the United Nations*.

⁴ Carty 2008:352.

⁵ Subsequently, as an example, Pictet 1985:47 and Best 1983:298 indicate that common article 3 of the *Geneva Conventions* seemingly illustrates the new, modern development in the law that the sovereignty of the state is limited in order to benefit the individual. They hail this article as an essential step to making the law of Geneva universally applicable. It seems as though common article 3 has also surpassed its treaty-based origins as Gasser 1993:68 states that article 3 is binding not only in its capacity as part of treaty law, but indeed because it is part of the unwritten, general principles of law. He submits that it is part of *ius cogens*, those international norms from which no derogation is possible. See also Paust 2006:601.

⁶ Pictet 1985:61. Human rights law and its influence on IHL will be discussed below in section 3, pages 149-154.

⁷ 1985:61.

Subsequently, some of the definitions of IHL to emanate from international literature will be briefly considered to further the understanding of the far-reaching nature of this concept. Meurant defines IHL as 'the principles and rules which regulate hostilities in order to attenuate their hardships: they aim at safeguarding military personnel placed *hors de combat* and persons not taking part in hostilities; they also determine the rights and duties of belligerents in the conduct of operations and limit the choice of means of doing harm'.⁸ Two components of IHL can be gleaned from this description, namely protecting specific categories of persons and regulating the manner in which military operations are performed. Pictet focuses his definition of humanitarian law on the principle of *humanity*, hence IHL is 'that considerable portion of international law which is inspired by a feeling for *humanity* and is centred on the protection of the individual in time of war'.⁹ Pictet proceeds to explain that the notion *humanitarian law* in fact combines a legal *and a moral idea*.¹⁰ He even accepts that the substantive provisions embodying IHL are a mere transposition of moral and humanitarian concerns into the domain of international law. Furthermore, he continues that '[i]t is precisely because this law is so intimately bound to humanity that it assumes its true proportions, for it is upon this category of law, and no other, that the life and liberty of countless human beings depend if war casts its sinister shadow across the world'.¹¹

Clearly, IHL is deemed to represent the last line of defence against the suffering and atrocities which accompany war. This branch of law serves to ensure that certain *minimum standards of humanity* and *human dignity* are observed during probably the most tumultuous relationship which can arise between humans.

It is important to mention at this stage that these dual components of IHL, namely to protect certain persons and to regulate the conduct of belligerents, gave rise to two separate, yet closely connected,

⁸ 1987:237. The ICRC 1981:76 n. 1 defines IHL as: 'By "international humanitarian law applicable in armed conflicts" the ICRC means international rules, established by treaties or custom, which are specifically intended to solve humanitarian problems directly arising from international or non-international armed conflicts and which, for humanitarian reasons, limit the right of parties to a conflict to use the methods and means of warfare of their choice or protect persons and property that are, or may be, affected by conflict. The expression "international humanitarian law applicable in armed conflicts" is often abbreviated to "international humanitarian law" or "humanitarian law". See also Ahamad's *Inaugural Address* in Maybee and Chakka 2006:20 and Beyani in Chatham House 2005:56.

⁹ 1985:1 [Emphasis added.] See, for example, the *dicta* of the ICTY in *The Prosecutor v Kupreškić et al.* Case No. IT-95-16-T, Judgment of 14 January 2000, par. 521 where this sentiment was expressed in that: 'The protection of civilians in time of armed conflict, whether international or internal, is the bedrock of modern humanitarian law'.

¹⁰ 1985:1. This notion is also apparent from McDonald 2008:247 who states that: 'Despite the fact that its customary evolution shows international humanitarian law to be a body of rules that has evolved largely to serve states' interests, the modern body of treaty law is deserving of the title humanitarian. This is because, by recognizing that wars have limits...the laws of war draw a line...Without these elements of humanity, and without observance of these rules, the law of war would be law in the service of war'.

¹¹ 1985:1.

treaty regimes. Thus, the trend to focus on the victims of war began with the 1864 *Geneva Convention* and was furthered in 1929 when the *Geneva Convention on Prisoners of War* was adopted.¹² The 1929 treaty, with the hindsight of World War I, covered all aspects of captivity, including prisoners of war.¹³ In 1949, four new *Conventions* were adopted in Geneva by the representatives of 48 states invited there for that purpose. These *Conventions* were also aimed at bettering the protection for victims of war and were the result of long deliberations by the ICRC after the harrowing experiences of World War II. The 1949 *Conventions* replaced the 1929 *Conventions* and partly the *Hague Convention* No. IV.¹⁴

The other trend regarding the limitations imposed on the means and methods of warfare were regulated through the *Hague Conventions* of 1899 and 1907. Accordingly, whereas the *Geneva Conventions* relate to the victims of the armed conflict, the *Hague Conventions* are applicable to the conduct of hostilities.¹⁵ These then are the two trends to have emerged in the development of IHL treaty law, namely one which focused on the protection of war victims (the wounded, prisoners of war, internees and various other non-combatants) which began with the Geneva Conference of 1864 and has become known as the *law of Geneva* (humanitarian law properly so called). The essential principle of the law of Geneva has been formulated as: '[p]ersons placed *hors de combat* and those not directly participating in hostilities shall be respected, protected and treated humanely'.¹⁶ The other trend focused on the rules and conduct of war and limitations on the means of warfare, thus its occupation was mainly with combatants, and has become known as the *law of The Hague* (law of war properly so called).¹⁷ The principle of the law of The Hague has been stated as: '[t]he right of the parties to the conflict to choose methods or means of warfare is not unlimited'.¹⁸ The Geneva codifications were created solely for the benefit of war victims and, unlike the codifications of The Hague, do not grant states rights against individuals. The law of Geneva gives primacy to man and the principle of *humanity*. On the other hand, the law of The Hague, although also influenced by

¹² Meurant 1987:242, Sassoli and Bouvier 2006:126 as well as Kalshoven and Zegveld 2001:27.

¹³ Pictet 1985:36 and Best 1983:155.

¹⁴ Meurant 1987:242 and Gasser 1993:12. Gasser, *ibid*, and Schindler 2003:165 submit that these *Conventions* have become the most universally accepted treaties as the entire community of states has ratified them. Of the *Fourth Convention* Pictet 1985:43 submitted that it represented a major achievement for the Diplomatic Conference of 1949. This *Convention* maintains the very important principle that *respect for the human individual* should be given in all circumstances, thereby also prohibiting, *inter alia*, torture, reprisals, collective punishments and the taking of hostages. It is therefore easily established that the *principle of humanity* was given additional protection through this *Convention*.

¹⁵ Meurant 1987:240, Gasser 1993:49 as well as Sassoli and Bouvier 2006:123.

¹⁶ Pictet 1985:63. See also Bothe 2005:146-147 and Kalshoven and Zegveld 2001:15.

¹⁷ Pustogarov 1996:314 and Pictet 1985:1-2. Kalshoven and Zegveld 2001:15 deem the 1868 *St. Petersburg Declaration* to be the starting point for this branch of IHL.

¹⁸ Pictet 1985:63. See also Bothe 2005:146 as well as Kalshoven and Zegveld 2001:15.

humanitarian considerations, is mainly aimed at regulating hostilities and, thus, they are based on military necessities and the preservation of the state.¹⁹ In comparing these branches of IHL it is clear that:

It [the law of The Hague] has a wider field of application than the law of Geneva but also possesses a humanitarian character, though less specific, because its principal object is to attenuate the evils of war and violence which is unnecessary for the purpose of war – to weaken the resistance of the adversary. In comparing these two juridical domains, it has been said that the law of The Hague originates in reason rather than sentiment, in mutual interest rather than philanthropy, in direct contrast to the law of Geneva.²⁰

Also, due to the impartial nature of the *Hague* and *Geneva Conventions* as well as the *higher values* which they embody, their historical tradition and their widespread acceptance, it has been submitted that these *Conventions* are not mere reciprocal treaties anymore, limited to relations between certain states, but rather that they embody *absolute* and *universal* commitments.²¹

Schindler believes that both the law of The Hague and the law of Geneva rely on the same fundamental values and have the same goals – maintaining *human dignity* in war.²² Thürer, likewise, states that IHL is not only aimed at prohibiting excesses in time of war and ensuring a balance in the use of military force, but rather that the central issue is *human dignity*.²³ It is submitted that the influence and importance of *human dignity* is evident in both of these branches of IHL treaty law. These two normative trends were consolidated through the *Additional Protocols* of 1977, bringing the rules up to date regarding victims of war and methods employed in hostilities, and through the *Statute of the International Criminal Court (ICC)* of 1998, allowing sanctions for both violations of Hague and Geneva law.²⁴ Unsurprisingly, due to the similar goals and

¹⁹ Pictet 1985:2.

²⁰ Pictet 1985:49.

²¹ Pictet 1985:89. Meron 2006:377 also confirms that the customary nature of the *Geneva Conventions* is now taken for granted.

²² 2003:168. Regarding *human dignity*, Schachter 1983:849 states that the intrinsic meaning to be ascribed to this concept has in fact often been left to intuitive comprehension, influenced greatly through subjective, cultural factors. However, considering the etymological root – the Latin *dignitas* – it may be translated as worth (one lexical meaning ascribed to dignity is intrinsic worth). Schachter continues – and this especially applies to considerations of human dignity in the context of IHL – that: 'Respect for the intrinsic worth of every person should mean that individuals are not to be perceived or treated merely as instruments or objects of the will of others'. In conclusion, Schachter, *ibid* at 850, states: 'Put in positive terms, respect for the intrinsic worth of a person requires a recognition that the person is entitled to have his or her beliefs, attitudes, ideas and feelings. The use of coercion, physical or psychological, to change personal beliefs is as striking an affront to the dignity of the person as physical abuse or mental torture'. Searl 2001-2002:283 also links human dignity to international law and, more specifically, IHL thus: 'In international law, acknowledgement of the fundamental dignity of the human person has long found forceful expression in the principles of international humanitarian law applicable to armed conflict, which prohibit the infliction of unnecessary suffering on opposing forces and stress that innocent civilians are not to be made the objects of warfare'.

²³ 2007:60.

²⁴ Bugnion 2008:63. See also Kalshoven and Zegveld 2001:34.

philosophical underpinnings of these branches, the *Protocols*, by elaborating on rules applicable to the law of The Hague and the law of Geneva, begin to blur the distinction. These *Additional Protocols* ensured better protection for civilians against the consequences of armed conflicts, also confirming the customary principle of distinction between civilians and combatants and between civilian objects and military goals. These *Protocols* also reaffirmed and extended the means and methods of warfare (one of the fundamental principles of the *Hague Conventions* of 1899 and 1907) to ensure that the treaty law could catch up with technological advances of the time.²⁵

It seems evident, therefore, that the protection of war victims and the regulation of belligerent conduct are the core components of IHL. Moreover, it is self-evident that both aspects essentially aim to lessen hardship and to protect the human person during times of armed conflict – the first aims to protect human dignity *directly* through active measures designed to help war victims while the second purports to protect human dignity *indirectly* through addressing the actions of those responsible for the suffering and hardship.²⁶ Clearly any definition of IHL will be influenced by these components. It seems that, for some, acknowledging the existence in IHL of essential *principles* (like the protection of humanity or human dignity) entails an apparent threat to their sovereignty (since it would seem that these principles would be binding even though they were not formally promulgated and agreed to by an authoritative body) and, thus, a limiting and inhibiting component to accept. This fear would then be reflected in their definition of IHL. However, when it is acknowledged that both the law of The Hague and the law of Geneva have the same ethical and philosophical basis, it seems strange that there is such resistance (especially from a select few powerful states) towards accepting principles, like humanity, as part of IHL treaty law – *how can one accept the construction without accepting the foundation?* In other words, why would states accept some of the specific IHL (treaty) rules to have emerged, but be so opposed to acceptance of

²⁵ Schindler 2003:168 and 172. Gasser 1993:14 states that besides the *Additional Protocols* of 1977, several other conventions were adopted after 1949 to ensure better protection for persons and objects in times of war. Thus, the *Convention of 14 May 1954 for the protection of cultural property in the event of armed conflict*; the *Convention of 10 April 1972 on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and Their Destruction*; the *Convention on the Prohibition of Military or any other Hostile use of Environmental Modification Techniques* and the *Convention of 10 October 1980 on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects* (CCW) were adopted. Furthermore, Kellenberger also states in his foreword to the ICRC Study on CIHL in Henckaerts and Doswald-Beck 2005:x, that the five *Protocols of the 1980 Convention on Certain Conventional Weapons*; the 1997 *Ottawa Convention on the Prohibition of Anti-Personnel Landmines*; the 1998 *Statute of the International Criminal Court*; the 1999 *Protocol to the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict* and the 2000 *Optional Protocol on the Involvement of Children in Armed Conflict* were adopted.

²⁶ Compare the comments of Gasser 1993:3, Meurant 1987:246, Pictet 1985:1, MacLaren and Schwendimann 2005:1218 and Van Oppeln 2002:234. Coupland 2001:987 submits that IHL ultimately aims at limiting armed conduct or, at the very least, limiting the effects thereof on security and health and in this manner promote *humanity*.

the fact that the principles upon which the entire IHL regime is based can also be *directly* relied on to further the humanitarian endeavour? Thus, for example, with regard to the specific terminology to be used when referring to this branch of law, the United States prefers the terms *law of war* or *laws and customs of war* rather than *international humanitarian law*.²⁷ Hoffman states that *law of war* is the earliest term used to describe the corpus of law that regulates the conduct of hostilities and treatment of the wounded and sick, civilians, prisoners of war and internees. There seems to be some debate as to whether *international humanitarian law* is a subcategory of the *law of war*, focusing on humane treatment of the wounded, sick or otherwise distressed.²⁸

Meron observes that the use of the term *international humanitarian law* is reflective of the influence of human rights law on this body of law.²⁹ Self-preservation and good sense played a role in humanitarian law, as it has been stated: 'The renaming of the law of armed conflict as international humanitarian law did nothing to change the fact that the *ius in bello* has evolved over the course of centuries to accommodate interests and concerns of states that are as much if not more about advantage and utility than they are about humanity'. Furthermore, the sentiment must be commended that: 'Whether we call it the law of armed conflict, international humanitarian law, the law of war, or *ius in bello*, observance of the rules regulating armed conflict is what separates the amateur, the sadist, the desperate and the mob from the professional fighter and his commander who, even in the maelstrom and fog of war – the most extreme of emergencies – can retain their basic human decency and morality'.³⁰ In this dissertation, *international humanitarian law*, *laws of war* and *laws and customs of war* will be used interchangeably. Nonetheless, it must be carefully noted that the acceptance or rejection of principles and standards of IHL – hence, a natural law or legal positivist orientation – may be evident from the terminology used to describe this branch of law.

Of course, IHL only applies when an armed conflict has broken out. These are the rules relevant in war. Thus it is known as the *ius in bello* as opposed to the *ius ad bellum*, which relates to the right to go to war.³¹ Therefore, the existence of an armed conflict is a necessary and sufficient *causa* for

²⁷ Bellinger and Haynes 2007:443.

²⁸ 2004:233 n. 4.

²⁹ 2000a:239.

³⁰ McDonald 2008:243 and 247.

³¹ Sassoli and Bouvier 2006:102 and Pictet 1985:84. Dinstein 2004:881 states that the complete separation of the *law in war* and the *law to war* is one of the most basic principles of contemporary international law. Thus, according to Best 1983:8, the *ius ad bellum* governs the right to go to war, whereas the *ius in bello* governs the conduct of parties when an armed conflict has broken out. See also Hensel 2008a:5, Dinstein 2004:881-882, Oppenheim 1940:174, Verdross and Koeck 1983:28-29 as well as Meurant 1987:247.

the applicability of IHL.³² War has been vividly described as being 'contrary to the normal state of society, which is that of peace. It is justified only by necessity, and must not serve as an end in itself. War is a means – the ultimate means – for one state to impose its will upon another. It consists in using the pressure necessary to achieve this end. Any violence which is not essential to this purpose is superfluous. To persist in it is both cruel and stupid'.³³

As is well known, two types of conflict are recognised in the international legal order. Those occurring beyond the borders of states are regarded as international armed conflicts and those occurring within the territory of a state are regarded as non-international armed conflicts.³⁴ Determining the nature of an armed conflict is important in order to determine which humanitarian treaty framework is engaged. Thus, international armed conflicts are governed by the four *Geneva Conventions* of 1949 and *Additional Protocol I* of 1977, whereas non-international armed conflicts are regulated by common article 3 of the *Geneva Conventions* of 1949 and *Additional Protocol II* of 1977.³⁵ The importance of common article 3 in relationship to considerations of humanity has been succinctly put:

The norms specified in Article 3 have an indisputably humanitarian character, but elementary considerations of humanity have not necessarily attained the status of customary law. Elementary considerations of humanity reflect basic community values whether already crystallized as binding norms of international law or not.³⁶

In the discussion of implementing the laws of war to non-international armed conflicts, two choices were possible, namely the complete application of the *Geneva Conventions* to a defined, limited number of non-international conflicts (on which consensus proved impossible) or relying on a generalised or limited application of the essence of these *Conventions* (which was eventually the

³² MacLaren and Schwendimann 2005:1226.

³³ Pictet 1985:62. See, for classical antecedents, De Vattel 1916:295 for the view that all hostile actions which harm the enemy without necessity or are not intended to bring the war to a conclusion are unjust and, as such, prohibited by natural law, and Suarez 1944:839 for the opinion that punishment ought to be inflicted as seldom as possible.

³⁴ Gasser 1993:21. See also Pejić 2007:89-93, Meron 2000a:261, Dinstein 2004:884-885 and Wenqi's *Implications for Non-International Armed Conflicts* in Maybee and Chakka 2006:129-131 regarding the classification of armed conflicts.

³⁵ See the respective treaties and, for example, Pejić 2007:77 and Meron 2000a:260. Evidently, the treaty rules pertaining to international armed conflicts are much more elaborate than the regime applicable to non-international armed conflicts and, therefore, customary law becomes an important supplement to the basic and incomplete treaty regime pertaining to non-international armed conflicts. See in this regard Fenrick 1998:198, Cowling 2006:75, Meron 1996:248 and, generally, UN Doc. E/CN.4/1998/87 paras 74-80 and UN Doc. E/CN.4/1999/92 par. 2. See also Gasser 1993:21, Pictet 1985:46-47 and, likewise, Van Oppeln 2002:240 supporting the breach of state sovereignty through common article 3 of the *Geneva Conventions* of 1949.

³⁶ Meron 1987:357. See also Pejić 2007:87 and the *Case concerning Military and Paramilitary activities in and against Nicaragua*, Judgment of 27 June 1986 (merits) par. 218, which is quoted in the main text on page 22.

route followed).³⁷ This procedure reflects the fact that certain *fundamental, universal norms* are accepted in IHL. The route taken was to rely on specific, accepted principles which would apply to any armed conflict rather than attempting to formulate a technical definition of the relevant armed conflicts to which the entire corpus of the *Geneva Conventions* should apply. This has led to the rigid distinction between these types of conflict becoming blurred. It was submitted by the International Court of Justice (ICJ) that common article 3 of the *Geneva Conventions* is not only applicable to non-international armed conflicts, but also to international hostilities since:

...these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court's opinion, reflect what the Court in 1949 called "elementary considerations of humanity" (*Corfu Channel, Merits, I.C.J. Reports 1949*, p.22)...Because the minimum rules applicable to international and to non-international conflicts are identical, there is no need to address the question whether those actions must be looked at in the context of the rules which operate for the one or for the other category of conflict. The relevant principles are to be looked for in the provisions of Article 3 of each of the four Conventions of 12 August 1949, the text of which, identical in each Convention, expressly refers to conflicts not having an international character.³⁸

The essential norms regulating non-international armed conflicts were thus held to be basically similar to those applicable to international armed conflicts and article 3 was used as justification for neglecting to determine whether the relevant actions should be considered by the standard used in international or non-international armed conflicts.³⁹ Unsurprisingly, in the light of such comments by the ICJ, Sassoli and Bouvier state that the IHL applicable to non-international armed conflicts is converging with the IHL of international armed conflicts due to the interpretations of customary international law (CIL) made by the International Criminal Tribunal for the Former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR); the defined crimes in the *Statute of the ICC*; the increasing influence of international human rights law; the adoption of recent treaties dealing with weapons and cultural objects' protection deemed by states to apply to both kinds of conflict and the findings of the ICRC Study on CIHL.⁴⁰ From tribunal jurisprudence this blurring is most evident in the ICTY's pronouncement in *Tadic*:

³⁷ Best 1983:300.

³⁸ *Case concerning Military and Paramilitary activities in and against Nicaragua*, Judgment of 27 June 1986 (merits) paras 218-219. See also Paust 2006:604-605 and Beyani in Chatham House 2005:56.

³⁹ Meron 1987:356. However, it must be remembered that IHL still only applies to non-international armed conflicts after the hostilities have reached a certain intensity. In this regard see Van Oppeln 2002:239 and see *Additional Protocol II* art 1(1) and (2).

⁴⁰ Sassoli and Bouvier 2006:250. Compare Meron 2000a:262. Likewise, Schindler 2003:176-177 voices a similar opinion, contributing the merging of rules initially only applicable to international armed conflicts with rules applicable to non-international armed conflicts to the *Tadic* decision of the ICTY. Compare Hoffman 2004:245 who states that the merging of the rules applicable to the two types of armed conflict already commenced in 1949 with the *Geneva Conventions*, but that the gap still allows significant room for states to determine which rules should be extrapolated.

Why protect civilians from belligerent violence, or ban rape, torture or the wanton destruction of hospitals, churches, museums or private property, as well as proscribe weapons causing unnecessary suffering when two sovereign States are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted "only" within the territory of a sovereign State? If international law, while of course duly safeguarding the legitimate interests of States, must gradually turn to the protection of human beings, it is only natural that the aforementioned dichotomy should gradually lose its weight.⁴¹

Later, more specifically, the Tribunal noted:

Indeed, *elementary considerations of humanity and common sense* make it preposterous that the use by States of weapons prohibited in armed conflicts between themselves be allowed when States try to put down rebellion by their own nationals on their own territory. What is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife.⁴²

However, this does not mean that all the rules of international armed conflicts would potentially apply to non-international armed conflicts:

The emergence of the aforementioned general rules on internal armed conflicts does not imply that internal strife is regulated by general international law in all its aspects. Two particular limitations may be noted: (i) only a number of rules and principles governing international armed conflicts have gradually been extended to apply to internal conflicts; and (ii) this extension has not taken place in the form of a full and mechanical transplant of those rules to internal conflicts; rather, the general essence of those rules, and not the detailed regulation they may contain, has become applicable to internal conflicts.⁴³

This convergence in the regulation of international and non-international armed conflicts is also strengthened, it is submitted, due to the moral and universal nature of IHL, which strengthens the possibility of extending the general essence of the rules to various conflicts. Meron, also, welcomes the current blurring of the different types of armed conflict. Thus, he commends the ICRC Study for adopting the distinction between international and non-international armed conflicts rather than the three-tiered approach embodied in the *Geneva Conventions and Additional Protocols*. Furthermore, he notes that some armed forces admit that the same rules of IHL should be applied to all situations of armed conflict and that, although they refer to the relevant provisions of the

⁴¹ ICTY, Appeals Chamber, *Tadic*, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, October 2, 1995, par. 97.

⁴² ICTY, Appeals Chamber, *Tadic*, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, October 2, 1995, par. 119. [Emphasis added.] See also UN Doc. E/CN.4/1998/87 par. 81.

⁴³ ICTY, Appeals Chamber, *Tadic*, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, October 2, 1995, par. 126. However, according to Turns 2006:209 and Cryer 2006:254, the reliance on this *dicta* from the *Tadic* case is controversial because *Tadic* was not accused of any offence pertaining to the unlawful use of weapons, thus, these remarks of the ICTY regarding the prohibition of certain weapons in non-international armed conflicts were *obiter*. However, it is to be indicated in the present dissertation that by relying on certain essential, common principles, protection in IHL may well be extended to persons suffering from conflicts regardless of whether the particular conflict complies with the definition as such.

Conventions and/or *Protocols*, most military manuals also do not distinguish their sphere of applicability.⁴⁴ Schindler commented that it was due to the increase in non-international armed conflicts, the destruction and atrocities that accompanied them and the reverberating effect these conflicts had on the international community that they were no longer accepted to be part of the internal affairs of the particular state. Action was needed from the international community and, accordingly, recourse was (inevitably) had to the *fundamental principles* of IHL, which had until then been developed essentially for international armed conflicts, to apply to these conflicts.⁴⁵ Evidently a need arose for common ground between the different types of armed conflict. The common commodity relied on was *principles and standards*. Despite these developments, the law applicable to protect the civilian population during non-international armed conflicts is still rudimentary in comparison with the legal regime applicable to international armed conflicts.⁴⁶ Naturally, principles and standards will remain important in IHL to address the various *lacunae* that still exist. The centrality of these principles is evident in light of the fact that it was considerations of humanity and moderation, as illustrated above, that informed and established the two branches of IHL (treaty law), namely Geneva law and The Hague law.⁴⁷ It must be noted that these regimes gave rise to the entire IHL treaty regime – these foundational principles were thus *directly* engaged in creating IHL's treaty law.

Furthermore, as will be seen below in the present chapter and in Chapter 3, rules of CIL were also important for establishing treaty provisions since CIL was the initial conventional source of substance for IHL. Subsequently, it will also be illustrated that these foundational principles influenced and shaped CIL and, thus, principles have also *indirectly* influenced treaty law through its reliance on CIL rules. It seems imperative for the coherent, harmonious development of IHL treaty law, that resort must be made to these *foundational principles*. Furthermore, it is submitted that the principles and standards upon which IHL is based, embody an independent source of IHL that can be relied on directly. This was effectively the course chosen when extracting the fundamental principles of IHL, applicable to international armed conflicts, to postulate a core minimum of rules to apply in non-international armed conflicts.

Having identified the essential principles (namely considerations of humanity and human dignity)

⁴⁴ 2000a:261. For the three-tiered approach to defining armed conflicts, see articles 2 and 3 of the *Geneva Conventions* of 1949 for international and non-international armed conflicts respectively and articles 1(1) and (2) of *Additional Protocol II* for a narrower set of non-international armed conflicts.

⁴⁵ 2003:176.

⁴⁶ Van Oppeln 2002:241. See also Fenrick 1998:198, Cowling 2006:75 and Meron 1996:248.

⁴⁷ See section 1, pages 16-20 above.

which constitute the basis of IHL's two branches of *treaty law*, the investigation needs to delve deeper into the very objectives and history of IHL in order to indicate that IHL is inextricably linked and committed to these principles. In this endeavour the focus will also now shift to CIHL as this was the initial conventional source of substance for IHL (indeed, codifications in IHL is a rather recent phenomenon) and, as such, has been significantly influenced by these foundational principles. In the process, the present dissertation aims to indicate the fundamental interconnectedness of these principles and both of the main formal sources of IHL before conducting an investigation into the most important contemporary restatement on CIHL, namely the ICRC Study on CIHL.

2 A consideration of the functioning and goals of IHL viewed against the nature thereof

As was evident from the preceding section, IHL is a unique branch of law. Even against the background of international law in a broad sense, this branch of law seems to be *the one area where non-legal, moral criteria have had a significant influence*. In this regard, Finch suggests that '...during the infancy of international law, the law of nature was an important source and an indispensable guide. In its earliest years, when the law of nations was so largely confined to the law of war, natural law exerted its greatest influence in ameliorating the inhuman practices of primitive war'.⁴⁸ For this reason, the objectives of IHL need to be considered in more detail since these goals may further illustrate the interconnectedness of IHL, humanity and morality. The historical development of IHL will also be scrutinised to prove the natural law basis and origin of this branch of law, which is important for the considerations of CIHL and the ICRC Study in Chapters 3 and 4. However, this emphasis on the natural law basis of IHL will lead to certain theoretical concerns, which have to be addressed directly.

The validity of international law has frequently been questioned as will be seen below.⁴⁹ The legitimacy of IHL has likewise been called into question. Nonetheless, it will be shown that IHL, although not perfect (and after all, which branch of law is?), does perform a very important function: it serves as an *aegis* to protect human dignity in the chaotic and inhumane circumstances which are war. Also, it will be indicated that the very *nature* of IHL is simultaneously its biggest concern and attribute. The investigation will then turn to a theoretical consideration of natural law

⁴⁸ Finch 2000:26.

⁴⁹ See section 2.3, pages 69-75 below.

and, peripherally, to other philosophical paradigms which have influenced IHL, in order to clearly elucidate their links with IHL. Hereafter, it will be necessary to analyse directly IHL's central principle of *humanity* as an emanation from natural law, as well as methods to implement it in the international community. In this regard, consideration will be given to the Martens clause, norms of *ius cogens* and obligations *erga omnes*. It will become evident that IHL is flexible due to the principles and standards inherent therein and that any negation of these inherent principles will inevitably weaken this branch of law. Mention will also be made of the principles of IHL identified by Jean Pictet in 1985, as these will confirm the centrality of principles to the *ius in bello* and provide an important frame of reference for comparing the CIHL rules identified by the ICRC in their Study with principles that were not yet considered as having 'hardened' into CIL a mere twenty years before the ICRC publication.

2.1 A brief consideration of the objectives of IHL

It is apparent from the previous sections that although war entails the resort to force, it is not unlimited force as moral and legal factors temper it.⁵⁰ Thus, for example, both the 1868 *St. Petersburg Declaration* and the 1907 *Hague Convention* indicate that the combatants' recourse to means of war is not unlimited since the former states that '...the necessities of war ought to yield to the requirements of humanity' and the latter aims to 'diminish the evils of war, as far as military requirements permit'.⁵¹ The *ius in bello* aims at lessening the harsh effects of war – not at eliminating war altogether. The *ius contra bellum* (law against war), on the other hand, aims at preventing war.⁵² These differing viewpoints are not seen as being contradictory since both have

⁵⁰ Pictet 1985:80. Pictet, *ibid*, succinctly puts it: 'War is of course a resort to force, but not to force without limits. War does not break all ties between nations; it cannot and must not attempt to do away with all the hard-won moral and material gains of civilization. Above and beyond violence, there is still a body of rights and duties. These constitute *the laws of war which are the products both of reason and of the deepest feelings of humanity and these must be respected by all men at all times*. These laws come into being through the same process as domestic laws. First they are customs. Then they become common law. Finally they take the form of written rules'. [Emphasis added.]

⁵¹ Meurant 1987:244. See the preamble of *Hague Convention II and IV* of 1907 and the preamble of the 1868 *St. Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight*. See also Gasser 1993:10, Schindler 2003:166 as well as Kalshoven and Zegveld 2001:20.

⁵² Meurant 1987:238. Accordingly, Hall 1924:82 finds it evident that international law accepts that states may set up the relation of war between them and, irrespective of the justice of the parties' actions regarding the *ius ad bellum*, the *ius in bello* must regulate the consequences of this relation. Compare Gentili 1933:33. The nature of IHL is illustrated by Meurant, *ibid* at 238: 'At the present phase of development of International Law, the "outlawing of war" is neither complete nor universal: not all armed conflicts are considered as illegal. Further, the fact that armed conflicts are waged illegally does not mean that hostilities cannot be subject to legal rules of warfare. And it is symptomatic that the law of armed conflicts in recent times, under the pressure of public opinion, expands and covers more and more non-international armed conflicts, in spite of the fact that insurrections and *coups d'état* are

their respective functions, namely either to regulate warfare or to attempt to prevent it. This apparent paradox is due to the *very nature of IHL, which is based on moral and philosophical considerations* rather than law and legal systems.⁵³ Meurant describes it as a mixture of idealism and realism.⁵⁴ Thus, the relation of war is accepted by IHL as inevitable even though war is prohibited in the current international legal order except where it occurs in the situations of individual or collective self-defence, Security Council enforcement measures and possibly to enforce the right of people to self-determination. However, wars still occur despite their prohibition and the duty is left to international law not only to combat armed conflicts' occurrence but also to ensure that a certain *minimum standard of humanity* is maintained in this inhumane situation.⁵⁵

It is therefore unambiguously evident that IHL strives to protect human values during armed hostilities and to furnish aid to the victims thereof.⁵⁶ As IHL has developed, it has become evident that its main aim is the protection of the individual.⁵⁷ As stated by Lauterpacht: 'We shall utterly fail to understand the true character of the law of war unless we realize that its purpose is almost entirely humanitarian in the literal sense of the word, namely, to prevent or mitigate suffering and, in some cases, to rescue life from the savagery of battle and passion'.⁵⁸ It must be submitted that this is the only sensible reason why the initial rudimentary rules of warfare could have been established – these rules were formulated, pragmatically, by the ancient societies, to lessen the effects of hostilities. Why else would these rules have been created? In the *Kupreškić* case the ICTY confirmed that IHL was not aimed to protect the interests of states, but rather to be to the individual's advantage in his capacity as a *human being*.⁵⁹ This goal of IHL endures even though it acknowledges that it cannot prevent war in its entirety.⁶⁰ Gasser also finds the aim of IHL to be the protection of persons and the safeguarding of man's *dignity* in the extreme situation of war. Succinctly put, IHL is part of the universal international law whose aims include creating and ensuring peace between people. The special contribution made in wartime by IHL lies in its

unquestionably illegal also under domestic laws'.

⁵³ Meurant 1987:239. Meurant, *ibid*, continues that, due to the importance of morals and philosophy for this branch of law, it relies on a subjective, value-based foundation.

⁵⁴ 1987:247.

⁵⁵ Sassoli and Bouvier 2006:102-103. Dugard 2005:506-518 refers to various situations where aggression is allowed even in the absence of United Nations consent, including the customary, pre-1945, right to self-defence; arguably anticipatory self-defence; hot pursuit (at sea); the use of force to defend nationals abroad; arguably humanitarian intervention and collective self-defence.

⁵⁶ Thürer 2007:58.

⁵⁷ Pictet 1985:93 and Meurant 1987:246.

⁵⁸ 1952:363-364.

⁵⁹ *The Prosecutor v Kupreškić et al.* Case No. IT-95-16-T, Judgment of 14 January 2000, par. 513. See also Quéguiner 2008:174.

⁶⁰ Pictet 1985:61.

promotion of the *principle of humanity*. It attempts to prevent man from spiralling into the abyss of barbarity.⁶¹

In order to ensure the greatest possible success of these objectives emanating from IHL, scholarly debate and analysis of the normative standards and axiomatic principles inherent thereto must be furthered. The ICRC Study on CIHL (and the reactions thereto) is precisely such an endeavour. The present study also aims to further this debate.

IHL, therefore, constitutes a very important and indispensable branch of the international legal system as it is the last line of defence when war occurs (and wars do occur!). It might not always be successful, but in striving to perfect its ideals many atrocities may be limited and much suffering alleviated. Furthermore, through its very nature (as a branch of law that can merely strive to reach its objectives) IHL shows flexibility – it has *moral objectives* to reach and, accordingly, its normative framework functions around its aims and goals. This is basically why additional studies on the elucidation of certain IHL rules are so important. The conclusion is reached that any and every possible strengthening of the *ius in bello* is to be welcomed in order to lessen the hardships of armed conflicts and to promote the value of human dignity. Even when the possibility of laws during armed hostilities is viewed with pessimism, scholarly debate and research into this area must not be dissuaded, since every and any constructive contribution to the betterment of those who suffer from the effects of war must be welcomed. The possibility of developing the legal system most likely to be acceptable universally across the cultural, religious and economic divide must also be encouraged. By emphasising the essential, core components of mankind such as humanity and human dignity, this dissertation may even reinforce the fact that, at a foundational level, the entire human race accepts certain common concerns and that, in the final instance, those components (like religion and culture) which contribute towards driving humans apart become insignificant when compared to those aspects which bind humans together in a universal brotherhood.

Due to the influence of *superior principles* and norms which emanate from established custom, principles of humanity and the guidelines of public conscience, IHL is believed to contain elements which make it universal and obligatory.⁶² States never denounced the *Geneva Conventions*. Meurant submits that as consequence 'humanitarian law underlies the *erga omnes* character of its obligations'. Each state has *locus standi* to prevent the *Conventions*' violation in order to defend the

⁶¹ Gasser 1993:6 and 16-17.

⁶² Meurant 1987:237. See also MacLaren and Schwendimann 2005:1219.

common interests of humanity in the international community.⁶³ It has been submitted that 'as humanitarian law is based on universal values and supported by principles which are really the underlying common ground of the human race, the major principles of protection which have an absolute value will remain intact'.⁶⁴ Schindler's concern must, however, be noted: 'Strong currents, such as nationalism, particularism, racism and various forms of fundamentalism are working against acceptance of universal humanitarian values'.⁶⁵ Nonetheless, it seems that this movement towards universality is done through a set of principles and rules which appear to be fundamental to ensure respect for the human being and the notions of humanity. Meurant states that IHL is not based on reciprocity anymore, but rather on an absolute and universal commitment.⁶⁶ Similarly, Meron found that various elements were driving IHL from its basis of reciprocity towards a regime established on *humane values* and human rights law.⁶⁷ Likewise in the *Kupreškić* case the ICTY stated that the bulk of IHL lays down absolute obligations, namely obligations that are *unconditional* or in other words not based on reciprocity.⁶⁸

It is submitted that these statements illustrate the *moral*, non-legal influences on IHL. *Ex necessitate* these transcendent notions of IHL must be protected and developed in order to prevent their asphyxiation at the hands of legal positivism. It has been submitted that '[b]eyond its apparent paradoxes and compromises, humanitarian law appears as a body of law *the principles of which transcend the rules which compose it*. It exists because it is necessary, and if it is necessary, it is because it is a manifestation of the safeguard of humanity'.⁶⁹ *Thus, the functioning of IHL also indicates its preoccupation with morality and the human being.*

⁶³ 1987:246. Fleck 2005:248 states that: 'The fundamental character of humanitarian standards as obligations *erga omnes* underlines that all states have a responsibility for taking appropriate steps to ensure respect of humanitarian law, even if they are not directly involved in an armed conflict'.

⁶⁴ Meurant 1987:247. Compare the acceptance of Heintschel von Heinegg in Chatham House 2005:79 of principles inherent to IHL.

⁶⁵ 2003:188.

⁶⁶ 1987:246.

⁶⁷ Meron 2000a:239 and also referred to by Evans 2005:3. Quéguiner 2008:173 indicates that IHL, like international law in a broad sense, was originally based on reciprocity. Reprisals were thus acceptable as response to a state's violation of a treaty or customary law rule. This philosophical basis changed, however, with the adoption of the 1949 *Geneva Conventions*. This is evident from common article 1 which places the High Contracting Parties under the obligation to respect and ensure respect for the *Conventions "in all circumstances,"* that is besides any consideration of reciprocity. Accordingly, in *Corfu Channel (merits)* ICJ Reports, Judgment of April 9th, 1949, 4 at 22 the ICJ stated that the duty to notify other states of minefields in their territorial waters could be seen as 'elementary considerations of humanity, even more exacting in peace than in war'.

⁶⁸ *The Prosecutor v Kupreškić et al.* Case No. IT-95-16-T, Judgment of 14 January 2000, par. 517. In this regard Meron 2000a:278, also quoted in Evans 2005:3, submits: 'In the long run, humanitarian norms must become a part of public consciousness everywhere. Education, training, persuasion, and emphasis on values that lie outside the law, such as ethics, honor, mercy, and shame, must be vigorously pursued. This job cannot be left to the law alone. Public opinion and the social consensus that have proved so effective in the development of the law should be geared to transforming practice as well. For that, the creation of a culture of values is indispensable'.

⁶⁹ Meurant 1987:245. [Emphasis added.]

From the aforementioned it is evident that IHL embodies and derives much of its momentum from moral goals, which seem unattainable in fact, but have to be pursued for the betterment of mankind. Due to the very nature of IHL (as viewed against the nature of the entire international legal order), rules seem to be easily negated and circumvented by sovereign states when their application hinders the states' political, economic, military or other endeavours. However, if war, which (at this stage of history) is inevitably bound to occur, is left unregulated, the suffering and resultant destruction would be unfathomable. Therefore, the most must be made of what is available, namely the rules of IHL. It must be submitted (and this will also become clear from the rest of the present chapter) that although the nature of IHL creates many of the problems relating to the effective implementation thereof, *it also establishes a platform which is admittedly unique for any branch of law from where axiomatic principles and standards can (and should) be introduced into the debate.* In the following section it will be illustrated that IHL was created from religious, military, ethical, pragmatic and other considerations. Therefore, naturally the substantive rules of this branch of law are closely connected to its moral objectives of protecting humanity and human dignity. Denying the inclusion of such principles into this body of law would weaken it significantly. The converse is also true – inclusion of such standards would strengthen IHL enormously.

It is submitted that the argument goes further than this – many of these principles have shaped and informed CIL. In fact, the following section will illustrate the natural law, principle-based foundation of IHL, which has been subsumed by the historical first source thereof, namely CIHL. Therefore, CIL, which will be considered in Chapter 3, is closely linked to the promotion of these essential natural law principles in IHL and, as such, is of the utmost importance.

However, regardless of whether they were subsumed under CIL, these principles will evidently elicit strong opposition from many states opposed to 'manipulable natural law' virtues; it is however the present dissertation's intention to illustrate that such fears would be unfounded as the objectives of IHL ensure that these principles will not be abused in order to further the interests of a particular state or group at the expense of another. It seems evident that the rules regulating warfare originated due to the concerns ancient societies had for the consequences of war. Therefore, it seems prudent to consider the historical development of IHL and, in this manner, to further elucidate the fundamental natural law basis of this branch of law and the influence of principles and standards thereon.

2.2 The historical influence of non-legal principles and standards on IHL

To further illustrate the inherent existence of principles and standards in IHL, a brief consideration of its historical development is in order. This (together with the previous section that indicated the aims and goals of this branch of law) will confirm the essential *natural law* foundation of IHL. Accordingly, with regard to rules of *IHL*, this dissertation respectfully disagrees with Bederman's statement that it is of little import whether an international legal rule can trace its origins to ancient times.⁷⁰ Without this insight, IHL will be deemed to comprise only treaty rules which effectively came into existence in the mid-nineteenth century. Obviously such a conception overlooks the wealth of CIHL that remains applicable as source of IHL. Nonetheless, arguments are frequently made that natural law principles should be viewed with scepticism. From this discussion it will become apparent that, since time immemorial, IHL has been influenced by various non-legal considerations such as religion, morality, principles and standards. It will also become apparent that, even for those (legal positivists) arguing that IHL only really began in all earnest with the *Geneva Convention* of 1864 and, more particularly, with Francis Lieber's Code (hence, through codifications), these very conventions were based on moral considerations derived from human reason – i.e. non-legal (natural law) factors – which became the formal window through which the *bona fide* humanitarian endeavour to alleviate the plight of victims of armed conflicts could be furthered.

Gasser admits that it is hardly possible to find real evidence of when and where the rules of IHL evolved, or to determine who created these rules. This is due to the fact that conflicts have arisen between tribes, clans and other informal communities since the beginning of time and sometimes, during those conflicts, rules to alleviate the violence were created.⁷¹ Meurant also finds the

⁷⁰ See Bederman *International Law Frameworks* in Weston, Falk, Charlesworth and Strauss 2006:35.

⁷¹ 1993:6, Sassoli and Bouvier 2006:121, Best 1997:14, Pictet 1985:6, Belli 1936:3 and Bugnion 2008:59. The comment of Meron 2000a:243 must be noted that, unfortunately, '[c]alamitous events and atrocities have repeatedly driven the development of international humanitarian law'. Accordingly, IHL has frequently had to repair the damage of yesterday rather than prepare for the possible problems of tomorrow. The development of IHL therefore seems to be reactionary rather than preparatory. Meron, *ibid*, indicates that the Lieber Code emanated from the American Civil War, which later gave the impetus for the Hague law dealing with the conduct of hostilities. The Red Cross and Geneva law (the law dealing with the protections of the wounded, sick and shipwrecked victims of armed conflict) emanated from the Battle of Solferino – and, admittedly, Henry Dunant's moving portrayal thereof in his book *A Memory of Solferino*. The Nuremberg Charter (where the emphasis shifted to individual criminal responsibility in lieu of only state responsibility before that time), the 1949 *Geneva Conventions* and the *Genocide Convention* resulted because of the atrocities committed by the Nazi regime. Finally, the *ad hoc* tribunals

historical development of IHL to follow the footsteps of mankind's development. Accordingly, it is seen as an eternal fight between good and evil. IHL has emerged throughout the centuries as customary law based on the specific cultural or moral principles which dominated a particular period in history.⁷² Kellenberger likewise states in his foreword to the ICRC Study on CHIL that:

The laws of war were born of confrontation between armed forces on the battlefield. Until the mid-nineteenth century, these rules remained customary in nature, recognized because they had existed since time immemorial and because they corresponded to the demands of civilization. All civilizations have developed rules aimed at minimizing violence – even this institutionalized form of violence that we call war – since limiting violence is the very essence of civilization.⁷³

Referring to Quincy Wright's 1942 *A Study of War*, Pictet mentions various war practices of ancient populations that are comparable to contemporary IHL rules, namely rules distinguishing various types of adversary; rules defining the situations, formalities and authority for initiating and ending a war; rules regarding the limitations of people, time, place and methods of its conduct and even rules which aim to prohibit war *in toto*.⁷⁴ The universal nature of these norms is evident from the fact that they are found in many diverse cultures. The Indian literary epics, the *Ramayana* and *Mahâbhârata*, ideologically diverse religious works like the *Bible* and *Koran*, and works on the art of war such as the Japanese code of *bushido*, contain many of these rules.⁷⁵ Both the Hammurabic Code and the Justinian Code contained rules pertaining to humanitarian conduct in armed

established for prosecuting the atrocities committed in the former Yugoslavia and Rwanda, contribute significantly to the development of IHL and its 'humanisation'. See also the similar sentiment of Bederman *International Law Frameworks* in Weston, Falk, Charlesworth and Strauss 2006:36.

⁷² 1987:239. Thus, for example, the principles of Christianity or Islam have influenced this body of law. In the example of Islam, it has been submitted that, despite the concept of 'Jihad,' certain principles of humanity in times of war were still respected. Meurant, *ibid*, refers to the *Viqayet*, a written treatise on law from *circa* 1280, which prohibits the killing of children, women, the sick and the elderly. Humanitarian norms were, however, only applied to believers, causing a significant reduction in the scope of these norms' application. Evans 2005:2 indicates that a link is visible between religious doctrines, for example just war, and the contemporary developments of IHL, leading to the inevitable conclusion that religion (in other words a non-legal component) is a historical source for contemporary IHL.

⁷³ Cited in Henckaerts and Doswald-Beck 2005:ix. See also Bugnion in Chatham House 2005:1.

⁷⁴ Pictet 1985:6-7. However, Gasser 1993:6, Sassoli and Bouvier 2006:121 and Pictet, *ibid* at 6, submit that some of the rules, had humanitarian effects although that might not have been their purpose, for example refraining from killing prisoners of war in order to have slaves. In this regard, although foreign to a modern audience, Belli 1936:85-86 justified the phenomenon of slavery in that this in effect saved persons that would have died otherwise. Hence, Belli maintains that nature itself exhorts that it is 'humane to spare a captured enemy and not to kill him'. Gentili 1933:331-332 also accepts slavery to prevent the killing of the captured enemies. See also Grotius 1925:692.

⁷⁵ Gasser 1993:6, McDonald 2008:224 as well as Sassoli and Bouvier 2006:122. Confirming the inclusion of many modern rules on warfare in the *Mahâbhârata* is Ahamad in his *Inaugural Address* in Maybee and Chakka 2006:20. Regarding the *Ramayana* see Weeramantry's *The Revival of Customary International Humanitarian Law* in Maybee and Chakka, *ibid* at 33, who reflects that this epic stated that '[t]he purpose of war is not to exterminate your enemy and destroy his countryside. The purpose of war, if at all, is to subjugate your enemy so that you can live in peace with him thereafter'.

hostilities.⁷⁶ According to Pictet, some of the provisions in the ancient texts of India are very similar to those contained in the *Hague Regulations* of 1907 pertaining to the laws and customs of war. Thus, we find provisions forbidding warriors from slaying disabled enemies or adversaries who had surrendered and the wounded were to be sent back home after they had recuperated. Also, certain weapons were forbidden, the taking of the adversary's property was regulated, the conditions of a prisoner's detention were stipulated and it was not permissible to order that no quarter be allowed.⁷⁷

It was approximately in 2000 B.C. when cities truly began to emerge, nations were organised and relationships between different cultures were cultivated that the first rules were developed of what was to become known as international law. These (customary) rules were naturally rudimentary, but they constitute the first link in the chain of contemporary CHIL's development. For the Sumerians, war was already an accepted institution, characterised by, *inter alia*, declarations of war, chances for arbitration, immunity for enemy messengers and peace treaties. Likewise, the ancient Egyptians were mindful of their fellow human beings as is clear from extant commandments such as that even the enemy should be given food. The Hittites signed declarations of war and treaties of peace. They also normally refrained from killing the inhabitants of a conquered city. However, when the enemy city resisted these invaders, the populace was dealt with more harshly; yet, even then, seldom through the massacre of everyone. This practice was in stark contrast to the atrocities committed by the Assyrians during their campaigns. In Greece, reason and the notion of justice as a part of natural law become very important. Accordingly, in Homer's *Illiad* we find a war containing truces and respect for the vanquished. Alexander the Great also treated his conquered foes humanely although captured enemies in Greece became the property of the winner. In addition to the practice of these ancient civilizations, philosophy also had a role to play. Thus the Stoic school of philosophy, with its notion of love permeating every living being and in turn reaching out towards other persons, firstly relatives, then acquaintances and eventually the whole of humanity, even enemies, caused war to look absurd.⁷⁸

⁷⁶ McDonald 2008:224. The Hammurabic Code emanated from Babylon during the eighteenth century BCE, while the Justinian Code came from the Byzantine Empire during the sixth century BCE.

⁷⁷ 1985:8-9. Bugnion 2008:59-60 indicates that some rules of ancient times will inevitably reflect values and needs of their civilizations which differ from our rules of today. Thus, for example, the Greeks were not overtly concerned with what happened to their prisoners – often though it was enslavement or slaughter. The dead were, however, treated with considerable care.

⁷⁸ Pictet 1985:7-10. However, according to Pictet, *ibid* at 11, the Stoic doctrine really only gained momentum after Rome had subdued the known world with various bloody wars. For the (Stoic) notion of a universal brotherhood, see Gentili 1933:67, Grotius 1925:14, De Vattel 1916:5, Rachel 1916:157 as well as Verdross and Koeck 1983:18-19. It was the Romans who were responsible for the 'just war' doctrine, which was later revived in the middle ages. See also Dugard 2005:11 who states that the roots of international law are already evident from the Egyptians, Jews,

Clearly, these rules came into existence many centuries ago and their continued relevance today is indicative of their universal, timeless nature. Furthermore, it is probable that these rules were not formally promulgated. Thus, a question arises as to the basis of their origin. Do we dare deny that they must have been derived from natural law? It must be emphasised that this question is still relevant for contemporary IHL, because the rules have remained very much the same over millennia (although their form has changed somewhat due to the fact that some of the rules have become codified in treaties while some have remained universally applicable as rules of CIL). Therefore, much can be appreciated regarding the functioning of the modern day equivalent rules when the historical and foundational roots of these principles and rules are properly scrutinised.

Many religious teachings deal directly with rules for war. In fact many of the initial rules pertaining to armed hostilities had a religious, rather than a legal, foundation, and the influence of religion on ideas about which type of conduct against other human beings was appropriate was appreciable.⁷⁹ Hinduism, for example, allowed each individual to determine his own destiny. Buddhism, on the other hand, focused on compassion and mutual assistance, Lao Tzu saw man's function in his service to others, Confucius advocated a sort of altruism based on solidarity and intelligence and Meh-ti proposed a universal notion of love. Zoroaster taught the Persians tolerance and Cyrus treated his enemy in the same manner as he did his own soldiers.⁸⁰ Regarding the ancient Hindu law on armed conflict, Bugnion submits that it was based on *humanity* – believing all humans to be the children of one Creator, recognising the difference between military objects (which could be attacked) and civilian objects (which could not be attacked) and limiting armed hostilities mainly to combatants.⁸¹ In Islam, the Qur'an prohibits acts of aggression perpetrated by Muslims and exhorts

Greeks and Romans. Searl 2001-2002:275 considers that *ius gentium* entails the 'law of nations' – the beginning of public international law. The origins of this concept lie in Roman law, where the *ius gentium* was a private law based on the customs of different nations and which was then applied to foreigners living in the Roman empire. See also Oppenheim 1937:70, Brierly 1963:17 and Villa 1997:542. Best 1997:290 indicates how the contemporary international law has returned to this ancient notion: 'International law has rediscovered those of its roots which its *ius gentium* precursor had in the idea of a world-wide humankind to whose members the sense of universal brother- and sisterhood would not seem alien, and among whom mutual respect and goodwill should be observable. IHL and human rights law are the areas of international law where this *ethical foundation* is most evidently needed and relied on, where it is therefore most important – and where it is incidentally most precarious'. [Emphasis added.]

⁷⁹ Evans 2005:14. See also Nicod's *Welcome address* in Maybee and Chakka 2006:8. Weeramantry's *The Revival of Customary International Humanitarian Law* in Maybee and Chakka, *ibid* at 37, reflects certain weapons prohibited by Hinduism, Islam and Christianity. *Ibid* at 38, Weeramantry confirms that while Buddhism rejects war, it remains important for the psychological investigation thereof. Also, *ibid* at 16, Evans submits that it is generally considered that IHL rules emanated from Christian writers. Thus, the distinction between *ius ad bellum* (right to go to war in which just war theories are included) and *ius in bello* (right during war) emanated from Christian writings.

⁸⁰ Pictet 1985:8.

⁸¹ 2008:60.

respect for human life.⁸² In the Christian tradition, the Old Testament, through the *lex talionis*, established a limitation on violence as only a tooth or an eye could be exacted as punishment, not death. Other passages of the Bible also prohibited the Israelites from killing enemies who surrendered and commanded that the wounded, women, children and elderly be shown mercy.⁸³ The influence of Christianity also pertains to the elevation of the human being as a creature worthy of respect and having dignity. Killing a fellow human being would clearly be contrary to this tenet and the Bible itself prohibits murder.⁸⁴ The influence of religion on the development of the laws of war has been significant and, moreover, continues to influence this branch of law in the contemporary international legal order. In fact, while considering the recent ICRC Study on CIHL (which will be discussed in Chapter 4), Weeramantry has opined that it would be useful to consider the principles of warfare that emanate from Hinduism, Christianity, Judaism and Islam. This argument already alludes to one of the main tenets of the present dissertation, namely that the laws of war (including any restatement thereof like the ICRC Study) must be bolstered by the moral, natural law norms which historically informed it for an enhancement of the proposed rules' normativity. As Weeramantry asserts: 'Wars of course are to be condemned as they are the utmost form of barbarism. But within this barbarism, let us see at least a few rays of sunshine, some basic principles and rules so that if there is a war, these basic principles of humanity will be respected'.⁸⁵

In the Middle Ages, when the notion of *chivalry* – comprising notions of military honour – was of paramount importance, the knights adopted certain strict rules relating to their fighting. It must also be noted that the notion of chivalry has endured to the present day.⁸⁶ The traditional motives upon which knighthood was established included faith, loyalty and love – these elements manifested in honour, the spirit of service, mercy and moderation. These precepts directly contributed to the development of international law since declarations of war, the prohibition of certain weapons and

⁸² See Suras 2 and 5 respectively. Illustratively Sura 5 determines that: '...he who slayeth any one, unless it be a person guilty of manslaughter, or of spreading disorders in the land, shall be as though he had slain all mankind; but that he who saveth a life, shall be as though he had saved all mankind alive'. (Rodwell 2005:489.)

⁸³ For example Deuteronomy 20:10-14. See also Evans 2005:14-15, McDonald 2008:224 and Pictet 1985:8.

⁸⁴ Pictet 1985:12.

⁸⁵ Weeramantry's *Closing Remarks* in Maybee and Chakka 2006:225.

⁸⁶ Gasser 1993:6-7, Meurant 1987:239, Oppenheim 1940:179, McDonald 2008:224 and Bugnion 2008:59. Pictet 1985:7 and 12 also refers to the influence of the notion of chivalry. Meron 2000a:242-243 observes that rules of chivalry, humanity and values emanating from religion have always influenced the law of war especially pertaining to the protection of the elderly, women, children and others deemed incapable of bearing arms. This branch of law has also come to include rules protecting combatants. Evidently, the dichotomy between military necessity and restraint on belligerent conduct is a characteristic of this branch of law. In this regard notions of chivalry and humanity served as a counterweight to military necessity. See also Bederman *International Law Frameworks* in Weston, Falk, Charlesworth and Strauss 2006:36 regarding the natural law beliefs in the Middle Ages relating to the fact that international law emanated from universal values and norms.

the status of persons bearing a flag of truce stem from them.⁸⁷

Further impetus was given to the development of international law (and especially IHL) during 1540-1648 when great expansions occurred in the Christian world as explorers began to enter the New World. These expansions provided international law with a challenge seeing that these newly discovered territories were neither Christian nor Roman and, thus, neither Christian laws nor the *ius gentium* could hold sway over the relations with the inhabitants of these territories. Accordingly, the basis of obligation was obliterated from the so-called *universal* (which in fact was a European and Christian) law of nations. However, CIL would emerge to form the essential foundation for a general law of nations.⁸⁸ At its start, international law was substantially customary in nature. Therefore, it was inevitable that the earlier international law scholars would focus on custom and its unwritten corpus of rules. Initial explanations were based on natural reason. Therefore, international law was deemed to be the necessary emanation of the laws of nature and was determined through the use of reason.⁸⁹ Furthermore, international law was accepted as being derived from 'universal, objective, and discoverable "natural" principles'.⁹⁰ The importance of these initial writers on IHL is due to their comprehensive treatment of their subject regardless of whether it pertained to peace or war. The (continued) significance of these works for IHL resides in the fact that these publicists relied on *principles* and rules (which had to be observed by states during war and peace). These publicists wrote prior to the first modern treaties, and the source from which they derived these rules and principles can be sought in natural law, right reason, common sense and customary rules of the time. Therefore, a brief exposition on some of these eminent jurists' views will strengthen the notion of the universality and natural law basis of IHL.⁹¹

By referring to some of the substantive rules and principles furthered by these writers an interesting and informative comparison might also be made with the proposed rules of the ICRC Study.⁹²

⁸⁷ Pictet 1985:15.

⁸⁸ Lesaffer 2002:119. Lesaffer, *ibid* at 125, submits that in understanding the fact that the Christian system would not be effective in dealing with the New World, Francisco de Victoria contributed to creating a more universal and less Christian approach of international law and relations. Compare Phillipson 1915:178.

⁸⁹ Cohen 2007:79 submits that De Victoria and Suarez took such a view of international affairs plus some theological considerations.

⁹⁰ Anonymous 2008:1224.

⁹¹ The selection of publicists offered here include Da Legnano, De Victoria, Belli, Suarez, Ayala, Gentili, Grotius, Zouche, Rachel, Textor, Van Bynkershoek, Pufendorf, Wolff and De Vattel so as to provide a rather comprehensive survey of the various theoretical approaches to international law (including the precursors of Grotius, the positivists, naturalists and Grotian traditions) and, thereby, to strengthen the present dissertation's findings. For this division between positivists, naturalists and Grotians, see Oppenheim 1937:88-91, Phillipson 1908:30-31, Finch 2000:17-21 and 24 as well as the discussion in footnote 165 below.

⁹² For ease of cross-reference, the appendix contains all 161 proposed black-letter rules of the ICRC Study as well as

Furthermore, through these considerations the interconnectedness of the laws of war, *natural law principles like humanity* and CIHL will also become evident.

Giovanni da Legnano (d. 1383) had already completed a treatise on war in 1360 and needs to be mentioned as this treatise effectively ushered in the period where publications on international law began to emerge. Although Da Legnano's treatise was written in a period very alien to our own, and although it relies on theology, moral philosophy and various other aspects which would be deemed foreign for a contemporary treatise on war, it still has some value since he already accepts that quarter should be given to the general of the enemy who does not resist any longer, thus already reflecting mercy, moderation and *humanity*; that trickery in war is allowed (provided that does not relate to false statements or the breaking of a promise) and that *mercy* should be allowed to those captured in war unless doing so would entail a fear that the peace will be disturbed.⁹³

Francisco de Victoria (1480-1546) and Francisco Suarez (1548-1617) were responsible for asserting, prior to Hugo Grotius (1583-1645) and more effectively than him, that natural law, separate and independent from God and based on human nature, bound nations.⁹⁴ Barrie summarises the views of De Victoria and Suarez in that they believed that all human laws originate with God and are subordinate to Him. Natural law is subsumed partly by the Holy Order and revealed partly through the Bible. To the contrary, Grotius was a rationalist, who determined the content of natural law through the universal reason and not through the Holy Order.⁹⁵

De Victoria maintained that various states exist in the world which derive their existence from human nature and were therefore equal in terms of natural law. All of these states were also part of one global, international order constituted by mankind. Since the final goal of a state was the common good of its subjects, the final goal of this international order was the common good of mankind. Furthermore, since the international order was under the sway of the rules and principles of natural law, the human law of nations 'could not contradict the divine or the natural law as the normative authority of man was vested in the divine will and the natural order'.⁹⁶ The importance of

footnotes with the essentially comparable rules of the international jurists to be considered in the present section.

⁹³ See the introduction of Holland in Da Legnano 1917:ix, xvii-xviii and xxvii. For the rules, compare Da Legnano, *ibid* at 254, with proposed rules 46 and 47 of the ICRC Study regarding quarter and those *hors de combat*; compare Da Legnano, *ibid* at 271, with proposed rule 57 of the ICRC Study pertaining to ruses and also compare Da Legnano, *ibid* at 274, with proposed rule 47 of the ICRC Study.

⁹⁴ Villa 1997:549. Regarding the influence of the Spanish School, see Phillipson 1915:175-176.

⁹⁵ Barrie 1983:174.

⁹⁶ Lesaffer 2002:123. Lesaffer, *ibid* at 124-125, submits that the human law of nations is in fact subject to divine and natural law in De Victoria's eyes not independent from it. If, however, states and princes are both subject to the

a higher, teleological purpose for mankind in its totality is clear from this. Also, to reach this common good, rules had to be made in conformity with natural and divine law. In this regard, it is argued that recourse to fundamental considerations of *humanity* was inevitable.

A principle elucidated by De Victoria is that we are prohibited from taking up arms against those who do not injure us: killing innocent people is prohibited by natural law.⁹⁷ De Victoria's stance on this point is that intentionally killing non-combatants, even if those non-combatants are infidels, is wrong. Since the foundation of a just war is an injury – a violation of a right, and a non-combatant has not perpetrated such an act, killing such a non-combatant is unlawful.⁹⁸ Also, regarding whether the enemy combatants should be spared after victory, De Victoria answers in the affirmative, believing that considerations of *humanity* should temper the punishment meted out to enemies.⁹⁹ De Victoria also maintains that it is not right to kill someone who is suspected to cause danger in the future as *evil should not be done to avoid greater evil*.¹⁰⁰ It is submitted that these notions are completely congruent with modern views on non-combatants and the balancing of military necessity with humanitarian considerations – therefore, De Victoria's position also precedes and confirms some of the findings of the ICRC Study.¹⁰¹

common good of the international order and both natural and positive binding legal rules – how can these rules be enforced? De Victoria found the solution in the highest authorities in the international legal order – the sovereign powers themselves. Lesaffer, *ibid* at 128, continues that since law enforcement was left to the highest authorities in the international order – states – war became the ultimate measure of enforcement in the international legal context. But these authorities also were the sole actors to judge their own actions and whether their conduct promoted the interests of the international community, they were more likely to defend their own interests even with force if need be.

⁹⁷ De Victoria 1917:171 and Phillipson 1915:190. Compare De Victoria, *ibid* at 179, who prohibits the slaying of children, women, agricultural persons, clerics, members of a religious order and the rest of the peaceable civilians who are deemed innocent until the contrary is proven with proposed rules 1, 6, 27 and 134-138 of the ICRC Study on CIHL regarding the principle of distinction between civilians and combatants, the loss of civilian protection when arms are taken up, special protection for religious personnel until they take up arms and the specific protections *vis-à-vis* women, children and the elderly respectively.

⁹⁸ De Victoria 1917:178. Compare proposed rule 1 of the ICRC Study on CIHL.

⁹⁹ De Victoria 1917:182-183. Bearing in mind the time in which De Victoria wrote, it was an important concession to *humanity* that, in his view, not all the guilty among the enemy ought to be killed. Hence, the nature of the offence and the amount of damage caused by the enemy must be considered when deciding upon revenge and punishment 'without any cruelty or inhumanity'. De Victoria, *ibid* at 185-186, resorts to *equity* and *humanity* as guidelines to ensure that punishment exacted in war is proportionate to the fault it seeks to remedy. Evidently, the punishment inflicted on the guilty must further equity and humanity. Compare the essence of proposed rule 47 of the ICRC Study on CIHL prohibiting attacking someone *hors de combat* who intends to surrender or is in the power of the adverse party; also compare proposed rules 87, 89 and 90 of the ICRC Study on CIHL.

¹⁰⁰ De Victoria 1917:180. [Emphasis added.]

¹⁰¹ Further rules are proposed by De Victoria that are comparable to those postulated in the ICRC Study. Hence, De Victoria 1917:173 mentions that the death of innocents may not be ordered and, if it is done, soldiers must not fulfill the order as they would be just as guilty of the offence by consenting to it than the one who ordered the slaughter. Soldiers are not excused when they engage in hostilities *mala fide*. Compare proposed rules 151, 154 and 155 of the ICRC Study pertaining to individual responsibility and superior orders. De Victoria, *ibid* at 180, also accepts that those things which the enemy may use against you in war might be taken from the innocent such as ships, arms and engines of war. In this regard, compare proposed rules 49 and 51 of the ICRC Study. However, De Victoria, *ibid* at

When evaluating the merit of De Victoria's work, it must also be borne in mind that during his time the powerful monarchs commanded and the weak had to comply or face annihilation. Therefore, to advocate against the performance of the most dreadful actions during military operations was deemed to be an exceptional concession to the *demands of humanity* rather than a duty due to the opponent and the public opinion of the (civilised) world. De Victoria's work thus illustrated that certain inevitable *rules and principles* apply to states in their relations to each other whether in war or peace. Accordingly, De Victoria emphasises the importance of considerations of *humanity* for ensuring the universal applicability of his doctrines.¹⁰²

Another influential writer on the laws of war who reflected the importance of considerations of *humanity* was Pierino Belli (1502-1575).¹⁰³ By rejecting punishments for soldiers like torture, work in the mines and other similar degrading treatment, Belli seems to provide a forerunner of the provision that soldiers should not suffer cruel, degrading or inhumane punishments.¹⁰⁴ Furthermore, he deemed harming prisoners to be both savage and barbarous. Hence, prisoners should not be treated cruelly or killed on a whim.¹⁰⁵ Humanity as principle also seems evident from Belli's assertion that the declaration of war (which was still needed in his day to commence armed hostilities) and the actual attack should not happen almost simultaneously so that the opposing party

180, allows the confiscation of the innocents' money as well as the destruction of their grain and horses if this is necessary to decrease the enemy's resources. Still, De Victoria tempers this with considerations of humanity in that if the war can be effectively continued without despoiling the agricultural and other innocent population then such despoliation should be refrained from.

¹⁰² Phillipson 1915:196-197. See, for examples of rules where considerations of humanity are evident, De Victoria 1917:178 where he dissuades from war when it will cause excessive loss as compared to possible gains and *ibid* at 184-185 regarding the sacking of cities. Although he accepts collateral damage, De Victoria, *ibid* at 179, further evidences considerations of humanity by postulating a primitive form of proportionality in attack (to be compared with proposed rule 14 and, generally, proposed rules 15-24, of the ICRC Study): 'Great attention, however, must be paid to the point already taken, namely the obligation to see that greater evils do not arise out of the war than the war would avert. For if little effect upon the ultimate issue of the war is to be expected from the storming of a fortress or fortified town wherein are many innocent folk, it would not be right, for the purpose of assailing a few guilty, to slay the many innocent by use of fire or engines of war or other means likely to overwhelm indifferently both innocent and guilty. In sum, it is never right to slay the guiltless, even as an indirect and unintended result, except when there is no other means of carrying on the operations of a just war...'. See also Suarez 1944:845-848 and Ayala 1912:33 (especially in comparison with proposed rule 21 of the ICRC Study). Subsequently, De Victoria, *ibid* at 185, also prohibited soldiers from looting or burning without the authority of their general or sovereign (the latter provision being a result of the time in which he wrote). Compare proposed rule 52 of the ICRC Study which prohibits pillaging.

¹⁰³ See the comments of Scott in the Introduction to Belli 1936:11a-14a.

¹⁰⁴ Belli 1936:186-187. Compare proposed rule 90 of the ICRC Study regarding cruel treatment of civilians and persons *hors de combat*. However, *ibid* at 222-223, Belli admits that torture might be appropriate treatment for deserters.

¹⁰⁵ Belli 1936:85-86. However, bearing in mind the period in which he wrote, Belli submits that it is more merciful to refuse to accept surrender and rather to fight to the finish. It is submitted that although this is contrary to the modern approach, it nonetheless indicates how seriously Belli deemed the duty of treating prisoners without cruelty. Compare proposed rule 90 of the ICRC Study regarding cruel treatment of civilians and persons *hors de combat*.

will have time to react (possibly to comply with the required claims and thus to prevent bloodshed) and prepare itself.¹⁰⁶ Further, Belli refers to the view of some that soldiers are under a higher standard of *morality* compared to other persons.¹⁰⁷ Belli thus aided in entrenching considerations of *humanity* in the jurisprudence of the laws of war.¹⁰⁸

Already from a youthful age, Francisco Suarez found the law of nations to be universal, historical, customary, subject to derogation, often identifiable with negative natural law and based on common customs.¹⁰⁹ García y García summarises the conclusions reached by Suarez in his *magnum opus*, the *Tractatus De Legibus ac Deo Legislatore*, as including, firstly, that the norms found in the law of nations are not necessarily included in either the *ius naturale* or *ius civile*. Suarez distinguished international law from natural law. He submitted that these forms of law coincided partly due to the fact that both are binding on man to a certain extent, both apply to man and, lastly, both recognise prohibitions, concessions and permissions. The differences Suarez noted included that international law cannot be as immutable as natural law, that the obligation to follow international law's precepts do not derive from a process of conclusions drawn from first principles as is the case with natural

¹⁰⁶ Belli 1936:79. See also De Vattel 1916:254-256 where he indicates that the declaration might be made just prior to hostilities in the hope of compelling the adversary to comply with the required claims.

¹⁰⁷ Belli 1936:208.

¹⁰⁸ Further rules are mentioned by Belli which might be comparable with the ICRC Study. Hence, Belli 1936:88-89 maintains that deceptions are lawful if they are not treacherous. Wit and arms are therefore to be used against the enemy provided that there is no wrong or treachery involved. Compare proposed rule 57 of the ICRC Study regarding ruses in war. The use of poison as weapon was also rejected by Belli, *ibid* at 89. In this regard, compare proposed rule 72 of the ICRC Study pertaining to poison. The elderly and very young were held by Belli, *ibid* at 15, to be exempt from military service. See proposed rules 136-138 of the ICRC Study regarding the special protection accorded to children and the elderly. Belli, *ibid* at 16-17 and 81, likewise acknowledged that the clergy could not be harmed unless they took up arms themselves. In this regard, compare proposed rule 27 of the ICRC Study regarding religious personnel. For the view that a clearly unjust cause must not be pursued by the soldiery, see Belli, *ibid* at 63-64. Compare proposed rules 151, 154 and 155 of the ICRC Study pertaining to individual responsibility and superior commands. Belli, *ibid* at 131, opines that cities should not be plundered unless some significant wrong and crime was committed by the whole community (or the vast majority thereof). In this regard, a comparison with proposed rules 14, 50 and 52 of the ICRC Study entailing proportionality in attack, the destruction of enemy property and prohibition of pillaging might be made.

¹⁰⁹ García y García 1997:27. Suarez 1944:348-349 described the *ius gentium* as having its basis in a philosophy of reason: 'The rational basis, moreover, of this phase of law consists in the fact that the human race, into howsoever many different peoples and kingdoms it may be divided, always preserves a certain *unity*, not only as a species, but also a moral and political unity (as it were) *enjoined by the natural precept of mutual love and mercy; a precept which applies to all, even to strangers of every nation*. Therefore, although a given sovereign state, commonwealth, or kingdom may constitute a perfect community in itself, consisting of its own members, nevertheless, each one of these states is also, in a certain sense, and viewed in relation to the human race, a member of that universal society; for these states when standing alone are never so self-sufficient that they do not require some mutual assistance, association, and intercourse, at times for their own greater welfare and advantage, but at other times because also of some moral necessity or need. This fact is made manifest by actual usage. Consequently, such communities have need of some system of law whereby they may be directed and properly ordered with regard to this kind of intercourse and association; and although that guidance is in large measure provided by natural reason, it is not provided in sufficient measure and in a direct manner with respect to all matters; therefore, *it was possible for certain special rules of law to be introduced through the practice of these same nations*. For just as in one state or province law is introduced by custom, so *among the human race as a whole it was possible for laws to be introduced by the habitual conduct of nations*'. [Emphasis added.] See also Sherwood 1926:21-22.

law and also that natural law applies to all and is only disobeyed through some error while the law of nations is observed in general by most people. Secondly, García y García submits that Suarez found international law to be a universal law with regard to its ambit of application. Accordingly, this law is not limited to a state or nation, but it applies to all people and all realms. Thirdly, the law of nations is a human law as it is directed to governing the human species and it is valid for each human. It is therefore a law containing norms to regulate relationships and coexistence between men and it serves as the foundational basis for every code of positive law. Fourthly, the law of nations is positive law as it emanates from an authority which has the competence to make universal juridical rules positive through deriving certain principles of natural law as logical conclusions. It is submitted that the natural law foundation of international law (and, by implication, IHL) is apparent from this observation. García y García submits, fifthly, that the law of nations is found to be a voluntary law in the opinion of Suarez as it emanates from the will of the legislators. These notions of a positive, voluntary law were very important to Grotius who built thereon. Sixthly, because it is positive in nature, the *ius gentium* is believed to be customary in nature, on account of 'its general and continuous practice by all or nearly all nations, and it has its origin in the customs of all or nearly all peoples'.¹¹⁰

Naturally the law of nations is unwritten human law according to Suarez. Unwritten law is formed from customs. A major difference between the law of nations and natural law is found in the fact that the former is based more on customs than on nature, and *vice versa* in the case with the latter. Seventh, the basis of the *ius gentium* is the consent of nations, which causes whatever there is of natural law to be made positive and to constitute norms only found in such consent itself.¹¹¹ Suarez writes from a pro-peace point of view. Naturally war is in opposition to notions of peace and, thus, it needed to be addressed. War was accepted as a reality which had to be regulated somehow.¹¹² Although Suarez distinguishes international law from natural law, it is submitted that he accepted natural law to form the basis from which the principles and rules of international law were derived. Furthermore, Suarez acknowledges the universal nature of international (and by implication IHL) law and he also emphasises the inevitable and crucial role played by CIL as a formal source of international law. Finally, the substantive rules of war he proposes also contribute to the promotion and entrenching of humanity as central principle of the *ius in bello*.¹¹³ Illustratively, then, Suarez

¹¹⁰ 1997:28-31 and 33. Regarding the natural law basis of the rules to be derived, see Verdross and Koeck 1983:21.

¹¹¹ García y García 1997:31-32.

¹¹² Sherwood 1926:26-27.

¹¹³ Common soldiers, according to Suarez 1944:832-833, do not have to investigate the justness of a war. They ought to go to war when summoned, but not if it is apparent that the war is unjust. When there seem to be indications that

opines that innocents, including women, children and others who are unable to bear arms should not be killed even in the case where the opposing force would not be able to get redress for the injuries it has suffered otherwise. This is because slaying innocent persons is *essentially evil*.¹¹⁴

Balthazar Ayala (1548-1584) is the next eminent international jurist to which the present scrutiny turns. *Humanity* and *clemency* are, according to Ayala, important factors to be observed in war, although he does limit their application due to the fact that severity must be employed for the state in cases of necessity. He continues that kindness and humaneness not only appease soldiers and citizens but also contribute to better interaction with enemies. This is due to the fact that humaneness defeats anger, diminishes hatred and ‘mingles the enemy’s tears with his blood’.¹¹⁵ Ayala submits that the intent to harm, to resort to vengeful savagery and the lust of conquest must be entirely absent when commencing a war. It is submitted that, although this pertains to the *ius ad bellum*, it reflects humane considerations mindful of human dignity.¹¹⁶ Ayala also refers to a principle formulated by Cicero that it is a duty of war not to treat the conquered severely since mercy and appeasement are the characteristics of a great and eminent person. Punishment should thus be limited.¹¹⁷

the war is unjust then the soldiers will have to investigate the truth of the matter. (Although this aspect is related in terms of the *ius ad bellum*, it seems that the idea of not following superior orders when they are manifestly illegal emerges, something which is accepted in the *ius in bello* as well.) In this regard, compare proposed rules 151, 154 and 155 of the ICRC Study pertaining to individual responsibility and superior commands. Capturing booty during wartime is allowed to soldiers according to Suarez, *ibid* at 840. See also the stricter distinctions made by Ayala 1912:36-39 regarding booty, which is nonetheless, accepted in particular cases. See also the comments of Ayala, *ibid* at 40, that *res sacra* were not liable to be captured as war booty. See also De Vattel 1916:292 and Gentili 1933:315. Compare proposed rule 49 of the ICRC Study which provides different limitations on war booty. Suarez, *ibid* at 845, admits that a rule seemed to be emerging that ecclesiastical persons and property were not to be attacked except when the citadel or church was used by the enemy as a defensive camp. Compare proposed rules 10, 27 and 38-41 of the ICRC Study regarding civilian objects becoming legitimate objects of attack when they are used for a military objective, the protection accorded to religious personnel and the protection given to cultural objects respectively. See Suarez, *ibid* at 845-848, regarding proportionality in attack and compare proposed rule 14 of the ICRC Study. Suarez, *ibid* at 852, accepts the use of stratagems in war provided that they pertain to the concealment of plans and not the relating of lies. Compare proposed rule 57 of the ICRC Study regarding ruses in war.

¹¹⁴ Suarez 1944:843-848. Compare proposed rules 1 and 134-138 of the ICRC Study regarding the principle of distinction and special protections accorded to women, children and elderly in war. Suarez, *ibid* at 840, accepts that losses might be inflicted upon the enemy during war in order to obtain redress or to ensure victory, but he rejects inflicting these losses on innocent persons when they would cause an intrinsic injury. Compare proposed rule 1 of the ICRC Study regarding the distinction between combatants and civilians. Although Suarez, *ibid* at 850, allows the victor in a just war to use the property of the enemy in any way he sees fit to perpetuate peaceful relations, he must spare the lives of the enemy. Compare proposed rules 47, 87 and 89 of the ICRC Study regarding the treatment of civilians and persons *hors de combat*.

¹¹⁵ Ayala 1912:107 and 132.

¹¹⁶ Ayala 1912:10 and 95.

¹¹⁷ Ayala 1912:105. Further, see Ayala, *ibid* at 33 and 44-45, who confirms that the intentional killing of women and children during war is prohibited since it was disgraceful; however, capture of women and children was allowed. Furthermore, clerics and members of a religious order are also deemed to be innocent until the contrary is proven. Compare proposed rules 1 and 134-138 of the ICRC Study regarding the distinction between combatants and civilians as well as the special protections given to women and children. Regarding clerics, compare proposed rule

For Albericus Gentili (1552-1608), the law of nations is the law which all states (or the majority of them) agree upon.¹¹⁸ Gentili believed that war was regulated through certain practices which were agreed upon, general customs that were tacitly followed *and natural law*; not (solely) Roman and ecclesiastical laws anymore. He deemed war to be contrary to the normal condition of nations and advocated for peaceful settlements of disputes whether through diplomatic negotiations, arbitration or other pacific methods emanating from natural reason rather than resorting to armed hostilities or other kinds of violence.¹¹⁹ Considerations of *humanity* and *human dignity* are evident in the substantive rules of IHL proposed by Gentili, for example, that non-combatants, like women, children and peaceful peasants, are exempt from normal hostile treatment.¹²⁰ Indeed, Gentili states that it seems cruel – and, therefore, unjust – to unleash fury on the innocent and weak.¹²¹ Gentili also rejects cruelty and savagery against the vanquished.¹²² Subsequently, Gentili submits that it

27 of the ICRC Study. Regarding hostage-taking, Ayala, *ibid* at 33, seems to opine that it is not permissible against innocents when it is accompanied by the infliction of bodily harm. Nonetheless, Ayala does accept the infliction of bodily harm on and even killing of innocents in cases where the hostage-taking could not have been performed in another way. Clearly, Ayala attempts to 'humanise' the taking of hostages, which was an accepted phenomenon at the time. Thus, compare the prohibition of the ICRC Study on hostage taking in proposed rule 96 and proposed rule 21 regarding less dangerous objectives. Also, Ayala, *ibid* at 84-87, accepts various trickeries, ruses and stratagems as permissible in war. Compare proposed rule 57 of the ICRC Study relating to ruses of war. Regarding the plundering and destruction of cities, Ayala, *ibid* at 105, (relying on Cicero) stresses the importance of not doing anything rashly or cruelly. However, *ibid* at 108, Ayala acknowledges that necessity might serve to justify the destruction of certain houses that may be useful for military operations. Compare proposed rule 14 (and the essence of rules 15-24) of the ICRC Study pertaining to proportionality in attack.

¹¹⁸ Gentili 1933:8 and Phillipson 1911:59-60.

¹¹⁹ Phillipson's Introduction in Gentili 1933:32a and Phillipson 1911:69-70. For the main text reference, see Gentili 1933:20. Nonetheless, for the importance of Roman law, and especially the principles thereof, to the law of war see Gentili, *ibid* at 18: 'Again, are not the following principles from the books of Justinian applicable to sovereigns: to live honourably; not to wrong another; to give every man his due; to protect one's children; to defend oneself against injury; to recognize kinship with all men; to maintain commercial relations; along with other similar and cognate matters which make up almost the whole of those books? These belong to the law of nations and to the laws of war'. This leads Strenski 2004:642 to opine that adopting the basis of Roman civil law was very important for Gentili to ground his conception of the law of nations in. Such an approach he contrasts with that taken by De Victoria, namely to ground the law of nations on biblical authority and the Scholastic traditions of natural law. On war as a last resort see also Gentili, *ibid* at 15, Suarez 1944:837-838 as well as Ayala 1912:8 and 97.

¹²⁰ Gentili 1933:251-252 and 260-262 prohibits the slaying of women, children, the elderly, clergy and farmers, unless they are armed. Indeed, Gentili, *ibid* at 262, succinctly maintains that there cannot be a war against unarmed men. See also Phillipson 1911:74. Compare proposed rule 1 of the ICRC Study regarding the distinction between combatants and civilians, proposed rule 6 regarding the protection accorded to civilians until such time as they take up arms, proposed rule 27 regarding religious personnel as well as proposed rules 134-138 regarding special protection accorded to women, children and the elderly in wartime.

¹²¹ Gentili 1933:256. Gentili, *ibid* at 126, also finds it unjustified that a soldier kills an innocent person at the order of his commander. In this regard, compare proposed rules 151, 154 and 155 of the ICRC Study regarding superior orders and individual responsibility.

¹²² 1933:285. That severity ought not to be shown to the captured, see also Gentili, *ibid* at 322-325 and 327. Gentili, *ibid* at 209-210, argues that prisoners are not to be slain as doing so would be cruel and contrary to *humanity*. Likewise, *ibid* at 216, he finds that those who surrender are, in conformity with the laws of humanity, to be spared. *Ibid* at 223, he opines that POWs ought to be treated with kindness, lest others who want to surrender are dissuaded through fear of harsh punishments. Finally, although Gentili, *ibid* at 239, acknowledges that some harm might be necessary towards prisoners, he still submits that this right must be exercised in *moderation*. Compare proposed rules 47, 87, 90, 91, 92 and 93 of the ICRC Study regarding the treatment of persons *hors de combat*, i.e. persons in

will always be unjust to violate the honour of women. Indeed, in light of the unlawfulness of the killing of women and children, Gentili states that it is an even greater wrong to inflict upon those groups a loss of modesty.¹²³ Evidently, then, natural law considerations, as they manifest in the principle of *humanity*, permeated Gentili's thought.¹²⁴ Hence, the natural law influence on Gentili is evident when he submits that nothing cruel is just.¹²⁵ Unsurprisingly, therefore, Gentili states that 'not everything which is allowable is honourable. One should always consider not only what is lawful, but also what is honourable'.¹²⁶

For Hugo Grotius (1583-1645) the doctrine of law rests on a four-fold concept of legal obligation. The most basic law of nature that regulates the order of the world is self-preservation: nature and indeed, every living thing in nature, attempts to sustain itself. This is also the essential principle justifying recourse to war – man has a right to preserve his own life.¹²⁷ The second concept was a notion of the conformity of aspects with reason, which surpasses corporal things. Third is the human volitional law or 'positive' law encompassing all man-made jurisprudence including national and international, based on explicit or implied agreement.¹²⁸ Natural law was viewed as binding on all humans simply because they were human, in contrast to volitional or positive law which varied greatly from one community to the next. This led Grotius to focus on the former.¹²⁹ Since the

the power of the adversary.

¹²³ Gentili 1933:257. Compare proposed rules 87, 90 and, especially, 93 of the ICRC Study on CIHL.

¹²⁴ See also Gentili 1933:270 where he rejects the destruction of temples, statutes, colonnades, farm-houses and crops. Compare generally proposed rules 38-41 of the ICRC Study on CIHL pertaining to cultural property. Furthermore, Gentili, *ibid* at 142-143 and 148, accepts a certain amount of craft, deception and stratagems as lawful. In this regard, compare proposed rule 57 of the ICRC Study regarding ruses of war. Gentili, *ibid* at 155-159, also rejects the poisoning of water sources and the use of poison in war as a direct weapon. See proposed rules 70, 71 and 72 of the ICRC Study regarding unnecessary suffering, indiscriminate weapons and the prohibition of using poison as weapon. *Ibid* at 319, Gentili rejects the devastation of cities as a means to terrify others. In this regard, compare proposed rule 2 of the ICRC Study pertaining to the use of terror. Gentili, *ibid* at 278-280, also seems to acknowledge the right to make conventions regarding the burial of the dead after a battle. Compare proposed rules 112, 113 and 115 of the ICRC Study regarding the dead. Gentili, *ibid* at 171, submits that murder should not be allowed. Compare the prohibition on murder in proposed rule 89 of the ICRC Study. However, for the approval of the harsh treatment of spies, because of the significant damage they can inflict, see Gentili, *ibid* at 173-174, and compare this with proposed rule 107 of the ICRC Study which merely omits to allow spies POW status but allows them a fair trial. Further compare proposed rule 88 of the ICRC Study regarding adverse distinction in relation to race, religion and the like with the comments of Gentili, *ibid* at 274, that it is contrary to the laws of war to exhibit cruelty towards enemies due to their religion and, *ibid* at 333, that it is forbidden to injure some merely for being of another race.

¹²⁵ 1933:295.

¹²⁶ Gentili 1933:259-260. Indeed, Gentili, *ibid* at 349, states that he prefers justice to the letter of the law and honour to advantage.

¹²⁷ Ford 1996:343. Christov 2005:564 holds that central to Grotius' deliberations was the need to achieve the correct balance between the need for self-preservation and the needs of the broader spectrum of the human species. See Grotius 1925:51.

¹²⁸ Ford 1996:343-345. See Grotius 1925:44 and 51.

¹²⁹ Ford 1996:345. Grotius 1925:38-39 defines the law of nature as: "The law of nature is a dictate of right reason, which points out that an act, according as it is or is not in conformity with rational nature, has in it a quality of moral baseness or moral necessity; and that, in consequence, such an act is either forbidden or enjoined by the author of

principles of natural law are immutable, whereas the norms of positive law often change, only the former fall within the ambit of a systematic treatment.¹³⁰ Grotius himself seems to accept that beyond the law of nature there is basically no law common to every nation.¹³¹ Again, like Suarez, the conclusion is reached that natural law is essentially the only universal law applicable to mankind in its entirety. Grotius' essential natural law foundations in his philosophy of international law seem to derive from the Roman Stoicism as developed by the Church Fathers and, later, the Spanish jurist-theologians. Cicero believed that one legal system regulates the affairs of the *hominum societas*. This universal law exists eternally and it manages and guides the whole world. This idea was also taken up by the Church Fathers, who maintained that all people are one in Christ irrespective of their heritage. The influence of such ideas on Grotius is evident from his statement that there exists one law for states and that this law makes no distinction with respect to religion or race, nor East or West. *According to Grotius, this universal law determines that states may not commit unjustifiable acts against each other.*¹³² The fourth component in Grotius' scheme was divine volitional law, comprising rules not evident through use of reason, but which gained validity through a decision of God's will.¹³³ Grotius opined that humans have a duty to God not to harm other humans. States, argues Grotius by analogy, had a duty to God not to harm the subjects of another state contrary to God's will and the teachings of Christ.¹³⁴ In his article on Oliver O'Donovan's *The Ways of Judgment*, Carty states that O'Donovan supports the Grotian idea that the international order is already governed by the law since the law of God and the *ius gentium* regulate it before any treaty or customary norm can take effect.¹³⁵ These views led to Grotius accepting that natural law was central to relations between states since princes are persons and states consist of people, seeing that persons are subject to natural law (and states consist of persons), natural law must apply to states.¹³⁶

Lauterpacht expresses doubt as to whether Grotius' view of the law of nature always functions in a humanising way so as to lessen suffering. It seems as though the law of nature sometimes yields to

nature, God'.

¹³⁰ Grotius 1925:21.

¹³¹ Ford 1996:345. See Grotius 1925:44.

¹³² Barrie 1983:174-175.

¹³³ Ford 1996:345.

¹³⁴ Barrie 1983:173.

¹³⁵ 2008:339-340.

¹³⁶ Ford 1996:348. Later Ford, *ibid* at 364, concludes that: 'On the whole, therefore, though he greatly elaborated upon, systematized, and internationalized the ideas of his predecessor, Grotius' scheme of natural law follows the basic contours of the Neo-Stoic political philosophy articulated by Justus Lipsius. It finds all individuals – sovereign and subject, brigand and burgher alike – bound by the dictates of a Ciceronian natural law deriving from the dictates of right reason and discernible *a priori* by all thinking human beings'.

the law of nations, but this position is not without doubt since the immutable law of nature is claimed to surpass God Himself.¹³⁷ The caveat has been voiced that Grotius' attempt to achieve a *via media* between realism and idealism was based on a moral concern, namely that he desired an effective set of *moral restraints* to be applicable to states.¹³⁸ Grotius was the first philosopher to formulate a system of rules to guide states in their relations *inter se* during times of peace and war. Seeking a common principle which could serve as a basis of appeal for all parties, Grotius relied on natural law, which he believed to be everlasting, immutable and existing irrespective of whether God did.¹³⁹ Regarding *ius ad bellum*, Grotius relied on natural law as the most fundamental basis for justifying war.¹⁴⁰ Grotius states that:

Least of all should that be admitted which some people imagine, that in war all laws are in abeyance. On the contrary war ought not to be undertaken except for the enforcement of rights; when once undertaken, it should be carried on only within the bounds of law and good faith.¹⁴¹

Natural law enabled Grotius to build his system without having to refer to new or old religious or political convictions. The law as found in nature can, according to Grotius, be rationally known by each individual who uses his/or her intellect correctly. Grotius believed the states to be like individuals who were associated in a society of states and he applied his natural law notions to the members of this society.¹⁴² It seems that Grotius, following Francisco Suarez, acknowledged that human law may in certain circumstances allow the violation of natural law precepts. This seems to be only apparent violations of natural law for Suarez denies that human law can abrogate a true norm of natural law. He sees human law as an implementation of natural law. Grotius takes this notion of permissions and makes it applicable to the law of war. Grotius opines that the international law allows many things which are forbidden by natural law. Thus, injustice is sanctioned for example with regard to belligerent violence and the treatment of prisoners of war. With regard to the *ius in bello*, Grotius also submits that all war captives may be made slaves in terms of the law of nations. Grotius sees it as a necessity that the international legal order has to allow injustice in furtherance of humanity as that might be the most effective manner to alleviate suffering in the broader context.¹⁴³

¹³⁷ Lauterpacht 1946:8 and 11 states that Grotius views natural law only as immutable in respect of matters it expressly prohibits and enjoins, but not with respect to those things it only allows.

¹³⁸ Forde 1998:639.

¹³⁹ Elliott 1917-1918:272. See Grotius 1925:13, 40 and 49, Kunz 1961:951-952, likewise Lauterpacht 1946:8 and Strenski 2004:643.

¹⁴⁰ Strenski 2004:643.

¹⁴¹ Grotius 1925:18.

¹⁴² Elliott 1917-1918:272.

¹⁴³ Forde 1998:643-645.

The eternal aspects of Grotius' *De Iure Belli ac Pacis* have been summarised as being, firstly, Grotius' subjection of all international relations to a 'rule of law'; secondly, this rule of law not only emanates from the will of states, but also from *natural law*; thirdly, Grotius identified the community of states with the community of individuals; fourthly, Grotius was adamant that no absolute right to warfare existed, but that a distinction should be made between a just and unjust war; fifthly, the idea of qualified neutrality regarding states not participating in the hostilities still being able to passively furnish aid to the party conducting the just war; and sixthly, Grotius' idea of *pacta sunt servanda* indicates his view of international law as a voluntary system to which states bind themselves by way of voluntary agreement.¹⁴⁴ For Grotius the jurisprudential precept on which international law is based is *pacta sunt servanda* – for him the main precept of natural law.¹⁴⁵ Barrie submits that the *De Iure Belli ac Pacis* gave the international legal order new content and dimension, which is still relevant in contemporary international law, namely that the relationship of states *inter se* is based on the law and *morality*. Seventh, Grotius was a pacifist whose works aim at promoting peace. Grotius would have preferred arbitration and negotiations rather than war, but due to the fact that wars do occur, he attempted to ensure that a greater humanitarian element existed to regulate this most inhumane of circumstances.¹⁴⁶

The *De Iure Belli ac Pacis* was largely a treatise on law in general, with international law forming a (significant) component thereof – confirming the unity and interwoven nature of all law. Unlike the selfish, anti-social man created by Niccolò Machiavelli (1469-1527) and Thomas Hobbes (1588-1679), Grotius' law of nature views man as being directed by an inherent desire for social life, endowed with goodness, altruism and morality, able to learn from experience and act in conformity with general principles.¹⁴⁷ Also, contrary to Hobbes' and Machiavelli's scepticism towards a moral duty surpassing desire and passion:

One of the salient characteristics of *De Iure Belli ac Pacis* is not only the frequency of the reliance on and appeal to the law of love, the law of charity, of Christian duty, of honour, and of goodness, and to the injunctions of divine law and the Gospel: the element of morality and the appeal to morality are, without

¹⁴⁴ Barrie 1983:182-184. Likewise, see Lauterpacht 1946:19-46 and 51.

¹⁴⁵ Lauterpacht 1946:22 and Lesaffer 2002:127 state that this notion also emanates from the writings of Jean Bodin and Albericus Gentili. Some modern writers also hail this principle as integral to international law, thus Dumbauld 1935:601 submits that international law derives its obligatory nature from a fundamental norm and he postulates *pacta sunt servanda* as a part of this fundamental norm. Ibid at 605-606, Dumbauld continues that this norm is derived from moral and political considerations and it determines the sources of international law and how they are formed.

¹⁴⁶ Barrie 1983:173 and 182-184. For Grotius' pacifism, see Grotius 1925:33.

¹⁴⁷ Lauterpacht 1946:18 and 24.

interfering decisively with the legal character of the exposition, a constant theme of the treatise.¹⁴⁸

Hence, for example, Grotius (in a very well-known passage) states that '[t]hroughout the Christian world I observed a lack of restraint in relation to war, such as even barbarous races should be ashamed of; I observed that men rush to arms for slight causes, or no cause at all, and that when arms have once been taken up there is no longer any respect for law, divine or human; it is as if, in accordance with a general decree, frenzy had openly been let loose for the committing of all crimes'.¹⁴⁹ Evidently, for Grotius (and as it is argued by the present dissertation) moral concerns permeate the international law debate. Not only the actions of individuals are viewed through the elements of rationality and morality (these elements are the consequence of deeming law to be vested in the social nature and inherent goodness of man) but also the actions of states and the persons acting on their behalf. One of the characteristic elements of Grotius' exposition on the law is the *close nexus between legal and moral rules* regulating the actions of both states and individuals. This is not due to states being like individuals, but rather because states are composed of individuals. Also, the individual, in the final instance, is the object to which all law is directed – to further his well-being, development and dignity.¹⁵⁰ Although international law mainly entails a system of rules regulating the affairs of states, this does not affect the *moral content* of international law and the dictates of reason and general principles of law which underpin it. The influence of Grotius' work has been described as satisfying 'the craving, in the jurist and the layman alike, for a moral content in the law'.¹⁵¹

To summarise Grotius' import for the international legal order, his tradition may be seen as a living one since many of his principles are currently part of codified international law and other principles still provide aspects towards which the international community may strive.¹⁵² Thus, for example, although Grotius (and essentially De Victoria as well) accepted that the vanquished foes were at the mercy of the winner, Grotius submitted that violence should not exceed the amount needed for the victory and that both non-belligerents and belligerents should be spared if possible.¹⁵³ It was Grotius who established grounds on which non-combatants may be excluded from the conduct of

¹⁴⁸ Lauterpacht 1946:25.

¹⁴⁹ Grotius 1925:20.

¹⁵⁰ Lauterpacht 1946:26-27 as well as Jenks 1954:5 and 33.

¹⁵¹ Lauterpacht 1946:28 and 52.

¹⁵² Barrie 1983:184.

¹⁵³ Pictet 1985:20. Compare also proposed rule 87 of the ICRC Study. Grotius 1925:600-601 also reflects that proportionality in attack is necessary. Compare proposed rule 14 of the ICRC Study in this regard. Accordingly, later, *ibid* at 756, Grotius finds that the sack of cities will almost invariably only bring serious harm to innocent persons while providing scant consequence for the result of the war and, as such, should be refrained from.

war. His argument has been summarised to entail that a non-combatant would usually be innocent and that killing that person would bring no advantage to the enemy nor would allowing him/her to live damage the enemy's chances in the armed conflict. Furthermore, by hurting a non-combatant the enemy shows *cruelty* and *malice*, while letting a non-combatant live shows *moderation* and *mercy*.¹⁵⁴ Grotius believed that moderation in war was possible, and he extended this idea even to the non-Christian world as his natural law theory led him to believe that acknowledgement of a common humanity and acts of common kindness were in principle within each culture or religion's ability to perform.¹⁵⁵ According to Meurant, it was due to Grotius' distinction between combatants and civilians and his recommendation of humane treatment of prisoners of war in his *magnum opus*, the *De Iure Belli ac Pacis*, that direct attacks on the civilian population were prohibited in the Western world.¹⁵⁶ Barrie submits that Grotius gave the international law dignity, authority, made it part not merely of a general system of jurisprudence, but also of a (universal) *moral code*. International law, according to Grotius, is *ethics* and law.¹⁵⁷

Wouldn't this be the case *a fortiori* for IHL?

Consequently, Grotius also made a significant contribution to strengthen and entrench natural law principles, like humanity, in his jurisprudence. Hence, although he differentiates between the law of nations and natural law, he evidently seems to favour the latter in linking justice and considerations of honour.¹⁵⁸ Indeed, Grotius moves for moderation even when a party is justified in

¹⁵⁴ Best 1997:26. See Grotius 1925:733-737 regarding women, children, the elderly, religious persons, farmers and other innocents. Compare also proposed rules 1, 6, the essence of 14-21 and 87 of the ICRC Study. For the prohibition on killing POWs on account of goodness and justice, see Grotius, *ibid* at 737-739. For considerations of humanity regarding the treatment of POWs mindful of their health, see Grotius, *ibid* at 763-764. Compare proposed rules 47, 87, 89 and 90 of the ICRC Study pertaining to persons *hors de combat*, the prohibition on murder and prohibition on cruel treatment. Regarding mercy to be shown to those who wish to surrender, see Grotius, *ibid* at 739-740. Compare proposed rules 47 and 87 of the ICRC Study.

¹⁵⁵ Best 1997:28. Hence, for example Grotius 1925:450-461 and 662 accepts the right of the enemy to burial. Compare proposed rule 115 of the ICRC Study regarding burial.

¹⁵⁶ 1987:239. Compare also the similar proposed rules 1 and 118-128 of the ICRC Study.

¹⁵⁷ Barrie 1983:184 and Lauterpacht 1946:51.

¹⁵⁸ Grotius 1925:716-717. For the view that the law of nations (as opposed to the law of nature) prohibits the use of poison as weapon, the use of poisoned weapons and the poisoning of waters, see Grotius, *ibid* at 651-653. Compare proposed rules 70, 71 and 72 of the ICRC Study *vis-à-vis* unnecessary suffering, indiscriminate attacks and poison as weapon. Grotius, *ibid* at 656-657, submits that rape is contrary to the law of nations. Compare proposed rule 93 of the ICRC Study regarding rape. For the view that the law of nations allows the destruction and pillaging of enemy property (including sacred property), see Grotius, *ibid* at 658. However, see the need for moderation under the law of nature in this regard in Grotius, *ibid* at 745-751. Hence, Grotius, *ibid* at 751-753, indicates that devastation of things which are of no use in providing resources for war, like temples and structures erected in honour of the dead, should be refrained from. Compare proposed rule 38-41 of the ICRC Study. With regard to ruses and deceit in war, for example, Grotius, *ibid* at 605-622 and 662, accepts pretences, but limits falsehoods to specific categories. Compare proposed rule 57 of the ICRC Study regarding ruses of war.

resorting to war.¹⁵⁹ Therefore goodness, high-mindedness and moderation combine to alleviate punishment even when the punishment was just.¹⁶⁰ Also, due to considerations of humanity, Grotius rejects fighting which merely shows strength rather than purposefully opposing the enemy.¹⁶¹ Hence, Grotius succinctly formulates the importance of humanity as principle in war: 'Violence is characteristic of wild beasts, and violence is most manifest in war; wherefore the more diligently effort should be put forth that it be tempered with humanity, lest by imitating wild beasts too much we forget to be human'.¹⁶² The importance of Grotius for entrenching moral considerations in the laws of war is, accordingly, confirmed. Finally this dissertation fully supports Grotius' hope:

Let the laws be silent, then, in the midst of arms, but only the laws of the State, those that the courts are concerned with, that are adapted only to a state of peace; not those other laws, which are of perpetual validity and suited to all times. It was exceedingly well said by Dio of Prusa, that between enemies written laws, that is, laws of particular states, are not in force, but that unwritten laws are in force, that is, those which nature prescribes, or the agreement of nations has established. This is set forth by that ancient formula of the Romans, "I think that those things ought to be sought by means of a war that is blameless and righteous".¹⁶³

Although Grotius' time differs from contemporary times, the abundance of wars (whether they are of a religious, civil or national nature) ensures that his works remain relevant in the modern context. In fact, the modern appeal for the international communities to base their relations with each other on moral principles is Grotian in content. Whilst Grotius laid down the foundations of an ideal international law, with his guidelines still applying today, much must still be done to ensure that the international community moves as close as possible to the ideals stated. Barrie submits that contemporary international law must, just like Grotius' international law, be based on reason and it must be reasonable. The foundation of this international legal order must be justice with a humanitarian basis.¹⁶⁴ This emphasis on morality in international law and especially IHL is exactly what the present study advocates. The addressing of humanitarian concerns through a universal natural law seems attainable and significant. The importance of natural law as the basis from which the law of nations was derived is clear from the views of Grotius, Suarez, Ayala, Belli, De Victoria and Gentili. They deduced principles and rules of IHL from natural law long before the first

¹⁵⁹ 1925:722.

¹⁶⁰ Grotius 1925:731. Grotius, *ibid* at 733, continues: 'Furthermore, from humanitarian instincts, or on other worthy grounds, he will either completely pardon, or free from the penalty of death, those who have deserved such punishment'.

¹⁶¹ 1925:743-744.

¹⁶² 1925:861.

¹⁶³ Grotius 1925:18-19.

¹⁶⁴ 1983:180-181.

modern treaty was concluded and, through their endeavours, the development of IHL gained momentum.

However, international jurisprudential thought diverged after Grotius and, in order to fully investigate the truth in the current dissertation's proposition of the centrality of principles in the law of war discourse, some exponents of the positivist, naturalist and Grotian traditions must be considered briefly.¹⁶⁵

The first important positivist publicist on international law was Richard Zouche (1590-1660). He was responsible for the initial shift in focus from a natural law-dominated approach to a method that emphasised conventional law, and especially custom. However, while Zouche's focus was on consensual forms of law for the law of nations, he still accepted the law of nature and that it was ascertained through a correct deduction from first principles.¹⁶⁶ Irrespective, Zouche nonetheless indicates that a wrong is committed when victors neglect to show *moderation* after their victory. Thus, refusing to show mercy *vis-à-vis* those who surrender and other suppliants are contraventions both of the laws of war and *humanity*. Moderation will also be exceeded, Zouche indicates, if women and children are killed, burial is denied to the fallen and sacred places or tombs are destroyed.¹⁶⁷ Accordingly, even this shift in jurisprudential thought still illustrates the centrality of certain (evidently higher, normative) considerations like mercy, moderation and humanity in war as well as the importance of custom as source of the laws of war.

¹⁶⁵ Oppenheim 1937:88-91 defines the naturalists as 'those writers who deny that there is any positive Law of Nations whatever as the outcome of custom or treaties, and who maintain that all Law of Nations is only part of the Law of Nature'. The positivists, in contrast, include those who 'not only defend the existence of a positive Law of Nations as the outcome of custom or international treaties, but consider it more important than the natural Law of Nations, the very existence of which some of the Positivists deny, thus going beyond Zouche'. (Zouche emphasised custom as most important, although he still accepted the existence of a natural Law of Nations.) The Grotians occupy a middle position; hence, '[t]hey keep up Grotius' distinction between the natural and the voluntary Law of Nations, but, in contradistinction to Grotius, they consider the positive or voluntary of equal importance to the natural, and they devote, therefore, their interest to both alike'. See also Phillipson 1908:30-31 and Finch 2000:17-21 and 24.

¹⁶⁶ Zouche 1911:1-2.

¹⁶⁷ Zouche 1911:55-56. Compare proposed rules 38-41, 47, 87, 89, 112 and 115 of the ICRC Study pertaining to cultural property, persons *hors de combat*, humane treatment of civilians, the prohibition on murder of civilians and the right to bury the dead. Regarding the destruction of sacred things, see also Zouche, *ibid* at 181-182. Regarding whether mercy ought to be shown to those who surrender, see Zouche, *ibid* at 157. Regarding deceptions and falsehoods in war, see Zouche, *ibid* at 172-173, who seemingly accepts the former but not the latter. Compare proposed rule 57 of the ICRC Study *vis-à-vis* ruses in war. For the apparent prohibition against the use of poison as a weapon and the poisoning of wells, see Zouche, *ibid* at 174. Compare proposed rules 70, 71 and 72 of the ICRC Study pertaining to unnecessary suffering, indiscriminate attacks and the prohibition on poison. It seems as if Zouche, *ibid* at 180-181, holds that when women take up arms they lose their protection and that the rape of women conquered in war is prohibited. Compare proposed rules 6 and 93 of the ICRC Study regarding the loss of civilian protection when arms are taken up and the prohibition against rape. For an apparent protection accorded to priests, see Zouche, *ibid* at 181. Compare proposed rule 27 of the ICRC Study.

Three of the later international positivists will be briefly considered so as to determine whether the *principles* argued for in the present dissertation did, in fact, permeate their work as well. In the process, the argument of this dissertation will be significantly strengthened if principles indeed pervaded the work of those who seemingly attempted to distance themselves from a normative approach. Firstly, Samuel Rachel (1628-1691), while acknowledging the existence of natural law, centralised positive law and agreement (especially in the form of custom) as the basis of the law of nations.¹⁶⁸ Rachel admitted that there were some consequences of war which the law of nations allowed but which were condemned as unjust according to the law of nature.¹⁶⁹ Although (on the present author's reading) Rachel essentially focuses on the law of nations and the rules emanating therefrom, he still importantly maintains that: 'I have already admitted that there are some rules of the Law of Nations of this sort, and I have insisted that such as are repugnant to Natural Law or Christian piety can and ought to be rejected, as being, indeed, incapable of ever acquiring any obligatory force, seeing that the supremely great authority of Natural or Divine Law prevents this'.¹⁷⁰ It is submitted that although Rachel focuses on conventional positive law, the importance of a higher, normative structure still pervades his thought.

Secondly, Johann Wolfgang Textor (1638-1701) emphasised reason and usage as the essential sources of the law of nations.¹⁷¹ Although natural law emanates directly from reason and the law of nations from usage, some overlapping is allowed in that 'both have a common origin in the Natural Reason which is implanted in us and which is nothing else than the Practical Intelligence directed towards moral principles, in the light of which men, whether individuals or nations, can see what conduct, as being honest and just, is to be adopted for the better ordering of life, and what, on the other hand, as dishonest and unjust, is to be avoided'.¹⁷² Thus even a positivist like Textor, for

¹⁶⁸ Rachel 1916:157-158. Hence, Rachel, *ibid* at 175, emphasises that long-continued use combined with the consent of those who use it constitutes customary law.

¹⁶⁹ Rachel 1916:184 and 190.

¹⁷⁰ Rachel 1916:206. Therefore, Rachel, *ibid* at 185-186, seemingly allows excessive injury to persons and property during war under the law of nations. Thus, he finds it allowable in terms of the law of war to kill women, children and those having surrendered. Contrast proposed rules 1, 47, 87, 89 and 134-138 of the ICRC Study regarding civilians and those *hors de combat*. However, Rachel, *ibid* at 186, 210 and 212, still prohibits the use of poison, poisoned weapons and the tampering of wells. Compare proposed rules 71 and 72 of the ICRC Study pertaining to indiscriminate attacks and poison. Due to his conception of the law of nature, Rachel maintains that it scarcely matters in terms of *that* law who is killed or how. Under the law of nations, Rachel, *ibid* at 186, allows the destruction and plundering of enemy property, but not under the law of nature (see *ibid* at 212). Hence, under the law of nations, the destruction of sacred and religious places was allowed but not the mutilation of corpses. Furthermore, fraud could be used in war provided that it was not perfidious. Contrast and compare proposed rules 38-41 and 52 of the ICRC Study regarding to cultural property and pillaging, but compare proposed rules 57, 65 and 113 of the Study *vis-à-vis* ruses in war, the prohibition on perfidy and the treatment of the dead.

¹⁷¹ Textor 1916:1.

¹⁷² Textor 1916:4. See also, *ibid* at 8-12, regarding the overlapping of natural law – which emanates from natural reason – and conventional law – which emerges due to the necessities of human life.

example, relies on considerations of *humanity* to condemn the overly frequent flogging of captives.¹⁷³ Also, unless imperative military necessity dictates otherwise, *clemency*, *moderation* and *mildness* ought to be displayed *vis-à-vis* the vanquished.¹⁷⁴ Accordingly, even Textor accepts certain rules which reflect considerations of humanity.¹⁷⁵

During the eighteenth, nineteenth and twentieth centuries philosophers clearly began to base their theories on various assumptions and views that were essentially in direct contrast to the tenets of natural law.¹⁷⁶ Naturally, these perspectives had a significant effect on how the law of armed conflict was viewed. Phillipson submits that the use in the eighteenth century was for writers to impose greater duties on combatants and to put more limitations on their rights in armed hostilities. This was not in conformity with practice of the day and Cornelius van Bynkershoek (1673-1743), the third eminent positivist, subscribes to the sterner position.¹⁷⁷ Van Bynkershoek held that:

Justice is the essential of war; generosity is only an accident...¹⁷⁸ Humanity, clemency, piety, and other magnanimous virtues are certainly noble, but cannot be insisted on by law.¹⁷⁹ Reason (by which he often means the logical rigour and impartiality of nature) permits the use of all means except perfidy against an enemy^{180 181}.

¹⁷³ Textor 1916:194. Evidently, Textor, *ibid* at 156, 191-192 and 306, also maintained that tombs, palaces, temples and consecrated places were inviolate in accordance with the law and the *precepts of humanity*. In this regard compare proposed rule 38-41 of the ICRC Study pertaining to cultural property.

¹⁷⁴ Textor 1916:305. Textor, *ibid* at 187-189, 191 and 303, also seems to accept that the unarmed women, children, elderly as well as those having surrendered should not be slaughtered. Thus, compare proposed rules 1, 47, 87, 89 and 134-138 of the ICRC Study pertaining to the distinction between combatants and civilians, treatment of civilians and persons *hors de combat* and the special protection for children, women and the elderly. Textor, *ibid* at 190, 303 and 306, forbids conduct which is morally base, including rape. Compare proposed rule 93 of the ICRC Study.

¹⁷⁵ Textor 1916:151-152 and 157, for example, deems it sinful to violate corpses and states that the dead (also of the enemy) should be buried. Compare proposed rules 112, 113 and 115 of the ICRC Study. Textor, *ibid* at 160 and 186, also accepts the use of stratagems and frauds provided that they do not contravene divine law or natural probity. Compare proposed rule 57 of the ICRC Study. The use of poison is seemingly rejected by Textor, *ibid* at 160 and 186-187. Compare proposed rule 72 of the ICRC Study. For the acceptance of collateral damage which is outweighed by the good aimed for, see Textor, *ibid* at 186 and 191. Compare proposed rule 14 of the ICRC Study regarding proportionality. For Textor's acceptance of war booty, see *ibid* at 197-198. Compare proposed rule 49 of the ICRC Study.

¹⁷⁶ Hensel 2008c:63-65.

¹⁷⁷ 1908:39.

¹⁷⁸ Van Bynkershoek 1930:17. Van Bynkershoek, *ibid*, continues that justice '...permits the destruction of the enemy by whatsoever means, the latter grants to the enemy whatever we should like to claim for ourselves in our own misfortune, and it desires that wars be waged according to the rules of the duel which was formerly admissible in some states. Considerations of justice permit us to have larger forces than the enemy, and to use firearms and other devices that differ from theirs, while generosity forbids this. Justice permits every manner of deceit except perfidy, as I have said; generosity does not permit it even, apparently, when the enemy employs it.' Importantly, Van Bynkershoek, *ibid*, maintains that justice may be insisted upon, but not generosity.

¹⁷⁹ Van Bynkershoek 1930:26. This leads Van Bynkershoek, *ibid* at 27, to state that although the right of killing has become almost obsolete, this is due to the will and clemency of the victor, not because the right has been extinguished. Nonetheless, it is to be noted that, indirectly, Van Bynkershoek essentially admits the alleviating influence of moral principles by this statement.

¹⁸⁰ Van Bynkershoek 1930:16-17. The acceptance of fraud, stratagems and the like against the enemy (with the exception of perfidy) echos what the ICRC Study postulated in proposed rule 57 and 65 *vis-à-vis* ruses and perfidy.

Hence, Van Bynkershoek allows any force in relation to the enemy to be lawful, including the destruction of unarmed and defenceless enemies as well as the use of poison, missile weapons and the like.¹⁸² It is submitted that although Van Bynkershoek understands the law of nature to justify any force and means against enemies, this approach neglects the normative component of natural law as is argued for by the present dissertation (and many of the other philosophers considered above). However, it must be emphasised that Van Bynkershoek did avail himself of the principle of humanity where he finds it shameful to punish a maiden who defends her chastity, or cruel to punish someone for their courageous defence of a city. Furthermore, Van Bynkershoek allows considerations of humanity to permeate his rules regarding the treatment of the dead.¹⁸³

Samuel Pufendorf (1632-1694) was the leading exponent of the so-called naturalist approach to international jurisprudence. He accepts the law of nations and the law of nature to be the same thing.¹⁸⁴ Whereas Pufendorf largely accepts and merely refers to the substantive rules formulated by Grotius, he notes, importantly, that mercy and generosity are dictated by natural law *vis-à-vis* the vanquished.¹⁸⁵ Hence, Pufendorf also advocates for the performance of the duties of humanity in relation to other persons during war.¹⁸⁶

Christian Wolff (1679-1754) was a so-called 'Grotian' in that he considered both positive law and natural law in conjunction with the law of nations. Therefore, on the one hand, he subscribed to the notion that states live in a state of nature and are thus under the sway of immutable natural law. On

¹⁸¹ Phillipson 1908:39. Footnotes in the quote are current author's.

¹⁸² Van Bynkershoek 1930:16. Contrast Van Bynkershoek with proposed rules 1, 47, 72, 87 and 89 of the ICRC Study. See Van Bynkershoek, *ibid* at 31, for the rule that those things of the enemy which might be harmful to us, might be taken and compare proposed rule 49 of the ICRC Study regarding war booty.

¹⁸³ Van Bynkershoek 1930:29. Compare proposed rules 93 and 112-115 of the ICRC Study *vis-à-vis* the prohibition of rape and treatment of the dead.

¹⁸⁴ Pufendorf 1934:226. Pufendorf, *ibid* at 208, postulates the fundamental law of nature as: 'Every man, so far as in him lies, should cultivate and preserve towards others a sociable attitude [which entails showing kindness, love and peace], which is peaceful and agreeable at all times to the nature and end of the human race'. Accordingly, everything promoting that sociable attitude is commanded by natural law and that which destroys it, forbidden. He, *ibid* at 227-228, argues that if custom, which is seen as a mere observance, is based on natural law, it has more *dignity* than when it is based on agreement.

¹⁸⁵ See the introduction of Simons to Pufendorf 1934:11a-15a, 52a-53a and Pufendorf, *ibid* at 1298. Regarding the substantive rules, Pufendorf, *ibid* at 229, seems to accept the right to burial as part of the obligations of humanity. Compare proposed rules 113 and 115 of the ICRC Study. Pufendorf, *ibid* at 1297 and 1308, recognises the use of deceit and craft against an enemy, but rejects the resort to perfidy. Compare proposed rules 57 and 65 of the ICRC Study regarding ruses and perfidy. For a possible reference to a predecessor of the rule regarding command responsibility (proposed rule 153), see Pufendorf, *ibid* at 1304. Pufendorf, *ibid* at 1311, allows the taking of war booty/plundering provided that the necessary permission was obtained from the sovereign. See proposed rules 49 and 52 of the ICRC Study *vis-à-vis* war booty and pillaging.

¹⁸⁶ Pufendorf 1934:1292.

the other hand, Wolff also maintained that nature had combined all states into a combined state (the *civitas maxima*). It was the laws (including customs and treaties) that were derived from natural law by the will of this *civitas maxima* that comprised voluntary (positive) law.¹⁸⁷ Nonetheless, Wolff also reflects the importance of principles for international law stating, *inter alia*, that enemies ought to love and cherish each other.¹⁸⁸ Subsequently, Wolff also emphasised the importance of *humanity* as principle of the laws of war.¹⁸⁹

The European conception of the law of war, during the eighteenth century, was founded upon a religious-based philosophy that sought *peace*, being the highest condition of humankind, while accepting war as an unwelcome, occasional situation of human evilness. The laws of war were therefore seen as an instrument through which this peace might be achieved.¹⁹⁰ It was also during the eighteenth century that Emmerich de Vattel (1714-1767), another so-called 'Grotian', espoused the notion, now part of CIHL, that combatants did not have an unlimited choice in their methods of war and that excessive injuries were to be avoided.¹⁹¹ According to Best, it was De Vattel who completely detached the law of war from its exclusive connection with the 'just war' concept, reasonably justifying its separate existence and moral worth irrespective of the question of whether

¹⁸⁷ Wolff 1934:9-12 and 17-19. See also Nippold *Introduction* in Wolff 1934:xl and Finch 2000:24-25.

¹⁸⁸ Wolff 1934:86-87 and 382-383.

¹⁸⁹ See, for example, Wolff 1934:318-319 who condemns the actions of those who enter into war without justification or persuasive reasons thereto and, thus, merely injure innocents for their own pleasure as contrary to humanity. *Ibid* at 387, Wolff indicates that children and the elderly are not bound to serve in the military. Compare proposed rules 136-138 of the ICRC Study regarding children and the elderly. For the prohibition on the killing or cruel treatment of innocents, like children, the elderly and those who have surrendered, see Wolff, *ibid* at 409-412. Compare proposed rules 1, 47, 87, 89, 90 and 134-138 of the ICRC Study pertaining to the distinction between combatants and civilians, the treatment of persons *hors de combat*, prohibition on murder and cruel treatment of civilians and the specialised protections accorded to children and the elderly. If it is required by military necessity, towns, villages, cities, fields, crops and the like may be destroyed, according to Wolff, *ibid* at 427. Compare proposed rule 14 of the ICRC Study pertaining to proportionality in attack. Wolff, *ibid* at 429, also prohibits the destruction of tombs, temples and monuments as well as violence to the bodies of the buried. Wolff, *ibid*, continues that these actions are also not allowed in order to terrorise the enemy since terrorising the enemy is prohibited as well. Compare proposed rules 2, 38-41 and 113 of the ICRC Study *vis-à-vis* the prohibition of using terror, protection of cultural property and the prohibition on the mutilation of the dead. Wolff, *ibid* at 438-439, accepts pillaging provided that the necessary contributions could not be obtained otherwise. Compare, however, the prohibition on pillaging in proposed rule 52 of the ICRC Study. For the approval of taking war booty, see Wolff, *ibid* at 439-440, and compare it with proposed rule 52 of the ICRC Study. Wolff, *ibid* at 442-443, accepts the use of deceit and stratagems in war, but not when they entail the breaking of a promise. Compare proposed rule 57 of the ICRC Study *vis-à-vis* ruses in war. For the prohibition on rape, see Wolff, *ibid* at 449. Compare proposed rule 93 of the ICRC Study. However, see Wolff, *ibid* at 450, for the acceptance, by nature, of poison and poisoned weapons. Contrast proposed rule 72 of the ICRC Study regarding poison. Nonetheless, Wolff, *ibid* at 450-451, prohibits the poisoning of springs. Compare proposed rules 70 and 71 of the ICRC Study regarding unnecessary suffering and indiscriminate attacks. Contrast also the allowance of starvation as means of warfare by Wolff, *ibid* at 451, with proposed rule 53 of the ICRC Study.

¹⁹⁰ Best 1983:129.

¹⁹¹ Pictet 1985:54. See, for example, De Vattel 1916:280. Compare the essence of proposed rules 70 and 71 of the ICRC Study.

'justice' was to be found in armed conflicts or not.¹⁹² De Vattel also accepted that states must be regarded as analogous to individuals living in the state of nature. Men are subject to the law of nature and they remain so bound even when they enter into a civil society since they nonetheless remain men. The state, whose will is the combined wills of the subjects, likewise remain bound to the laws of nature, which laws it 'is bound to respect' in all its interactions. Subsequently, natural law must be applied to states in order to ascertain their rights and duties. Accordingly, the law of nations, according to De Vattel, is essentially the law of nature applied to nations.¹⁹³ De Vattel labels the law, which emanates from the application of natural law to nations, the necessary law of nations since states are absolutely compelled to obey it. Furthermore, this necessary law of nations, being based on natural law, is not susceptible to change. It cannot therefore be changed by agreement between states. It is submitted that on this view natural law entails a normative standard. De Vattel submits that all treaties and customary rules opposed to the postulates of the necessary law of nations are *unlawful*.¹⁹⁴ Thus, CIL is measured against natural law, which evidently comprises a higher, normative standard! De Vattel also accepts the idea of a 'voluntary law of nations' which is law made by imperfect men in an imperfect world, thereby showing that he had positivist tendencies in addition to his natural law ideas (hence rendering him, like Wolff, a 'Grotian').¹⁹⁵ Nonetheless, De Vattel distinguishes between the law of nature and those rules which emanate from human agreement.¹⁹⁶

Cohen indicates that customary law became very important for these initial natural law scholars both from a theoretical and normative point of view as '[t]he often-mysterious process by which practices become accepted as law, or *opinio iuris*, was explained and imbued with divine, or natural, rationality'.¹⁹⁷ De Vattel, who deems customary law to be based on the tacit agreement of the states observing it, maintains that any customary 'rule' which embodies anything *unlawful* or *unjust* is without force and states are bound to reject it because the violation of the law of nature cannot be authorised or compelled.¹⁹⁸ Indeed, the close nexus between natural law/morality and law is evident when De Vattel states that '...a right is nothing else but the power of doing what is *morally* possible, that is to say, what is good in itself and conformable to duty, it is clear that right is

¹⁹² 1983:39.

¹⁹³ De Vattel 1916:3-4. However, this does not entail that there are no differences between the law of nations and the law of nature; inevitably, the different contexts must be kept in mind. See also Christov 2005:570.

¹⁹⁴ 1916:4-5.

¹⁹⁵ Best 1983:40.

¹⁹⁶ Cohen 2007:80.

¹⁹⁷ 2007:81.

¹⁹⁸ Vattel 1916:8-9.

derived from duty, or passive obligation, from the obligation of acting in this or that manner'.¹⁹⁹ De Vattel accepts that a state pursues its own interests, but that this pursuance is tempered by considerations of humanity.²⁰⁰ De Vattel indicates that the rules of equity, justice and humanity furnish the parameters within which force may be applied by states conducting war.²⁰¹ It is deemed a grave error to accept that all duties and all ties of humanity cease in wartime. Although they take recourse to arms, 'men do not therefore cease to be men' and, as such, they remain under the authority of natural law.²⁰² In a time when non-international armed conflicts were not accepted *per*

¹⁹⁹ De Vattel 1916:3. [Emphasis added.]

²⁰⁰ Christov 2005:571. Vattel 1916:6.

²⁰¹ De Vattel 1916:235. Thus, for example, reliant on the just war theory, De Vattel, *ibid* at 280, indicates that a sovereign has the right to do whatever is necessary to weaken his enemy and to compel the latter to comply with justice provided that the means relied upon are not intrinsically evil and, subsequently, prohibited by the law of nations. Only if the resistance of the enemy cannot be overcome or terms be brought about by less severe means, can killing be resorted to. Subsequently, when the enemy submits and lays down his weapons, he may no longer be killed, according to De Vattel. Furthermore, De Vattel, *ibid*, indicates that quarter must be given to those who give up their weapons. However, De Vattel, *ibid*, accepts that quarter may be refused to enemies who surrender, when they are guilty of a serious violation of the law of nations and, especially, the laws of war. However, in every instance when severity is not absolutely required, mercy must be shown. Compare proposed rules 14, 46 and 47 of the ICRC Study regarding proportionality in attack, prohibiting the denial of quarter and the attacking of those having surrendered. Common soldiers, according to De Vattel, *ibid* at 303, do not have to investigate the justness of a war. They ought to go to war when summoned, but not if it is apparent that the war is unjust. Compare proposed rules 151 and 154 of the ICRC Study regarding individual responsibility and superior orders. De Vattel, *ibid* at 293-295, indicates that those buildings should not be destroyed which 'are an honor to the human race and which do not add to the strength of the enemy, such as temples, tombs, public buildings, and all edifices of remarkable beauty'. However, he allows the destruction of cities as a last resort when there is a need to compel the enemy to act more humanely in the war or to punish him. Nonetheless, moderation must be observed in pillaging and devastation of the enemy's territory. Compare proposed rules 38-41 of the ICRC Study pertaining to cultural property.

²⁰² De Vattel 1916:296. Naturally many of the substantive rules proposed by De Vattel embody these considerations of humanity, equity and justice. The principle of distinction between combatants and civilians seems to be recognised by De Vattel, *ibid* at 283, when he submits that 'war is carried on by regular armies; the people, the peasantry, the towns-folk, take no part in it, and as a rule have nothing to fear from the sword of the enemy'. Also, *ibid* at 318, De Vattel finds that only troops perform the hostilities while the remainder of the populace remain at peace. Compare proposed rule 1 of the ICRC Study *vis-à-vis* the distinction between combatants and civilians. De Vattel, *ibid* at 322, seems to acknowledge the right to make conventions regarding the burial of the dead after a battle. Compare proposed rules 112 and 115 of the ICRC Study pertaining to the dead. Furthermore, although De Vattel, *ibid* at 284, accepts that prisoners of war may be imprisoned or chained to prevent their attempts at attack or escape, he opines that prisoners of war may not be killed and nothing justifies treating them harshly. (Nonetheless for extreme exceptions to this rule see, *ibid* at 284-285.) Compare proposed rules 47, 87, 89 and 90 of the ICRC Study regarding the treatment of persons *hors de combat* and prohibition against killing them. De Vattel, *ibid* at 292, indicates the more humane custom instead of pillaging the country and innocent persons, namely the levying of contributions. Although De Vattel, *ibid* at 292-293, accepts that a combatant may destroy food and provender in order that the enemy be weakened, these measures must be used in moderation and solely when necessary. The tearing up of vines and cutting down of fruit trees are viewed as savage measures. See also Gentili 1933:275 and Wolff 1934:429-430 regarding fruit trees. Compare proposed rules 52 and 54 of the ICRC Study regarding pillaging and the prohibition against destroying subjects indispensable to civilian survival. For the exemption of women, children, the elderly, magistrates and clergy from bearing arms in war see De Vattel, *ibid* at 238, and for the cruelty inherent to punishing or killing these innocent citizens of the enemy see De Vattel, *ibid* at 280 and 282-283, who calls this a rule of justice and humanity. Compare proposed rules 1, 87, 89, 90 and 134-138 of the ICRC Study *vis-à-vis* the principle of distinction, humane treatment of civilians, prohibition of murder and cruel treatment, the special protections accorded to women, children and the elderly. De Vattel, *ibid* at 289, also rejects poisoning as contrary to the laws of war and prohibited by natural law and the consent of states. De Vattel continues that natural law forbids the poisoning of weapons since poisoned weapons perpetuate the evils of war. Also, although it is necessary to overcome your enemy, De Vattel questions whether the enemy must necessarily die of his wounds. This illustrates the notion of only rendering your enemies *hors de combat*. The poisoning of springs, wells and

se, De Vattel submits that the parties to a civil war (where there exist two clear factions), have an absolute and indispensable obligation to observe the customary laws of war towards the other as well as the obligations natural law places upon states *inter se* when conflicts break out.²⁰³ De Vattel, therefore, also contributed to the entrenchment of natural law considerations in the laws of war and the natural law influence on CIHL is evident from these views.

Hall states that from the middle of the seventeenth century, i.e. during the Enlightenment, the laws of war have been influenced through the growth of *humanity*.²⁰⁴ During the second half of the seventeenth century and the initial stages of the eighteenth, the so-called modern law of nations emerged – a period where both treaties and custom became increasingly important.²⁰⁵ It is submitted that this period naturally relied on the rules and principles which carried the approval of antiquity and/or that of eminent jurists. These rules were therefore dependent on their antecedents and, it is proposed, they should be understood against their contextual background with its emphasis on the protection of humanity.

The characteristics of the counter-Enlightenment movement must also be considered. They rejected the natural law tenet which reduced all experience to everlasting, perpetual laws as ignorant of the fact that many dynamic forces shaped the world which could not be reduced to mere laws. Sentiment and emotion were emphasised in lieu of reason as conditioning the human being's experience of the past and responses to current or future occurrences. The counter-Enlightenment emphasised custom and tradition, and these theorists emphasised the study of history and held that the Enlightenment theorists viewed the past through the subjective lens of their own values and prejudices while maintaining those values to be universal.²⁰⁶

streams are also prohibited by De Vattel. Compare proposed rules 71, 70 and 72 of the ICRC Study regarding unnecessary suffering, indiscriminate weapons and the use of poison. De Vattel, *ibid* at 298, also accepts stratagems provided that they are not perfidious. He continues, *ibid*, that the rights of humanity must be respected when resorting to stratagems. Compare proposed rules 57 and 65 of the ICRC Study on ruses in war and the prohibition on perfidy.

²⁰³ De Vattel 1916:340. Indeed, De Vattel, *ibid* at 338, also states for civil wars '...it is perfectly clear that the established laws of war, those principles of humanity, forbearance, truthfulness, and honor which we have earlier laid down, should be observed on both sides in a civil war'.

²⁰⁴ 1924:89.

²⁰⁵ Lesaffer 2002:130. *Ibid* at 113, Lesaffer notes that it was also in the seventeenth century that treaty law arose as a distinct type of law with Roman law, feudal law and canon law regulating contracts between princes prior to that time. See also Pictet 1985:21.

²⁰⁶ Hensel 2008c:68-71. Thus, Edmund Burke, for example, maintained that tradition and custom were much more important forming factors in determining society's identity and shape than human reason. These traditions and customs developed from a society's experiences and could be adopted for contemporary challenges. Also, when individuals participated in the creation of society's customs and traditions, Burke held that they found their identity and fulfillment. Burke maintained that every society must develop inside the boundaries of its own customs and traditions and not through reliance on some inherent, abstract standards and principles, although he did not

In summary the movement away from natural law is seen in the beliefs of these counter-Enlightenment philosophers that each society shapes its own notions of normative standards and acceptable conduct through customs, standards and perspectives which emanate from the particular state's unique heritage, and, thus, that there is no objective, universal set of norms from which morality and values can be deduced. These philosophers held that in order for international law – inclusive of general international law and customary and conventional law – to be followed and to be effective over time, there has to be a certain level of normative agreement and a commitment to reciprocity to follow these norms from the various individual states. Reason, as opposed to individual will, instinct and emotions, is rejected as being the primary driving force behind human conduct.²⁰⁷

Evidently, CIL and the tradition of communities were important sources of law to these philosophers. It is submitted that even through these sources principles indeed continued to exist indirectly although they were explicitly rejected by the various theories that held sway.

Finally, the unique views held by religious and secular ideologically based groups have also influenced the international legal arena, especially with regard to armed conduct. These groups held that the values immanent in their doctrines were reflective of an absolute and ultimate standard of good. Needless to say, their conduct in hostilities and interpretation of the right to resort to armed force was determined by the unique values which constituted their doctrine.²⁰⁸

Some philosophical schools are thus premised on the notion of absolute, objective, normative standards while others advocate that all values are relative and context specific. Some of those who maintain that absolute, universal norms regulate (and serve as a standard to measure) individual and group behaviour, look towards a Divinity for the source of all law. Some view standards as established on customs which are generally accepted in the international community. Others hold a

propagate heedlessly following all customs and traditions as they could be defective or absent. Davidson 1959:487 indicates that Edmund Burke stressed the moral force of established custom although he remained inexplicit regarding the standard with which custom ought to be judged. Another influential thinker opposed to the Enlightenment, according to Hensel, *ibid* at 78, was Carl von Clausewitz (1780-1831) who believed that acceptable conduct in each war would be relative due to conformity to the existing situational context be it technological, political, economic or cultural. Therefore, he clearly rejects the possibility of relying on universal, objective norms to regulate conduct in warfare. Bearing this in mind, the move away from a universal and moralistic foundation to the law (including international law) is clear.

²⁰⁷ Hensel 2008c:78-79.

²⁰⁸ Hensel 2008c:89.

particularist religious or ideological perspective, maintaining that the beliefs derived therefrom should serve as normative standard for group and individual actions. On the other hand, those who maintain that no absolute and universal norms and standards exist, believe that values are determined relative to the specific situation with cultural, individual or other interests directing group and individual actions.²⁰⁹

It is noted that 'standards' are accepted by all schools of thought. The substantive content of these 'standards' is determined by various other factors. However, in a branch of law like IHL it is largely clear how those standards should be construed – thus, in this branch of law, with its specific humanitarian ideals, objective standards – and right and wrong conduct – must be accepted. How can any theorist accept the killing of innocent women and children during the course of an armed conflict? This is not to say that policy or self-interest may not influence the actions taken during the course of an armed conflict (even to the detriment of civilians), but that such conduct can inevitably be right or wrong according to universal norms.

These developments eventually culminated in a written IHL due to the efforts of Henry Dunant (1828-1910) and Francis Lieber (1798-1872) in the nineteenth century, after both had experienced the trauma of war. Without knowing of the other, these two contributed significantly to the concepts and content of contemporary IHL. Both were, however, continuing with the notion expressed earlier by Jean-Jacques Rousseau (1712-1778), who had denied that combatants were allowed to annihilate the enemy physically. This notion leads to the distinction made *between those persons participating in the conflict*, who may be attacked, and *those not participating therein*, who may not be attacked. Citizens not taking part in the hostilities and combatants who are unable to fight are understood under the latter category as they are not participating in the conflict and as such are no longer legitimate targets for the opposing forces.²¹⁰ The influence of Dunant and Lieber will accordingly be discussed *seriatim*.

The modern roots of IHL are found in Henry Dunant's *A Memory of Solferino*. This was written after witnessing the atrocities of the battle of Solferino in 1859, which led Dunant to advocate, firstly, for the creation of relief societies which may alleviate the plight of the war's sick and wounded and, secondly, for the formulation of an international principle, which will be sanctioned through a Convention and might serve as the foundation for relief activities and ensure the

²⁰⁹ Hensel 2008d:283.

²¹⁰ Gasser 1993:7. Compare proposed rule 1 of the ICRC Study.

neutrality of the medical personnel in the field of war.²¹¹ Evidently, Dunant had a *moral* conception of the value of human life. Consequently, *humanity* has been identified as the central ideal and value of his work.²¹² As is well known, the International Red Cross developed from the first entreaty while the second gave rise to the 1864 *Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field*.²¹³ The import of this treaty is neatly captured by Thürer:

The Convention was also an expression of the European tradition of *natural law* that had started to emerge in the sixteenth century, under which legal experts strove to overcome the particularity of laws and practices and replace them with *universally applicable principles*.²¹⁴

Evidently, then, it is reconfirmed that even the treaty regime of IHL has been influenced by *principles and standards* from its very inception. Thus, it was compassion, empathy and the desire to promote human dignity which drove Dunant and the other representatives at the Geneva Conference of 1864 to accept the *Convention for the Amelioration of the Condition of the Wounded in Armies in the Field*. It is submitted that this was an inevitable occurrence when it is taken into account that IHL treaties were built on prior, existing customary rules which were already heavily influenced by moral principles and standards. This also marked the beginnings of the codification

²¹¹ Haug 1986:129, Gasser 1993:8, Kalshoven and Zegveld 2001:26, Sassoli and Bouvier 2006:122, Meurant 1987:240, Pictet 1985:26, Best 1983:149-150 and 1997:42, Pustogarov 1996:306-307, Dugard 2005:526, McDonald 2008:225 and Wortel 2009:783. Bugnion 2008:62 and Thürer 2007:50, state how Dunant's proposal already contained embryonic elements of humanitarian organisations like humanity, impartiality, neutrality, independence and voluntary conduct. In his foreword to the ICRC Study on CIHL (Henckaerts and Doswald-Beck 2005:ix), Kellenberger lauds the influence of Henry Dunant in this branch of law thus: 'However, it was the nineteenth-century visionary Henry Dunant who was the true pioneer of contemporary international humanitarian law. In calling for "some international principle, sanctioned by a Convention and inviolate in character" to protect the wounded and all those trying to help them, Dunant took humanitarian law a decisive step forward. By instigating the adoption, in 1864, of the Geneva Convention for the amelioration of the condition of the wounded and sick in armed forces in the field, Dunant and the other founders of the International Committee of the Red Cross laid the cornerstone of treaty-based international humanitarian law'.

²¹² Wortel 2009:783 and 800. Regarding the *Memory of Solferino*, Dunant 1986:73 evidently reveals his compassion in the following passage: 'The moral sense of the importance of human life; the humane desire to lighten a little the torments of all these poor wretches, or restore their shattered courage; the furious and relentless activity which a man summons up at such moments: all these combine to create a kind of energy which gives one a positive craving to relieve as many as one can'. Wortel, *ibid* at 782, identifies the importance of *humanity* and courage for Dunant in those passages where Dunant, *ibid* at 52-53, lauds kindness and sympathy *vis-à-vis* the enemy.

²¹³ Meurant 1987:240, Haug 1986:130-131, Schindler 2003:166 and Wortel 2009:784.

²¹⁴ 2007:50-51. [Emphasis added.] This *Convention* was also the initial drive behind a fundamental shift in the structure of international law, causing this field of law to be opened up gradually to accommodate individuals and civil society. Accordingly, Thürer 2007:50 observes that, following the atrocities witnessed at Solferino, this *Convention* was not focused on generals and leaders, but rather on those who had been victims of war and who had received little protection previously. This *Geneva Convention* was described by Pictet 1985:30 to embody the first accepted limitation of state power, in a formal and permanent instrument, aimed at promoting an altruistic ideal and protecting the individual. He believes this *Convention* to be illustrative of the first time where 'war yielded to law'. It must be observed that, although this *Convention* may very well have been one of the first treaties on IHL, war had already been brought under the sway of principles and customs from a much earlier time.

of IHL.²¹⁵ Sassoli and Bouvier confirm that the rules found in this treaty were not new, but largely derived from customary rules and uses.²¹⁶ Henckaerts correlates this notion as follows:

During the centuries preceding this first codification, rules regulating warfare did exist but up until then, *these rules were based mainly on tradition and custom*. It is fair to say, therefore, that *humanitarian law started as a body of customary rules and remained so for centuries and that its codification is a much more recent phenomenon*.²¹⁷

The exact nature of these customary rules prior to codification is the central topic of the present study. When taking into consideration the historical, *ad hoc* development of rules and principles by ancient communities and the writings of eminent publicists of the time, it seems apparent that natural law must have formed the basis of these rules. This is true due to the fact that various criteria such as religion, cultural views and moral principles were inevitably relied upon at this time to formulate these rules. Inevitably, then, these historical first (customary) rules of the laws of war were imbued with principled considerations pertaining, it must be inferred, to the protection of the human person. These would then be the legal sources destined to constitute the foundation of treaty law and that would inform the newer source. The first section of the present chapter also indicated the influence of humanity for IHL treaty law.

Best has suggested that the creation of the ICRC, together with the codification of IHL, has been the greatest single step in the attempt to *humanise* warfare.²¹⁸ These developments actively and formally began to promote and protect *humanity* and *human dignity*. Nonetheless, the very coming into existence of certain rudimentary (customary) rules to regulate strife between ancient communities already showed the emergent inclination to increase the protection accorded to humanity.

Across the Atlantic, President Abraham Lincoln requested Francis Lieber to formulate rules for the troops, who were about to embark on the American Civil War, on the conduct of war. The resultant *Instructions for the Government of Armies of the United States in the Field* (commonly known as the *Lieber code*) was published in 1863. This manual aimed at furnishing rules that would prevent unnecessary suffering and limit the number of victims in armed conflict.²¹⁹ In short, the Lieber code

²¹⁵ Henckaerts 2008:117. Schindler 2003:166 states that the law of war was the first branch of international law to be codified. Compare section 1, pages 16-20 above.

²¹⁶ 2006:121.

²¹⁷ 2008:117. [Emphasis added]. See also, *ibid*, at 129.

²¹⁸ 1983:138.

²¹⁹ Meurant 1987:240, Gasser 1993:9, Kalshoven and Zegveld 2001:19-20, Schindler 2003:167 and Best 1983:155.

was an attempt to codify the law of war, inspired by *humanitarian ideals*.²²⁰ Accordingly, this document had a very *humane* character. It was really inspired by the thoughts of the eighteenth century philosophers, based on the idea that a war is legitimate only if and to the extent that it is conducted in conformity with particular rules.²²¹ Although the Lieber code was drafted for a civil war, Schindler opines that it largely consisted of general rules on the law of war.²²² Gasser submits that the Lieber code made a significant contribution to IHL as it set the standard for subsequent military handbooks and instructions with regard to the law of war and it set in motion a second series of developments in the IHL as rules on the conduct of war were formulated.²²³ Some have argued that the Lieber code reflected customary law, but others believe that it was unlikely that such a comprehensive and detailed body of customary rules pre-dated this code's coming into effect. Therefore, the code is seen as a mere 'wish list' reflecting what was deemed necessary to ensure that the hostilities were conducted in a constrained manner which would speed up the process of reconciliation after the end of the hostilities.²²⁴ *Obiter* it must be submitted that, even if this line of argument is accepted, the 'wish list' still embodied *fundamental standards, principles and virtues*. Where would such standards and principles emanate from (in the absence of a conventional treaty law antecedent) – reason or a Divinity? Is this not the very essence of natural law?²²⁵

Hoffman 2004:242 and Oppenheim 1940:181 state that the Lieber code was the first attempt in history to systematically codify the laws of war.

²²⁰ Meurant 1987:240. The humanitarian ideals of this instrument are clear from sections 11, 15 (last sentence), 22 and 29: Art. 11. The law of war does not only *disclaim all cruelty and bad faith* concerning engagements concluded with the enemy during the war, but also the breaking of stipulations solemnly contracted by the belligerents in time of peace, and avowedly intended to remain in force in case of war between the contracting powers. *It disclaims all extortions and other transactions for individual gain; all acts of private revenge, or connivance at such acts.* Offenses to the contrary shall be severely punished, and especially so if committed by officers.

Art. 15. *Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God.*

Art. 22. Nevertheless, as civilization has advanced during the last centuries, so has likewise steadily advanced, especially in war on land, the distinction between the private individual belonging to a hostile country and the hostile country itself, with its men in arms. The principle has been more and more acknowledged that *the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit.*

Art. 29. Modern times are distinguished from earlier ages by the existence, at one and the same time, of many nations and great governments related to one another in close intercourse. Peace is their normal condition; war is the exception. *The ultimate object of all modern war is a renewed state of peace.* The more vigorously wars are pursued, the better it is for humanity. Sharp wars are brief. [Emphasis added.] The humane intention of article 29 seems evident, although it is acknowledged that the method to achieve it seems contrary to modern conceptions. For the fact that Lieber's 'balancing of humanitarian concerns with military necessity did not always further the dictates of humanity', see Meron 1998:271-273. Nonetheless, Meron, *ibid* at 274, believes that these few instances where humanitarian concerns gave way, did not detract from the humanitarian spirit which pervades the Code.

²²¹ Pictet 1985:35. Meron 2000a:245 confirms that several human rights elements found their way into Lieber's Code like the prohibitions on rape, slavery and enslavement.

²²² 2003:167.

²²³ 1993:10. The Lieber Code eventually led to the Hague branch of IHL regarding the means and methods of warfare. For the opinion that the Code influenced the *Hague Regulations* as well as the *Geneva Conventions*, see Meron 1998:274-279. For The Hague law, see section 1, pages 17-20 above.

²²⁴ Cowling 2006:68 n 20 and 77 n. 71.

²²⁵ In this regard, see the comments on anthropocentric and theocentric natural below in section 2.4, pages 85-88.

For the debate pertaining to humanity, although the history thereof will be discussed more fully below,²²⁶ note should also be taken of the Martens clause – first accepted at the Peace Conference of 1899 and included in the Preamble of the 1899 *Convention on the Laws and Customs of War on Land* – which determines that:

...populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience.²²⁷

According to Martens, only the law and the absolute rule of law can be the basis for a properly ordered, equitable and organised legal order, free from violence and war. Martens suggested that there is a single law running through the history of nations, namely ‘the principle of respect for the human person’. It is to Martens’ credit that he placed the human individual at the centre of international law, notwithstanding the opposing views prevalent at that time. This viewpoint of Martens is stated as: ‘Protection of the individual is the ultimate purpose of the State and goal of international relations’.²²⁸ Thus, the nexus between the principle of humanity and the workings of IHL is evident again. It is also significant to emphasise that the *principle of humanity* became embedded in treaty law. In other words, one of the natural law precepts upon which IHL is based, has been codified in a positivist, consensual legal instrument. The importance of this meeting between natural law and positive law is apparent and will be considered in greater detail later in the present chapter.

It has to be noted that the end of the nineteenth century saw increased support for *legal positivism* and *state sovereignty* in the international legal arena. Accordingly, this was the driving force behind the many codifications, especially with regard to the law of war, which took place at this time.²²⁹ State consent was seen as the key with which international law could become more

²²⁶ See section 2.4.1.1, pages 102-122 below.

²²⁷ This is the formulation of the Martens clause as embodied in the preamble to the *Hague Convention (II) with Respect to the Laws and Customs of War on Land* of 1899. Pustogarov 1996:311 explains that at the Peace Conference of 1899 some states opposed the idea of rights and obligations of armies of occupation and they demanded an unlimited right of resistance for the occupied territory’s populace. The solution for this problem was found in the so-called Martens clause.

²²⁸ Pustogarov 1996:304 and 314.

²²⁹ Ticehurst 1997:131. See also Cohen 2007:81 and Bederman *International Law Frameworks* in Weston, Falk, Charlesworth and Strauss 2006:36. Hensel 2008c:89 opines that the legal positivists held that the laws of a sovereign state, even if they are in conflict with ethics, must be obeyed since the written law had the highest authority. Right and wrong were thus reflected in the will of those who were vested with the necessary authority to make laws.

'scientific' as it would provide a basis for international law's existence in the absence of a sovereign and would also embody a criterion for scrutinising this branch of law.²³⁰ Naturally, state sovereignty and the influence of politics have had a significant impact on the development of IHL. Combatants' rights and duties were determined with the emphasis on their behaviour and the limitation on their choice of means for warfare. The law of warfare existing during the latter part of the nineteenth century has been described as being directly influenced by the notion of Rousseau, that wars are inter-state conflicts.²³¹ Also, only international armed conflicts were regulated since no rules had been established to apply to wars of a civil nature. During this time greater progress was made regarding the means with which combat was conducted. It was held by the 1868 *St. Petersburg Declaration* (in its preamble) that the only legitimate goal of war was to weaken the enemy's military forces.²³² Employing weapons which caused additional suffering or aggravating injuries already suffered was believed not only to be unnecessary, but also contrary to the laws of humanity. It was accepted in the nineteenth century in Europe that the rule requiring a distinction to be made between civilians and combatants was part of customary law.²³³

With the rise of positivism in the nineteenth century, naturally, the dominance of natural law

²³⁰ Cohen 2007:83.

²³¹ Meurant 1987:240-241. This, according to Meurant, *ibid* 239, (and compare Hall 1924:85-86 and Oppenheim 1940:169) is the so-called Rousseau-Portalis doctrine which determined that war is a relation between states and not individuals. Thus Rousseau 2007:31 formulated a fundamental rule of humanitarian law as follows: 'Even in real war, a just prince, while laying hands, in the enemy's country, on all that belongs to the public, respects the lives and goods of individuals: he respects rights on which his own are founded. The object of the war being the destruction of the hostile State, the other side has a right to kill its defenders, while they are bearing arms; but as soon as they lay them down and surrender, they cease to be enemies or instruments of the enemy, and become once more merely men, whose life no one has any right to take...War then is a relation, not between man and man, but between State and State, and individuals are enemies only accidentally, not as men, nor even as citizens, but as soldiers; not as members of their country, but as its defenders'. Pictet 1985:23 submits that these statements ensured that it was Rousseau's honour to state vividly and for all time, the fundamental rule of IHL. He continues, *ibid* at 23, his praise of Rousseau's work thus: 'With a stroke of his pen, he destroyed the whole argument of Hobbes that war is natural for mankind and is justified by the sovereign reason of the State, to which individuals are nothing but objects. He wiped out the old sophistry of the just war in contrast to an unjust war, and offered in its place a more significant distinction – the one which must be made between combatants and non-combatants. A combat, he told us, has no other purpose than to bring about the submission of the enemy State, and that we may not go beyond that. Soldiers who are *hors de combat* and peaceful civilians cannot bear the blame for crimes they have not committed; their lives must be preserved and their suffering must be relieved, for suffering is the same on both sides'. In this regard, compare Rousseau's proposition with proposed rules 1 (regarding the distinction between civilians and combatants); 14-21 (protecting civilians against unnecessary loss or injury); 47 (protecting persons *hors de combat*) and 87-105 (protecting civilians and persons *hors de combat*) of the ICRC Study.

²³² The preamble determines that: 'Considering that the progress of civilization should have the effect of alleviating as much as possible the calamities of war; That the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy; That for this purpose it is sufficient to disable the greatest possible number of men; That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable; That the employment of such arms would, therefore, be contrary to the laws of humanity'. Pictet 1985:49-50 hails the *St. Petersburg Declaration* as the first chapter of IHL ascribing its significance to its preamble.

²³³ Meurant 1987:240-241. Of course, in 2005, the ICRC Study confirmed this fundamental rule as its first proposed rule of CIHL.

lessened.²³⁴ Interestingly, however, MacDonald observes that the notions of *fundamental norms and values*, which had emanated from Grotius and Selden, continued to exist in the positivist era, although in this time they 'were removed from the theory of the subject but not its application'.²³⁵ Therefore, these principles, norms and values, which already comprised the basis of international law (and, likewise, IHL), further came to permeate the rules created during the period where positivism enjoyed ascendancy. *Evidently, irrespective of which philosophical school of thought dominated a particular era, these fundamental principles remained important.* Although legal positivism attempted to negate the value of these principles, these values – the essential core of international law (and IHL) – would not be denied. This clearly emphasises the importance of these principles and standards for international law (and IHL). This rise of positivism continued during the early part of the twentieth century and, in the process, natural law was further rejected. Notions of hierarchical laws existing in the international community, which would entail that states would be unable to contract out of them, perished under the onslaught of secularism. The emphasis was on state consent, irrespective of whether it was tacit or explicit, and, accordingly, states were only deemed to be bound to rules consented to.²³⁶ However, a paradigm shift occurred during the twentieth century since the complete dominance of state sovereignty was broken down by the rise of international organisations, the rebirth of natural law, limits placed on the right to conduct war and the renewed emphasis on the individual as subject of international law.²³⁷ Here the comments of Oppenheim, written in 1937, must be noted:

It is now generally admitted that, in the absence of rules of law based on the practice of States, *International Law may be fittingly supplemented and fertilised by recourse to rules of justice and to general principles of law*, it being immaterial whether these rules are defined as a Law of Nature in the sense used by Grotius, or a modern Law of Nature with a variable content, or as flowing from the “initial hypothesis” of International Law, or from the fundamental assumption of the social nature of States as members of the international community, or, in short, from reason.²³⁸

It is apparent that natural law and other principles were accepted as necessary supplementary rules in the absence of rules established through state practice. It is submitted that this was a mere recognition of a fact – these principles constitute(d) the basis of international law (and, of course, IHL) and, as has become apparent, they constitute a direct source of law. The positivist tendency is evident in the attempt to relegate these sources to be merely supplementary in nature. This,

²³⁴ Anonymous 2008:1225.

²³⁵ 1987:116.

²³⁶ MacDonald 1987:117.

²³⁷ Lesaffer 2002:106-107. See also Bederman 2003:1537 who indicates the re-emergence of a natural law, value-vested approach to international as opposed to the institutions and principles of creating positive law.

²³⁸ 1937:100. [Emphasis added.]

however, could still not prevent these principles from being admitted into the legal discourse (and later achieving a higher and independent status). The advantages inherent in the acceptance of these principles are self-evident, since their suppleness ensures greater chances of justice being achieved.

The movement of 'modern' to twentieth century international law may also be illustrated by juxtaposing the Hobbesian and Grotian notions of international society, with the former reminiscent of state sovereignty in its most extreme form and the latter resembling a more moderate society of states which accepted that they are bound to certain legal rules. The twentieth century has been deemed Grotian. This tradition seems to entail that the individual held certain rights and obligations in the international order directly; the liberty to act of members of the international order was curtailed by legally binding rules that transcended their own will and all these members were responsible for the protecting and enforcement of these rules.²³⁹ Early in the nineteenth century international law was still deemed to be an emanation of natural law, but currently – in the twenty-first century – international law has been viewed as positive law which is developed through, and gets its authority from, state practice and consent. Also, early in the nineteenth century, international law was concerned with the relations between nations or their subjects, whereas current international law has become embroiled in states' internal affairs through, for example, human rights law.²⁴⁰ It must be submitted that these views seem to be in opposition.

The contemporary international legal order seems to expound a positivist approach *regarding the determination of the formal sources of international law*, but the substantive rules thereof are based on natural law considerations.

Significant contributors to the re-emergence of natural law in modern international (humanitarian) law, were the international tribunals. It must be noted that it was left to international tribunals to 'find' the 'correct' standards of conduct in cases where governments neglected to meet their obligations towards, for instance, aliens. *Natural law* eventually came to be used in this regard, supplemented by considerations of justice and fair play. In the tribunals there was an increased insistence on the existence of an *a priori* normative standard that could be invoked, even if there existed no conventional rule or CIL supporting that particular standard. This process was indicative of the natural law basis of international law. With reference to the Nuremberg Trials after World War II, it becomes apparent that the count of crimes against humanity was a direct attempt to apply

²³⁹ Lesaffer 2002:108-109.

²⁴⁰ Anonymous 2008:1224 and 1226.

natural law standards to areas of conduct which had not previously been regulated by positive international law. The Nuremberg Trials have been described by analogy as a type of 'piercing of the corporate veil' since they attempted to hold individual decision-makers accountable for crimes against peace and humanity. This could only be achieved through reliance on natural law concepts of applying the higher standard to a new legal problem. It has been stated that the Nuremberg Trials do not stand up under a strict positivist analysis. This reliance on natural law at the Nuremberg Trials has been called a *renaissance of natural law* thinking in the international legal order which has continued in the post World War II international jurisprudence. Accordingly, natural law and natural rights occur in the *Charter of the United Nations*, for instance in the preamble and in articles 1, 55, 68, 73 and 76.²⁴¹ Another consequence of World War II was the *Universal Declaration of Human Rights*, which contained those generally agreed rights of humans considered to be the most important across a broad spectrum of cultures. A significant feature of this *Declaration* is its universality. The *Universal Declaration of Human Rights* has been viewed as a step towards the adoption of the fact that there exists a higher law towards which domestic systems must strive in the international legal community. This higher law is viewed with respect to individual legal systems and not to the international legal system by natural law lawyers.²⁴² With regard to the *Universal Declaration of Human Rights*, Woodcock submits that it can be placed in 'an almost unbroken scholarly tradition of Natural Law, based upon the principle of man's community being the derivation of the content of Natural Law'.²⁴³

From the preceding it becomes apparent that various rules and principles have come into existence to regulate inter-state affairs, including war. This has been the case since the first tribes and clans came into existence. It was an inherent desire to protect *humanity* against the barbarous consequences of armed hostilities that drove these first group collectives to formulate certain rudimentary rules to this effect. The origin of these rules therefore relied on virtues of moderation, concern, empathy, honour, dignity – in short, on morality. It is submitted that this natural law basis of IHL is indisputable. Also, it is evident that a body of rules regulating war and other relations emerged, derived from these natural law principles and standards over a long period of time, from the practices of these group collectives. From this it is evident that many of the natural law principles, virtues and rules of IHL have been posited in a customary form. The importance of the fundamental norms of IHL, therefore, is that they gave rise to CIHL and continue to pervade the

²⁴¹ O'Brien 1978:109-113. Compare Ticehurst 1997:132 regarding the reliance placed by the Nuremberg Trials on natural law. See also Verdross and Koeck 1983:40.

²⁴² Woodcock 2006:246 and 262.

²⁴³ 2006:252-253.

application thereof. In turn, CIHL has come to embody many rules that have been codified into treaty law – the so-called preferred legal instrument of the legal positivists. Principles have thus continued to impact even on conventional treaty law. Moreover, CIHL has remained relevant as a separate source of IHL because not all of its rules have been subsumed into codifications. This is especially true in light of the publication of the recent ICRC Study on CIHL. Therefore, various rules of CIHL remain important in the contemporary international legal order. However, just as it is necessary to understand the customary foundation (which, in turn, relies on principles and natural law) of parallel treaty rules (the rules newly created by treaty are binding *ipso facto* through consent and ratification and are not as important for the present discussion), so it is necessary to understand the natural law, principle-based foundation of CIHL when it applies directly. This study also aims to indicate that reliance – particularly in IHL – should and must be placed on these foundational natural law virtues and principles as a direct source of law. From the preceding section, it should have become apparent that this has already been accepted by the various eminent publicists on IHL, irrespective of whether they wrote in a pre-Grotius, positivist, naturalist or 'Grotian' tradition. The similarity between the rules proposed by these publicists and the ICRC Study confirm the existence of an objective, universal common denominator as the ascertainment of these respective rules was separated by a long period of time. It is submitted that moral concerns, especially the principle of *humanity*, was influential in this regard. It is furthermore postulated that many of the principles and rules of IHL derived from natural law by these publicists are indisputable because they are imminently reasonable – especially in the modern world with its high premium on human rights and humanitarian concerns.

With the clarion call to include *principles* and *standards* as a direct source of IHL and to accept IHL as being influenced by morality, it becomes necessary to re-consider some of the arguments which have been raised against international law (and, by implication, IHL) as being constitutive of *law*. These (positivist) criticisms are inevitably linked to those branches of law which further moral objectives. This will also lead to a more elaborate discussion on the main philosophical traditions to have influenced the development of international law and, particularly, IHL.

2.3 Regarding the nature of IHL as a specialised branch of international law

In light of the emphasis on morality (as independent and foundational component of IHL) in the previous sections, concerns might occur regarding whether the present study advocates for

international humanitarian *law* or international humanitarian *morality*. However, this question regarding whether IHL indeed qualifies as 'law' is not a new one. It is submitted that this is due to the very natural law based origin thereof as was indicated in the previous section. This section will briefly consider some of the arguments which have been raised against and for accepting international law and, by implication, IHL as constitutive of 'law'. In the process it will be established that although it is unsurprising that IHL, or the laws of war, is that branch of international law which has been famously described in that if international law is at the vanishing point of law, then the law of war is at the vanishing point of international law,²⁴⁴ because of, *inter alia*, its moral basis; it *is* law but with a very evident and flexible moral basis.

The status of international law (and, by implication, also of IHL as a specific branch of international law) as 'law' has frequently been called into question seeing that many legal commentators maintain either that it is not law in the proper sense of the word, or that it is ineffective with regard to the actual governing of inter-state relations. Some academics have even gone so far as to opine that international law as legal discipline is approaching its demise, causing us to become more aware of its political and moral force, but not its legal content.²⁴⁵ The question regarding the interaction of international law and morality is one which occurs frequently. Thus, Strenski states that international law, with the ICJ, the ancient laws of the sea, *Geneva Conventions* and the like, might seem to be more comparable to a global morality than to anything resembling a legal order.²⁴⁶ Hence, some have postulated that international law rather be classified as part of ethics and not law.²⁴⁷ Dixon indicates that some of these criticisms are valid, but it must be remembered that it has not been argued that international law is a perfect legal system. Although comparisons between the international legal order and national legal systems abound, it is important to note that the latter is also not a perfect, infallible system.²⁴⁸ The national model, containing courts, legislators and enforcement agencies has, however, often been held to be a manifestation of what 'the law' and a

²⁴⁴ Lauterpacht 1952:381-382. It is submitted that IHL is that branch of international law which applies in the most inhumane circumstances – armed conflicts. Laws normally aim to harmonise and promote various legally relevant relationships. Armed conflicts are the very antithesis of those circumstances in which laws would normally be expected to operate. Besides the fact that belligerents are strongly opposed to impeding their military objectives by being bound by laws, this branch of law (as was seen above) has its roots in *moral* principles and standards. Moreover, self-interest of states is frequently accorded preference to the detriment of IHL.

²⁴⁵ Dixon 2007:1.

²⁴⁶ 2004:635. Nonetheless, certain publicists like, for example, H. L. A. Hart, argue that international legal rules are frequently indifferent to morality. It is submitted that this would be especially true regarding rules pertaining to how ships should pass each other on the open sea.

²⁴⁷ Brierly 1963:68.

²⁴⁸ 2007:1-2 and Best 1997:6-7.

'legal system' should be.²⁴⁹ Subsequently, some of the more specific arguments against and in support of deeming international law (and, by implication, IHL) constitutive of 'law' will be considered. These comments must be viewed in the light of the arguments from the preceding section advocating the acceptance of morality as inherently part of IHL.

International law has been described as a horizontal, rather than a vertical, system where there exists no higher authoritative state. Thus, law does not emanate from a higher authority in the international legal order, but the lawmaker and subject are the same entities. This characteristic has been accepted to cause greater overlap in this system, with an indistinct boundary between social norms and law.²⁵⁰ Evidently, when the same entities make and are subject to the law, it becomes difficult to determine which norms are legal and which emanate from considerations of morality, comity or utility.

Some critics argue that a legal system's validity relies on the degree to which certain 'vital rules' can be enforced. In an international law context this might include the general rule prohibiting the use of force. International law, however, often seems powerless to prevent major violations of its rules and is perceived to be weak law due to this fact.²⁵¹ When one state perpetrates an act of aggression against another state, such an act has far greater consequences than what would be the case if one individual perpetrated a crime against another individual under a particular national system, and also the costs of controlling the action forcefully would be exceptionally high. Accordingly, Dixon is of the opinion that international law's ambit causes rules of physical enforcement to be less desirable or practical than they are in other legal systems. This is an unfortunate state of affairs due to the realities of international life.²⁵² Therefore, one of the chief arguments levelled against international law's validity as 'law' is that it is not generally

²⁴⁹ Dixon 2007:2. It must be remembered that the national and international systems indeed have a different reason for existing which causes the comparison to lose a lot of its validity. Hence, national law is occupied with the legal rights and duties of legal subjects within a specific political body. The law derives from an accepted legal superior, which is competent to make and enforce the laws. International law differs as it occupies itself with the rights and duties of equal states. The desired system regulating the relationships between states should be one which facilitates their interaction rather than a system which controls and dictates as the national legal systems are prone to do. See also Weil 1983:413 and Oppenheim 1937:34.

²⁵⁰ Norman and Trachtman 2005:546. Coleman 2004:1520 states that in the absence of an overarching sovereign, the international legal order has been deemed to entail a mere 'might makes right' system. See also Byers 1995:161 who comments that, in the absence of an overarching sovereign, international law ought to be understood 'as a multitude of bilateral relationships between states'. Naturally, the sources of law vary greatly between national legal systems (with their clear sovereigns) and the international legal system (where the sovereign and subjects are the same entities). See in this regard Best 1997:8 and Kelly 2000:459. See also Cheng 1983:519 and 548.

²⁵¹ Dixon 2007:14-15. Likewise, Cohen 2007:67 indicates that violation of international legal rules is frequently argued to illustrate that this body of 'law' is only that in name. See also Weston, Falk, Charlesworth and Strauss 2006:62.

²⁵² 2007:15.

enforceable.²⁵³ *However, this criticism might be countered with the question of whether the binding quality of any 'law' is found in the existence or absence of enforcement measures.* It is clear that less effective enforcement measures may encourage states to disregard the law more often than individuals in their national systems, but this argument concerns motives for compliance with the law, not about whether the particular set of rules are 'law' or not.²⁵⁴ Fyodor Fyodorovich Martens himself opposed the notion that law was based on force. He thought such an idea to be pernicious for international relations, as it entailed a confusion of law enforcement machinery with the law itself. Just because the law was ensured through enforcement procedures did not mean that force was the fundamental basis of the law.²⁵⁵

Indeed, the most acceptable argument for the validity of international law as a system of law is that the members of the international community recognise that there indeed exists a body of rules binding upon them as law.²⁵⁶ The effectiveness of international law is ensured through its advancement of the common self-interest of the international community and necessity of such a coherent, encompassing system of law in a global context.²⁵⁷ Further, states themselves, still the primary subjects of the international legal order, do not claim to be superior to the law or that international law does not bind them. States follow the rules of international law as a matter of

²⁵³ Best 1983:11 and 1997:5, Root 1908:451, Norman and Trachtman 2005:550 as well as Dixon 2007:6.

²⁵⁴ Dixon 2007:6. See also Coleman 2004:1521-1522. Likewise, Oppenheim 1937:8 opines that a lawmaking authority and courts are not essential for the existence of law, since, in a primitive community, it is the community which decides a question of law rather than a court.

²⁵⁵ Pustogarov 1996:303.

²⁵⁶ Dixon 2007:4. Likewise Coleman 2004:1520 states that 'International law, broadly construed, is the body of rules that can be derived from observation of the interaction of state actors on the international stage'. See also Dumbauld 1935:593-594 for the acceptance of international law as 'law'. By and large, states comply with international law for reasons unrelated to the threat of a sanction. This means that international law is not binding because it is enforced, but that it is enforced because it is already binding' (see Dugard 2005:10). The same understanding can be applied to CIL, and consequently to IHL. See also the comments of Oppenheim 1937:9-14 (and compare Frederick Pollock *First Book of Jurisprudence* 1929 28) when he defines law as: '...a body of rules for human conduct within a community which by common consent of this community shall be enforced by external power'. Thus, he continues, three requirements must be met before a 'law' can be established, namely a community must exist; a corpus of rules for human conduct inside that community must exist and a common consent must exist in the community that this corpus of rules will be enforced by an external power. On this definition, Oppenheim finds that the community of states complies with the first requirement as the individual states are bound to common interests which ensure persistent interaction among them. The second requirement must also be admitted as (customary) rules pertaining to the interactions of states have emerged over hundreds of years. Also, lastly, an external power of enforcement might be found in the international community in the idea of self-help. Thus, in Oppenheim's definition, international law still qualifies as law. See also Weston, Falk, Charlesworth and Strauss 2006:64 and 67 as well as Hall 1924:14-16.

²⁵⁷ Dixon 2007:10. The effectiveness of international law also entails a psychological component as Dixon, *ibid* at 11, describes: 'Law has a self-perpetuating quality. When it is accepted that the principles governing the activities of a society amount to 'law', as is the case with states and international law, the rules of that system assume a validity and force all of their own...There is, in other words, a psychological barrier against breaking international law simply because it is law'. See also Christov 2005:564 who submits that, although the actions performed by states may vary, all agree that international order should be maintained in a world where unregulated power abounds.

obligation, not as a matter of choice or morality.²⁵⁸

For the great mass of mankind, laws established by civil society are enforced directly by the power of public opinion, having, as the sanction for its judgments, the denial of nearly everything for which men strive in life.²⁵⁹ Likewise, Strenski believes that treating prisoners of war decently, accepting diplomatic immunity, and the *Geneva Conventions* regarding warfare and other similar rules of the international (humanitarian) legal order are better understood as aspects regarding honour in the brotherhood of states, that is as something which will bring shame upon the misbehaving country rather than rules binding states *ipso facto*.²⁶⁰ The binding or obligatory nature of these rules thus emanates from the various individual states' desire to be seen as upholders of these rights rather than being viewed as delinquent. The universal desires of states are evident from this – there is a core of norms which states will follow because, by doing so, they indicate their willingness to further the important goals encapsulated in them.

Furthermore, it is proposed, and this is an important consideration to counter the potential arguments that might be levelled at the apparent idealistic nature of the present study which moves for the inclusion of principles and standards of natural law in the IHL debate, that in effect moral precepts provide an *internalised sanction*. The essential argument against natural law precepts entail that they are not enforceable, but, it is submitted, that moral considerations do bind persons internally, whereas the law especially binds from an external point (although it might also bind internally).

Just as is the case with public international law, the international humanitarian regime also finds itself without a central lawgiving body, although various international organisations like the United Nations and the ICRC are making a significant contribution to the normative framework of this branch of international law. Although frequently impeded by politics and national interests, IHL seems to have a better functioning court structure compared to the broader international legal regime. Accordingly, the ICC, ICTY and ICTR have made significant strides for the successful implementation of IHL, but their authority is not yet absolute. Thus, it seems that IHL might even

²⁵⁸ Dixon 2007:4-5. Compare Oppenheim 1937:14-15. In this regard Brierly 1963:56 postulates that: '[t]he ultimate explanation of the binding force of all law [including international law and IHL] is that man, whether he is a single individual or whether he is associated with other men in a state, is constrained, in so far as he is a reasonable being, to believe that order and not chaos is the governing principle of the world in which he has to live'.

²⁵⁹ Root 1908:452-454. See also Hall 1924:15 who deems public opinion to be the 'ultimate sanction' of any law, irrespective of whether it is national or international. Compare also Oppenheim 1937:15. See Finch 2000:45 for the view that CIL is enforced through public opinion.

²⁶⁰ 2004:635.

have a slightly stronger argument for conformity with the 'national model' of what 'law' entails. However, due to the very nature of these rules, such formal machinery cannot prevent states from violating them. IHL is activated during a very sensitive period in a state's existence and, through considerations of sovereignty, states are frequently unwilling to limit themselves through rules during such a time. However, these rules are the last line of defence against atrocities. Regarding CIHL, Meron observes that:

Although the prospects for compliance with humanitarian norms may be less auspicious than for other norms of public international law, they *enjoy stronger moral support*. Judges, scholars, governments, and nongovernmental organizations are often prepared to accept a rather large gap between practice and the norms concerned without questioning their binding character. In many cases, gradual and partial compliance has been accepted as fulfilling the requirements for the formation of customary law, and contrary practice downplayed.²⁶¹

As has become evident from the present study, *moral principles* and *standards* are inherent to IHL. It is not enough to reduce this branch of law to mere international humanitarian morality – it must be noted that morality constitutes the *material source* of many legal systems and disciplines. To return to the comparison between national and international law – even the current *South African Constitution* of 1996 is based upon the *values* of human dignity, equality, human rights and freedoms.²⁶² Naturally, a national system such as that of South Africa is accepted by all and sundry to constitute a *legal* system. It is self-evident that natural law inspired very many (if not all – including, of course, IHL) legal systems in the first place. Is the ultimate aim of law not to ensure harmonious co-existence, where each partakes in the life of the community, free from interference by others, while being mindful not to interfere with others themselves? Has *equity* not remained an important notion for legal systems? Therefore, it must be submitted that the inclusion of morality as the foundation and a substantive material source of IHL does not *per se* render this branch of international law only *law* in name.

Considering the formal structures behind IHL, similar problems arise compared to international law in a broader context. Thus, applying IHL in practice can be difficult due to the nature of international law, but it is evident from Meron's statement that a significant amount of leeway is afforded to the formation of CIHL *precisely because the moral desire to enforce these rules is so strong*. Therefore, a universal commitment, across a broad spectrum of actors (including presiding officers, scholars, NGOs and governments) is clearly evident – all of these actors realise the

²⁶¹ 2000a:244. [Emphasis added.]

²⁶² Article 1.

importance of complying with IHL. *This is true to such an extent that the strict requirements for customary law formation in IHL are relaxed.* The very nature of IHL thus contributes to a more flexible approach in according proper protection to those suffering as a result of armed hostilities. Hence, strict theory gives way to fundamental ideas of furthering humanity, human dignity and freedom. Thus, due to the very nature of IHL, higher, normative standards can be considered in a branch of law which attempts to protect the human person. Why would states (unless they are allowing their own interests to interfere) attempt to return to the stringent theoretical requirements?

In any case, pragmatically viewed, states therefore accept the existence of IHL, similar to international law, and frequently state their commitment thereto. In principle, states do not contest the old adage that whoever says war, says law. That is, states do not contest that international law, and specifically IHL, exists for the legal management of armed conflict.²⁶³

Having considered the historical development of IHL (and the nature thereof), a more elaborate discussion on the main philosophical traditions which have been influential in the development of international law and, particularly, IHL is required. This is necessary in light of the argument proposed in the present dissertation that IHL was based upon and is informed by natural law principles. It remains to investigate the philosophical paradigm which provides the impetus for this branch of international law directly.

2.4 Analysis of the natural law basis of IHL as manifested in the principle of humanity

From the preceding it has become apparent that IHL originated from, and is shaped by, principles. It was indicated that the *principle of humanity* embodies the essential principle of IHL. Accordingly, the influence of this principle was indicated when both the law of The Hague and the law of Geneva were considered – in other words, the very foundations of IHL *treaty law*. Subsequently, the dissertation indicated that the protection of humanity and human dignity comprise the central objectives of IHL. Lastly, it was indicated that a concern for humanity led initial primitive societies to formulate primitive (customary) rules for the regulation of armed conflicts among themselves and that these rules, imbued with considerations of humanity, influenced the works of the most eminent publicists on IHL. The importance of these principles for

²⁶³ Forsythe 2008:25.

CIHL was also established. The possible problem with these moral considerations was indicated in the previous section, namely that precisely because moral concerns and principles feature so prominently in IHL, the legitimacy of this branch of law as 'law' has been questioned. However, it was established that this branch of law should not be compared to domestic legal systems as it is *sui generis* – functioning in circumstances most insusceptible to law-enforcement – and, as such is indeed 'law'.

However, in light of the emphasis on the existence of higher, normative standards in IHL, the natural law basis of IHL (and, peripherally, other philosophical paradigms to have influenced IHL) must be examined. Not only will this entail a theoretical investigation of IHL, but it will lead to an examination of the principle of humanity, which has been argued to comprise the central natural law virtue in IHL. Accordingly, the substantive content of this principle will be considered as well as possible means to implement it directly in contemporary IHL. It will be indicated that this principle can be implemented through three different components, namely treaty law (in the guise of the Martens clause); other principles (like norms of *ius cogens* and obligations *erga omnes*) and CIHL (which will be considered in the following chapters).

In limine, it has become apparent that, although IHL was not based thereon, the legal positivist approach and the historical school of jurisprudence have contributed significantly to the development of IHL (the first through, for example, giving legal certainty by way of its reliance on treaties; the latter through, for example, giving consistency to this branch of law). Therefore, the two philosophical traditions that have influenced IHL apart from natural law, namely *legal positivism*, and the *historical school of jurisprudence*, must be briefly investigated seeing that the former is reflected in the facts that IHL treaty law (as was seen above²⁶⁴) still exerts significant influence and the ICRC Study on CIHL seemingly reflects the international community's desire for certain, written CIHL, while the latter underscores the importance of CIL and the writings of eminent publicists in IHL as it is argued for in the present dissertation.

It must be noted, however, that the present study aims to advocate for a natural law, principle-based approach to IHL (and to view the ICRC Study on CIHL primarily through that paradigm), and as such it is necessary to consider legal positivism. This does not purport to place the natural law approach above any suspicion and to vilify legal positivism – indeed some sort of balance between

²⁶⁴ See, for example, section 1, pages 16-20 and section 2.2, pages 64-68.

these approaches must be attained for the strengthening of international jurisprudence to occur; rather, the goal is to enhance the argument for the existence of *a priori* rules in international law (and, especially, in IHL).

The positivist school uses law as a political instrument, a *corpus* of rules determined by the state, having a separate existence from morality and history.²⁶⁵ Also, these rules – which include judgments – are seen as the only sources of the law with legitimacy. Positivism falls under the 'realist' view of international law. The 'realist' view sees every action of states as made to further the state's own national interests.²⁶⁶ Those who submit that international legal rules are made internally, created by a legal community's participants, are basically following a positivist approach, based on the force of expressed or implied state consent.²⁶⁷ In summary, Ticehurst's definition of positive international law may be considered:

Positive international law is determined by the contractual will of the State, either through its consent to treaty provisions or through State practice leading to or preventing the development of a customary rule...It is therefore consensual law. If that will is absent, the State is not bound by that norm and so is not responsible to the international community for non-observance of it.²⁶⁸

It is evident that legal positivism asserts that the validity of law depends on its proper promulgation or, in the case of custom, its clear, unambiguous and consistent, authoritative acceptance by the individual members of the legal community. Obedience to the law must be enforceable according

²⁶⁵ Berman 1988:780. See also Medinger 2006:46.

²⁶⁶ Medinger 2006:46. For the realist school see Hensel 2008b:33-44, Reus-Smit 2004:14-44, Byers 1995:112-113, Golove 2006:341, Reisman 1987:136-144, Vagts 2004:1040, Trimble 1986:667-670 and Forsythe 2008:25-28.

²⁶⁷ Jividen 2004:693. See also Byers 1995:165 and Brierly 1963:51-52. See, for example, Oppenheim 1937:24 who accepts that a state could explicitly (as in the case of treaty law) or tacitly (as in the case of CIL) accept a rule of international law. See Cohen 2007:78-79 regarding consent. Magenis 2002:415 differentiates between natural law and legal positivism by submitting that in international law, consent lies at the basis of positive law's binding power, while reason creates the binding force of natural law. The action of natural law is directed internally at the morals of the individual, while positive law is directed at external actions towards others.

²⁶⁸ 1997:131. Dixon 2007:16-17 opines that this consensual theory emphasises that no international law can be constituted without the consent of the particular state which will be bound. Clearly, on this positivist view, the rules of international law are formed through the realities rather than the desirabilities of international life as it is the *de facto* consent which creates it rather than some higher moral principles. Dixon, *ibid* at 17-18, submits that natural law theory differs from the consensual theory in that it is determined through correct *moral principles* while the latter is based on the actual practice of states. From an empirical viewpoint, natural law is scantily supported in international law. This does not negate the importance of natural law though as Dixon submits: 'However, 'natural law' may be a good *descriptive* label for such concepts as equity, justice and reasonableness which have been incorporated in substantive rules of law, such as those dealing with the continental shelf, human rights, war crimes and rules of *ius cogens*. In this sense, natural law may be part of the sources of international law under the category 'general principles recognized by civilized nations'. See also Ticehurst 1997:132. Searl 2001-2002:299 proposes that states should return to the principles of natural law which advocates 'that states adhere to a standard of reason that is higher than that suggested by state practice alone – a standard that is attuned to promoting integral human fulfillment for each and every member of the international community'. For further definitions of positive law see Suarez 1944:44-45, Grotius 1925:44 and Searl, *ibid* at 274. For positive law generally see Ago 1957:693-728.

to the legal positivist perspective. From the latter it is apparent that codified law is the only law which ensures the level of certainty as to how the law is to be understood, determined and applied – which the positivists desire. Natural law, with its corollary designs on objective, universal values which can be rationally determined, is unenforceable and too vague and uncertain to be held as valid law by the positivists.²⁶⁹ It is submitted that such a positivist approach sets it at loggerheads with regard to the normative aspect of law, which is so crucial for IHL.

As positivism rejects the connection between morality and the laws, it injects sovereign lawmaking legitimacy into the legal tradition. Positivists find that moral precepts only become law once the norms are commanded by a sovereign. When facing the international legal system, where states are independent, sovereign, and answerable to no higher authority, positivism emphasises treaties and customs as the supreme sources of the international legal order.²⁷⁰ The positivists deny natural law's *a priori* claims and imply that striving towards maintaining humanity in warfare is linked to the self-interest of states.²⁷¹ Kunz submits that a changing, turbulent period, like the twentieth century, where wars, rebellions, revolutions and law reform and creation problems occur, is not sufficiently dealt with by rigid positivism – positivism suffices in more harmonious times where the questions pertain to interpretation and codification of law, not in times where the problems concern law-making and the politics of law.²⁷²

Although the positivists and naturalists have been involved in a debate for centuries, it seems as though these philosophies are moving closer towards each other. This is the consequence of the positivists taking more heed of the effect of morality on law and, likewise, the increased consideration of the effect of politics on law taken by the naturalists. This makes it possible to combine and apply these two trains of thought on specific problems with which the international legal order, and specifically the international humanitarian legal order, has to deal. The remaining points of division however remain, where the sovereign enacts a law which is fundamentally opposed to reason and conscience and where a court interprets a law without considering the moral purposes for which it exists. In these cases, the positivist denies the existence of moral purpose, reason and conscience.²⁷³ However, regarding the broader discipline of international law, it has been submitted that '[h]istorically, international law was first formulated by proponents of natural

²⁶⁹ Hensel 2008c:80-81.

²⁷⁰ Jividen 2004:694.

²⁷¹ Best 1983:17. It must be indicated that the distinction between pragmatic self-interest which endures unaltered and objective, unchanging principles seems trifling.

²⁷² 1961:953-954.

²⁷³ Berman 1988:784-785.

law theory, who provided the foundation of international law principles such as the peaceful resolution of disputes, self-defense, and the right of humanitarian intervention'.²⁷⁴ Bederman also indicates the increased interaction between positivism and natural law in that the international community has managed to place state concerns (which include sovereignty and maintaining international peace and security) side-by-side with the principle of protecting and extending the dignity of individual human beings. This vision is, according to Bederman, premised (at least partly) on a natural law notion of the inherent worth of human beings, and 'is manifested in the creation of rules by which a State must treat its own citizens'. Bederman speaks of the pendulum of natural and positive approaches to international legal obligation which has swung back to a more neutral position in which the international community recognises values separate and apart from state sovereignty.²⁷⁵

The third branch of legal theory, the historical school, holds that the beginnings of all laws, irrespective of whether it is customary or statutory law, can be found in communal heritages and the unique characteristics of the specific community. Law is therefore just as unique to a particular society as its cultural or lingual affinities. The proponents of the historical school maintain that law is found, formed and interpreted by the legal practitioners of a society rather than created.²⁷⁶ Historicists therefore argue that what the law 'is' (politically) and 'ought to be' (morally) can be found in the national character, the culture, historical ideals and traditions of the particular people or society whose law it is.²⁷⁷ The historical school submits that law is the result of a historically developing ethos of a particular society. The essence of the historical school of jurisprudence is the recognition that law is a continuing historical process which develops from the past into the future.²⁷⁸ The follower of the historical school adds a mediating factor to the debate which is also less controversial: *our collective past*.²⁷⁹ Accordingly, historicists use both rules and moral principles to define the law, unlike either legal positivism or natural law. Distinct from the positivists, the historicists are concerned with the rules of customary law rather than the rules of enacted law. Also, in distinction from the naturalists, the historicists are concerned with those moral principles that are inherent to the character and traditions of the particular people or society

²⁷⁴ Jividen 2004:695. Searl 2001-2002:271 and 273 also states that initially natural law principles played a significant part in the development of international legal theory, but later positivist ideals supplanted the natural law.

²⁷⁵ Bederman *International Law Frameworks* in Weston, Falk, Charlesworth and Strauss 2006:39.

²⁷⁶ Hensel 2008c:82.

²⁷⁷ Berman 1988:781 and Medinger 2006:56.

²⁷⁸ Berman 1988:780 and 795.

²⁷⁹ Medinger 2006:56.

rather than with moral principles of a universal nature.²⁸⁰ In this regard, it must be submitted that when this historical approach is applied to ascertain the *essential principles* of IHL, then, the 'particular people or society' whose character and traditions must be investigated include all states in the world and, hence, inevitably entailing moral principles which are universal.

In summary, it could be noted that the positivists find the lawmaker's will to be the ultimate source of law, while political compulsion is accepted to be the ultimate sanction. Thus, they emphasise the state. The naturalists find reason and conscience to be the ultimate source of law, while moral condemnation is the ultimate sanction. Thus, they emphasise the mind. The historicists find the national character or historically developing traditions of a society to be the ultimate source of law, while the acceptance or repudiation of those aspects by the people represent the ultimate sanction. Thus, they emphasise the people, the nation.²⁸¹

It is submitted that each of these approaches is reflected in the complex international legal order (and, by implication, IHL). Thus, legal positivists advocate treaty law and various other agreements in the international arena. Naturalist approaches tend to argue for the inclusion of reasonable rules and principles which derive their force from their moral authority (in essence what this study intends to achieve). The historical approach emphasises tradition and customary rules, which are clearly reflected in the importance attached to CIHL, considering the time and effort invested in this source of IHL by the ICRC Study contributors.

Nonetheless, certain criticisms might be made against the suitability and applicability of positivism, natural law and the historical method when they are used in isolation to solve a particular dispute. The positivists attempt to rely on transparent, written rules of international law in order to ensure certainty, but a criticism which has been levelled at the notion entails that 'law' is not limited to a set of rules regulating social behaviour. Laws are indeed a manifestation of a community's values and social beliefs. Thus, the essence of what the law really is transcends the written legal instrument to which the positivist clings.²⁸² Natural law has been criticised due to its susceptibility to cultural relativism. Thus, the criticism actually entails an assault on the truth of the naturalist's claim to adhering to norms of an objective and universal type. The reliance on values and norms such as

²⁸⁰ Berman 1988:781-782.

²⁸¹ Berman 1988:783.

²⁸² Medinger 2006:49. In this regard, Medinger, *ibid* at 50, states that it has been widely accepted that article 38 of the *ICJ Statute* authoritatively determines the sources of international law and, ironically, that this article – enacted in a treaty – allows reference to external sources such as general principles of the law.

dignity and justice has been criticised for being an instrument with which to further self-interested behaviour. The historical school can be attacked through the argument that ancient scholars and outdated CIL cannot still be relevant and authoritative in the modern international legal arena. Also, the positivists attack the historical school in reprisal for the latter (and the naturalist) critique regarding positivism's close, myopic, adherence to the letter of the law, with the counter-argument that the historical school itself looks myopically at the facts of the past, in effect neglecting contemporary developments.²⁸³

However, Berman submits that law is more than merely politics or morality as seems to be indicated by the naturalist-positivist debate. He submits that the historical element is of crucial importance and that it has been neglected in the traditional debate between naturalists and positivists. Berman continues that the development of international law over the past few decades gives a clear illustration of the virtue and necessity of an *integrative jurisprudence*. He finds that the insights and values of each of the three schools are needed to explain and justify these recent developments. Accordingly, positivist jurisprudence held in the past that an international legal order cannot exist in the absence of a strong sovereign with powers of enforcement. However, positivist jurisprudence has come to accept the existence of the international legal order especially after World War II. With the establishment of treaties and conventions, 'law' according to the positivist's dictionary has also been established (even though the mechanisms for the enforcement thereof are weak).²⁸⁴ Natural law jurisprudence has had an important role in the international legal order as it was responsible for emphasising international law's rootedness in the universal principle of justice. The body of human rights (and, it is submitted, IHL) which has developed has been due to the influence of the natural law jurisprudence. Various conventions have been acceded to and, by doing so, it has been established that there are certain *universal standards of humanity and human dignity* which must be protected by a legal regime which is not subversive to national legal orders.²⁸⁵ Also, the historical school might have a valuable role to play to ensure that the rules and customs to emerge in the international legal order are derived in a systematic, organised fashion. In this regard, Medinger opines that by relying on the facts of the past, the historical school reduces the chances of relying on culturally relativistic values and norms since the past is shared by all states.²⁸⁶

²⁸³ Medinger 2006:54-55 and 62.

²⁸⁴ 1988:787 and 797. See section 2.3, pages 70-72 above.

²⁸⁵ Berman 1988:798.

²⁸⁶ 2006:61. For further benefits of an integrative jurisprudence, see Berman 1988:799 and Medinger 2006:45-46 and 62 (Medinger, *ibid* at 45, also reflects some concerns regarding this approach).

It is submitted that the present dissertation is irrevocably influenced by these considerations of an integrative jurisprudence both as regards the *raison d'être* and the method hereof. Hence, it was a desire, in light of the very significant, positive exposition on CIHL by the ICRC, to re-emphasise the natural law foundation of IHL as it has developed in the international community since the initial rules against war were formulated which provided the impetus of the present dissertation. Unsurprisingly, therefore, the present dissertation conducts its research on all three levels seeing that treaty law, the ICRC Study, natural law principles and the historical development of IHL are all considered in order to bolster and enhance this branch of law.

It remains to consider the essential, fundamental philosophical paradigm of IHL – natural law – more fully.

As has become apparent, natural law sees legal rules and moral principles as derived from right reason and the conscience held by humanity collectively.²⁸⁷ Natural law has been viewed as a system of deductive reasoning from which natural rights of men and states may be derived.²⁸⁸ These rules and principles which give rise to rights and duties are believed not to emanate from human will, contrivance or convention, but to exist in the nature of things, that is, objectively. Disputes may be settled according to natural law theories, because there exists an objective moral law which distinguishes between correct and incorrect acts, and this law is not derived from human will but from nature.²⁸⁹ 'Law' is seen by naturalists as the manifestation of *norms and values*. According to some naturalists what the law 'is' must be determined by reference to what the law 'ought to be' in terms of a universal system of values. Also, rules must be interpreted, analysed and applied in terms of the *moral purposes* for which they exist. The naturalist relies on concepts such as humanity and justice to move for their particular desires, for example humanitarian intervention.²⁹⁰

Natural law has been described as being occupied more with the normative aspect of international law and considering actual international conduct only in so far as it may determine whether the law

²⁸⁷ Berman 1988:780 and Medinger 2006:52. See also Pufendorf 1934:201.

²⁸⁸ Magenis 2002:415.

²⁸⁹ Bull 1979:172 and 180.

²⁹⁰ Medinger 2006:52-54. See also Berman 1988:780-781 who states that naturalists have taken recourse to a set of moral principles to determine the validity of legal rules. Procedural and substantive fairness has also been applied by naturalists to determine legal rules' validity. Berman indicates that some naturalists have even looked toward the "oughtness" or "positiveness" believed to exist in legal rules for their validity.

is followed or not; whereas the positivist approach entails considering the actual conduct of international legal entities and giving that conduct the title of positive international law irrespective of whether it conforms to natural, divine or any other moral law.²⁹¹ The natural law approach, then, seems clearly occupied with the *lex ferenda* rather than the *lex lata*. Legal positivism takes the opposite approach. It is submitted that this difference causes problems when these jurisprudential paradigms are brought to bear on CIL and, especially, CIHL. It must be stated that IHL, in essence, seems to comprise an aspirational body of law. By demanding that the law cannot include aspirational aspects, the positivists, in effect, allow atrocities to happen in each war before attempting *ex post facto* to prevent them for the next time round. *Hence, it must be re-emphasised that IHL, with its emphasis on humanity and dignity, is inevitably linked to natural law principles and standards.*

Natural law may be seen as a system of deductive reasoning with which the rights of men and independent, sovereign nations may be determined and the norms of which are binding through the adherence to reason. Natural law posits standards of conduct for individuals and standards for the laws which states enact.²⁹² The traditional point of departure for natural law theories is the rights and duties of individuals rather than those of states or groups.²⁹³ It is precisely due to the influence of natural law that the international order is also focusing more and more on the individual. Unlike positivism, natural law adherents maintain that natural law is common to all nations since it exists *a priori*, through natural instinct, and is not dependent on enactment for its validity.²⁹⁴ Therefore, these immutable rules of natural law are seen as being universally valid while not dependent or confined to specific communities, societies or cultures.²⁹⁵ It is indeed the naturalists who will be able to furnish officials and practitioners with reasoned, principled advice and also with the moral and practical consequences for a state's *commissio* or *omissio* in the international legal arena.²⁹⁶ The follower of natural law has been defined as a philosopher, a moralist, who scrutinises and evaluates the law in terms of higher, non-legal, ethical norms to decide whether the law is good or bad and not whether it is law or not.²⁹⁷

The potential utility of natural law in the international legal order (and, especially, for IHL as it is

²⁹¹ Best 1983:39.

²⁹² Jividen 2004:695.

²⁹³ Bull 1979:171. As will become evident in section 3, pages 150-152, IHL is undergoing a process of 'humanisation' due to the influence of international human rights thereon. See also Meron 2000a:239-278.

²⁹⁴ Jividen 2004:695.

²⁹⁵ Bull 1979:171. See also Ticehurst 1997:132 and Pufendorf 1934:179.

²⁹⁶ Jividen 2004:723.

²⁹⁷ Kunz 1961:958.

advocated for in this study) is reflected in statements such as: 'At a time when it is commonly said that the society of states is or should be dissolving into a universal society or community of mankind, the natural law tradition may be thought to provide a ready-made set of rules that can be applied to it',²⁹⁸ and that natural law has been deemed to be important for international law since it is being 'recognized as customary international law through an examination of *opinio iuris* and state practice'. Hence, natural law is still relevant as a normative framework which would inform the legal system of the universal community of states. The second statement again reinforces the notion that natural law and CIL (and CIHL) are closely linked. It is further submitted that while CIL (and CIHL) is a source *through which* natural law can be introduced into disputes, natural law may simultaneously influence the manner in which CIL (and CIHL) can be determined. Another important advantage of natural law, similar to the dominant conception of CIL, is: '...it is neither tied to one culture nor loses its effectiveness in a forum informed by different value systems'.²⁹⁹ *Since IHL sees only victims and no culture, religious affiliation, race or gender, this statement clearly shows the utility of natural law to this branch of international law.*

Natural law seems to be a very flexible and popular theory on which to ground the basis of international law. However, the concerns about classic natural law theories still exist in contemporary debates. Accordingly, it is argued by some that the content of natural law is a matter of opinion and the likelihood of specifying the content of natural law down to the last detail remains a seemingly Utopian ideal.³⁰⁰ The United States courts per Marshall CJ have held that, although natural law may be a basis for positive law and a source from which new laws may be derived, it is still possible for the positive law, as it emanates from the sovereign prerogatives of nations, to clash with natural law standards. These latter standards may be held out as a goal for reform and revision of the international legal order's norms but they cannot be considered to be part of international law *per se*.³⁰¹ However, the learned Chief Justice still accepted the foundational role played by natural law in the international legal order as his remark that: 'The law of nations is founded on the great and immutable principles of equity and natural justice,' indicates.³⁰² Criticism against natural law as it pertains to the international legal order includes that the natural law theory, with its insistence that moral truth is known to all through reason, 'cannot readily accommodate the fact of moral

²⁹⁸ Bull 1979:171.

²⁹⁹ Magenis 2002:413 and 417.

³⁰⁰ Strenski 2004:647.

³⁰¹ O'Brien 1978:108. See Marshall CJ's stance in *The Antelope* 10 Wheaton 66 US 1825 par. 18: although slavery might be held to be contrary to the law of nature, it was nonetheless practised by states – thus, clearly illustrating the different views held by the law of nature and positive law of nations.

³⁰² O'Brien 1978:108. See *The Venus* 8 Cranch 253 US 1814 par. 28.

disagreement, so prominent in the domain of international relations, or the clash of values and ways of life which it expresses'.³⁰³ However, it must be questioned whether there indeed exists moral disagreement regarding the protection of human dignity during armed conflicts. It is the proposition of this dissertation that there is not; that disagreements thereon emanate from other interests and, as such, must be undermined to improve the protection afforded to victims.

With specific reference to the interaction between IHL and natural law, Lafrance finds that the *foundations* of the international humanitarian legal order certainly are *universal because they emanate from natural law* and, accordingly, irrespective of whether reason, universal harmony or the divine origins of humankind are used for assertions, certain acts such as torture and killing arouse repulsion.³⁰⁴ The beginnings of various international legal principles, for example, peaceful dispute resolution, the right to self defence and the right to humanitarian intervention, have been attributed to natural law philosophers like Suarez, Gentili and Grotius. These writers, even though they were influenced by Aristotle and Thomas Aquinas 'laid out a framework that subjected the entire international order to the rule of law, such law reflecting natural law principles on reason and the common good'.³⁰⁵ Searl succinctly suggests that:

...the relevance and substantive merit of natural law principles in international law were never conclusively refuted; on the contrary, as some authors have already argued, *a return to the principles of natural law appears essential for the successful resolution of current international dilemmas, particularly those concerning international peace and security*.³⁰⁶

This quote neatly captures the objectives of the present study – natural law principles cannot be denied in IHL. By neglecting to accept these principles one undermines this branch of law seeing that its foundations are natural law infused and, with the advent of human rights and humanitarian concerns, natural law has recently been reintroduced through various instruments (like, for example, the *Universal Declaration of Human Rights*, the *Geneva Conventions* of 1949, the *Additional Protocols* of 1977 and the ICRC Study on CIHL).

Consequently, two main approaches to natural law may be identified, namely theocentric natural law, which takes recourse to higher, external normative standards, and anthropocentric natural law,

³⁰³ Bull 1979:181.

³⁰⁴ Sassoli and Bouvier 2006:87.

³⁰⁵ Searl 2001-2002:273. See section 2.2, pages 40-51 above, for a discussion on Suarez, Gentili and Grotius.

³⁰⁶ 2001-2002:274. See also Verdross and Koeck 1983:42 who confirm the necessity of invoking natural law to solve the problems of international law, like the maintenance of peace. Subsequently, the search for and reliance on norms and principles of natural law, to be applied *de lege ferenda*, is upheld as of indisputable importance.

which focuses on man and his inherent nature.³⁰⁷

Theocentric natural law presupposes the existence of a Divine authority which is also the source for every normative standard that exists and influences individual and collective actions. This is an unwritten law, found in the conscience of man and based upon reason. This perspective views natural law as certain, unchangeable and everlasting. Mankind is viewed as a community built on the value of equality. Since natural law is valid everywhere and justice and morality underpin this system, the belief is held that inviolable human rights exist which must be protected by all communities. Theocentric natural law is viewed as a higher law, superseding human legislation from a particular society, custom and laws common to various people and, thus, it claims obedience from humans. The fundamental maxim of the theocentric perspective on natural law is that good must be done and evil avoided, thus, in the process giving to each other their just due.³⁰⁸

With regard to IHL, theocentric natural law is relevant both with regard to the *ius ad bellum* and the *ius in bello*. With regard to *ius ad bellum*, theocentric natural law maintains a cosmopolitan perspective emphasising the common good of all people. Thus, the aim of any armed hostilities must be to attain peace that is also aimed at re-establishing friendship, harmony and cooperation between the former combatants and not just to ensure a just and tranquil order. The theocentric approach emphasised that love of one's fellow man, mercy and charity should be considered when considering whether to resort to the use of armed force or not.³⁰⁹

With regard to *ius in bello*, the proponents of theocentric natural law maintain that the intention needed when employing force must be based on *compassion, mercy, charity and love* for one's fellow man – even if that man is your enemy – just as one would hope for those same attributes to be shown to one's own combatants when the enemy approaches. These qualities will also serve as a limiting constraint on the manner in which armed conflict is conducted. The theocentric natural law proponents already made a clear distinction between combatants and civilians as the latter could not be attacked in hostilities while the former could. Also the idea of military necessity came under scrutiny and, although it was accepted that some collateral damage was inevitable, it was advocated that the collateral damage should be minimised as far as possible. Evidently, '[b]y establishing absolute, permanent, and universal principles of justice and morality, theocentric natural law

³⁰⁷ See, for example, O'Brien 1978:105 and Woodcock 2006:255.

³⁰⁸ Hensel 2008a:6-8.

³⁰⁹ Hensel 2008a:10-12.

provides an ultimate, authoritative standard for determining right and wrong'.³¹⁰

From the aforementioned it is evident that values and principles like mercy, charity, compassion and love for one's fellow man should form the basis of both the *ius ad bellum* and the *ius in bello* according to theocentric natural law theory. Hence, non-legal, moral criteria are brought to bear on both the reasons to go to war and on the actions permissible in war by this natural law approach. Therefore, the acceptance of a higher, normative standard in IHL, as proposed by the present study, is supported by a theocentric approach.

On the contrary, anthropocentric natural law maintains that man can deduce law, to his own advantage, through rational, systematic analysis and, therefore, that man is the measure of all things. Right and wrong, just and unjust are determined subjectively by the anthropocentric natural law proponents, in contrast to the use of objective, normative standards and absolute values used by theocentric natural law adherents. It was these anthropocentric natural law thinkers who devised the state of nature as their starting point. In this state of nature, humans live without any governing authority, laws or regulations, and they are free to pursue their own interests. *Natural law, derived through reason, regulates the conduct of those individuals subject to this state of nature.* It was acknowledged that the unbridled pursuance of each person's own individual interest eventually hinders the attainment thereof as individuals' claims will come into competition with each other. Now it is granted that some form of restraint is necessary. Accordingly, a community will be created which can ensure a context in which individuals may still strive to attain their pursuits, but now tempered by the constraints of the society which promotes peace and harmony.³¹¹ These views of anthropocentric natural law can be extrapolated to the international legal arena. The notion that the *Law of Nature* binds states, just as it binds individuals, ensures a foundational basis for the international legal order based on the social contractarian school of thought. The implications are that all commonwealths exist in this state of nature and, accordingly, can only act legitimately *inter se* if they act in conformity with the *Law of Nature*. The “rightness” or “wrongness” of a state's decision to engage in a war is determined in accordance with the Law of Nature.³¹²

It seems clear that anthropocentric natural law accepts that states exist in a state of nature and are bound by *natural law*. This, of course, is also the proposition moved for in the present study.

³¹⁰ Hensel 2008a:14-16.

³¹¹ Hensel 2008b:31 and 54. Likewise see Hensel, *ibid* at 29-30 and 45, Ward 2006:692-693 and Cresswell 2004:632. See also generally the classical writers considered in section 2.2 above.

³¹² Cresswell 2004:633-635.

Anthropocentric natural law deems states to be the essential role players in the international arena, but this seems to be in the process of changing in the contemporary international order. Furthermore, by focusing on state interests as an essential motivating factor behind state conduct, the anthropocentric natural law adherents seem to offer a glimpse of how state sovereignty has come to be idolised in the international community and, subsequently, how this has influenced international politics, which are also seen from their writings to influence international law.

Evidently, legal positivism, natural law and the historical tradition have all influenced the development of international law and, more specifically, IHL. The present study has also bolstered its approach by drawing from these three levels when considering IHL, thus the influence of natural law on the basis of IHL and its interaction with customary law is indicated; the spectre of written, positivist instruments like treaties and the ICRC Study on CIHL also pervades the present work and, finally, the historical thought of eminent publicists on and factual development by ancient societies of IHL was scrutinised in the vein of the historical tradition.

IHL, as was indicated in this and the previous section, has its origins in natural law. Furthermore, both the theocentric and the anthropocentric branches of natural law have had an influence on this branch of law. However, like all things legal, there has been an unending and inevitable shift from a natural law dominant IHL to a legal positivist IHL. Subsequently, this law was reduced to codifications and, in fact, a high premium was placed thereon. Thrown into the mix is the historical tradition of legal theory with its focus on the continuity of thought in a particular society that is particularly evident from the customs of such a society. The importance of custom for the historical school is thus clear. It is submitted that for the genuine, lasting improvement of the protections emanating from IHL it is imperative to go back to the origins of this branch of law and re-consider the foundations thereof. In other words, the legal positivist approach and the historical school of jurisprudence have contributed significantly to the development of IHL (the first through, for example, giving legal certainty and the latter through, for example, giving consistency to this branch of law), but IHL was not based on them. Although well meant, it seems as if the contemporary international society has become entangled in these latter traditions while trying to improve IHL. Indeed, codifications are clearly in vogue as is apparent even from the ICRC Study on CIHL where unwritten CIHL has been reduced to writing for legal certainty. Although codified, written sources have many advantages and are to be welcomed, certain significant disadvantages remain if these sources neglect to return to the *fons et origo* of IHL – i.e. natural law. It is submitted that only in returning to the *bona fide* basis of IHL – natural law – can this important

branch of international law be enhanced to better address future concerns.

It remains to consider the interaction between IHL and *morality*. With the emphasis on natural law, it is necessary to consider the influence of morality on IHL. This is due to the inevitable overlapping of natural law with morality.

One interpretation of the notion of morality entails particular social forms and conduct. This type of morality manifests in limitations on and requirements of the conduct of a specific group of people, thus allowing or preventing certain forms of conduct. In this form of limitations and requirements, where morality is used by individuals within the group to compliment, criticise or blame behaviour of others, it is deemed a necessity for the education of one's own and other people's children and the belief is held that people should conform to these particular limitations and requirements.³¹³ With regard to this understanding of morality, Narveson states that:

Understood in this way, a society's morality is somewhat like its body of law. Law is *enforced* by persons specifically designated to do that; morality, on the other hand, is not so much enforced as *reinforced*, not just by a few people – the police and the law courts – but by *everyone*. Everyone appraises conduct as right or wrong, good or bad, fair or unfair, and so on. In so doing, we actually participate in the construction and maintenance of our culture's morality. If people cease to care about something, cease to direct critical attention to it, then it drops from their list of moral concerns.³¹⁴

It is submitted that morality plays a significant role in international law and, especially, IHL. It is apparent that the entire community of states scrutinises the actions conducted on the international arena and labels them as good, bad, right or wrong. Public condemnation, as was stated above,³¹⁵ is indeed the essential sanction in the international community and states strive to maintain a good reputation as this is crucial to their survival in the interconnected and interdependent international legal order. It is further submitted, that the contemporary pre-occupation with the individual and natural rights has caused an intensification with regard to the vigour with which states scrutinise the actions of others. Accordingly, the greater the focus on human rights, humanity and humanitarian concerns, the more important these factors become for the 'list' of moral concerns in the international legal order. Consequently, these concerns would be reinforced more vigorously as would otherwise have been the case.

³¹³ Narveson 1993:124.

³¹⁴ 1993:124. Nonetheless, Oppenheim 1937:7-8 distinguishes the rules of morality from legal rules through the former's sole application to a person's conscience and enforcement through internal power while the latter also applies to the conscience, but needs an external power to be enforced.

³¹⁵ See section 2.3, page 73 above.

Due to the fact that people's views may develop and change over time as regards which forms of conduct they consider blameworthy or praiseworthy, morality of a specific society is not static or rigid. This would lead society to embrace values which seem to best reflect current thinking on various forms of conduct. It is submitted that since the international community has commenced with the establishment of institutional structures to further the humanitarian endeavour, it seems likely that concerns pertaining to humanity and human dignity are here to stay for a significant period of time. The idea of self-interest is important to morality, since we can only appeal to individual reason when we appeal to morals. Something inside people makes it reasonable to expect that they would do right. However, only their own interest will guide people, in other words those things which they value. Morality, in order to be effective, must seem to contribute in some manner to these valued interests. Armed hostilities perpetuate violence. Although the hostilities might be necessary sometimes, morally speaking, violence is objectionable – violence is bad/evil since people find it undesirable as it prevents them from doing what they want. However, something which is deemed bad is not necessarily wrong. Bad and good are relative, but right and wrong are not. To indicate that something is wrong, it must be opposed to the interests of the broader community.³¹⁶ Thus, for example, it is submitted that killing innocent children in armed hostilities is wrong. There is no room for argument. Hence, if such rules can be identified which are uncontroversially accepted, it would greatly further respect and, potentially, success for IHL.

With regard to the moral consequences of actions in the international legal arena, it has been suggested that states, unlike individuals, do not enjoy the luxury to consider the moral consequences of their actions. Thus, the state has to detach from morality and pursue its national interest unemotionally, rationally through the gaining of power – that is control over others.³¹⁷ Nonetheless, it is submitted that with the current trend in the international arena to promote individual interests and rights, humanitarian concerns, to establish tribunals for the adjudication of war crimes, the establishment of international organisations, the creation of treaties pertaining to international human rights and IHL and the ICRC's Study on CIHL (not forgetting the focus placed by the eminent publicists on considerations of humanity as was indicated above³¹⁸), it seems that the international legal order does aim to promote moral concerns which are held by the international community as a whole. It seems evident that a concerted, unified attempt has been launched to further certain core values. As such, it is submitted that morality does play a role in the

³¹⁶ Narveson 1993:124, 126 and 131.

³¹⁷ Gunning 1991:216.

³¹⁸ See section 2.2, pages 36-64 above.

international legal order and, especially, in the branches of international human rights and IHL. In fact, the argument is made that natural law (which, of course, includes morality) constitutes the historical and essential basis of IHL and, indeed, postulates certain principles and rules which inform and permeate CIHL and treaty rules as they develop. Furthermore, it must be emphasised that some principles constitute a direct source of IHL.

Consequently, it remains to consider the principle of humanity directly, which it has been argued, embodies the central, core principle on which IHL was established, which influenced its development in the field and theory and which reflects the objectives and aspirations of this very important branch of law. Also, in light of the concerns which were elucidated in the present section, pertaining to the implementation of natural law principles and the contemporary emphasis on certain, written, enforceable legal instruments, the present consideration will also include a scrutiny into two of the three methods through which humanity might be directly invoked in IHL, namely treaty law (considering the Martens clause) and other, higher principles in international law (including *ius cogens* and obligations *erga omnes*). The third instrument through which considerations of humanity might be furthered, CIHL, will be considered in the following chapters as it was the initial conventional source of substance for IHL that was therefore directly informed and shaped by these natural law virtues.

2.4.1 Humanity as substantive and essential principle of IHL

The natural law basis of IHL was established in the previous section. However, although natural law constitutes the basis of IHL, the concrete manifested principles of IHL must still be considered. Accordingly, throughout the present chapter the importance of *humanity* as essential natural law principle and objective of IHL has been emphasised. It was indicated that the initial rudimentary (customary) rules of IHL were influenced by this and other natural law principles. Even the treaty regime pertaining to IHL was seen to be influenced by the desire to protect humanity and human dignity. Evidently, principles are indispensable for IHL since they embody both the *fons et origo* and aspirations of this branch of law. It is furthermore submitted that, because they are part of the law, these principles ought to be invoked directly in international legal disputes *à la* Ronald Dworkin.³¹⁹

³¹⁹ Dworkin 1977:22, 26, 40 and 44.

However, because the content of these natural law norms is difficult to ascertain (indeed, the previous section reflected the manipulable nature of natural law as one of its most visible concerns³²⁰), the international community (which, as was indicated above, desire the law – although it may embody normative ideals – to be posited in consensual, clear and unambiguous instruments) is loath to accept and invoke them. Nonetheless, it is submitted that precisely because of their importance, these natural law principles must be vigorously investigated. In the process, CIL, CIHL and treaty law will be strengthened as these principles influenced the later sources of law. However, a mere investigation into the substantive meaning of a natural law principle would still leave open the (positivist) concern as to how they might be relied upon *de facto* in the international legal system. The investigation in the present section will attempt to propose some answers to these problems.

Hence, this section may broadly be divided into two components, which are directed to counter the (positivist) criticisms that have been levelled against natural law virtues as was seen in the previous section, namely (i) an investigation into the *substantive content of humanity* as central principle of IHL and (ii) *possible methods* through which such a principle might be invoked in the international legal order (where positivism reigns supreme in relation to formal sources of law).

Therefore, the present chapter will investigate the Martens clause, as a treaty provision which embodies humanity, and other principles that have emerged from international jurisprudence, and that might be conveniently termed 'conceptual principles', which could arguably embody and further humanity as substantive principle. These conceptual principles include norms of *ius cogens* and obligations *erga omnes*, which are not substantive principles in the vein of humanity, but which express particular requirements with which any substantive norm, like humanity, must comply to be accorded a higher normative status in international law. The acceptance of these norms seemingly argues for a hierarchical view of international law, where some principles and rules cannot be derogated from. Naturally, if rules of IHL fall within this category, it would greatly strengthen them and, accordingly, this section will briefly consider these norms and whether certain IHL principles have been subsumed by them. It may be noted that, of course, the third possibility to further principles through another legal source is by considering their present interaction with the initial source of international law to embody them, namely CIL and CIHL. This interaction will be

³²⁰ See section 2.4, pages 80-81 and 84-85 above.

investigated in Chapters 3 and 4, but, in essence, *the interaction between principles and CIL (and CIHL) remains the golden thread throughout the present discourse as well since, besides being the original source to embody principles, the Martens clause and the conceptual principles have been recognised by some to be subsumed by CIL. It is submitted that the interconnectedness of these legal rules is very important when considering the ICRC Study in Chapter 4.*

Lastly, the importance of the principles in IHL is strengthened when the present study's proposition is also taken into account, namely that principles constitute an *independent* source of IHL. Subsequently, the principles of IHL postulated by Jean Pictet in 1985 will also be considered in this chapter against the background of the ICRC Study to establish whether some of the principles of 1985 have become accepted as rules of CIHL in 2005. It will also become apparent from Chapter 3, that principles are important since, besides providing the original natural law foundation of IHL, they may also be potentially relevant in the process of elucidating rules of CIHL in that they may supplement the traditional components of *usus* and *opinio iuris*.³²¹

The prominence and importance of *humanity* as foundational principle of IHL has already been stated. Thus, it was indicated that it were considerations of humanity, including the prevention of unnecessary suffering and damage, which substantially led ancient societies to formulate the first (customary) rules applicable in wartime. Why else would these societies have accepted rules which also restricted their individual actions? Hence, CIHL was and is significantly informed by humanity. Furthermore, the principle of humanity permeated and informed the writings of many of the most influential publicists on IHL. Since both those original customary rules and these writings of the eminent publicists have played an important role in the formulation of modern treaty law, principles – and, of course, the most prominent being *humanity* – have clearly influenced conventional law as well. The significance of humanity as principle of IHL is therefore evident. However, although the principle of humanity is important, it has been argued that '[a]t present, the meaning of humanity is ambiguous. It is currently perceived as little more than a source of international law with tenuous links to natural law. This ambiguity has led to a failure to recognise humanity as a continuing and powerful influence on international law and as the only valid objective of that law. It is therefore denied a place in legal dialogue'.³²² This section will therefore first inquire into the substantive content of *humanity* as a value used in international (humanitarian)

³²¹ See section 3 of Chapter 3, pages 186-197 below.

³²² Coupland 2001:988. See also Wortel 2009:800 who opines that humanity lacks a certain definition and ostensibly is an 'emotional impulse or a virtue'.

law and, subsequently, into how the Martens clause – a legal construct which *inter alia* embodies the concept of *humanity* – and norms of *ius cogens* and/or obligations *erga omnes* might influence the implementation thereof.³²³

The history and contemporary world of mankind has and is witnessing much suffering. Humanitarian consideration drives the limiting and prevention of suffering of every man, woman and child, seeing that human dignity is irreducible. Humanitarian motivation is not proportional to the amount of suffering or number of victims – one person who suffers is already one too many.³²⁴ *Tutti fratelli* – all are brothers! – was the sentiment of the women of Castiglione, who helped Henry Dunant take care of the wounded after the Battle of Solferino on 24 June 1859. This cry was spread worldwide by Dunant and it will be repeated continuously regardless of boundaries while, simultaneously, transcending hatred.³²⁵ Another humanitarian sentiment emanates from before the battle of Solferino, when Marshal Regnaud de Saint-Jean d'Angely spoke to the Imperial Guard, according to Henry Dunant, thus:

Soldiers of the Guard,...you will give the army an example of fearlessness in danger, of order and

³²³ Reddy J. A. 2006 *The Role of Morality in International Law: Pursuing Nuclear-Disarmament* (<http://www.wmgd.net/symposium/2006/report/jadithyareddy.html> accessed on 30 January 2010) states that: '...there are moral standards implicit in international law that need to be used and emphasized with greater strength. "Humanity" and not just "legality" should be the touchstone to decide the usage of nuclear weapons as well as all other means and methods of warfare. One might be tempted to dismiss this possibility, either because terms like "humanity" lack legal value or because they are too vague. As regards the issue of legal sanction for moral standards, it is not difficult to find it in international treaties or cases. The famous "Martens Clause" that is included in all Conventions and treaties related to armed-conflict converts into a legal yardstick the "principles of humanity" and "dictates of public conscience". It is now universally accepted that the mere absence of law on a particular point cannot be used to perpetrate acts during war that are in violation of "principles of humanity" and "dictates of public conscience" ...With regard to the vagueness of moral standards, in [the quoted author's] humble opinion there is no need for them to be concrete or specific. After all, their purpose is to deal with situations that have not been specifically addressed or foreseen before. Therefore the exact content of these terms cannot be fixed independent of the circumstances in which they need to be applied'. It is submitted, that *this quote again re-emphasises the existence of moral principles in international (humanitarian) law and indicates the importance of using humanity as substantive criterion for the determination of whether a particular method of warfare should be acceptable or not.* Moreover, the vagueness of humanity as substantive criterion is deemed to be an advantage due to the additional flexibility which it confers on this principle when confronted with new issues. This argument counters the notion of Pustogarov 1999:133 that when the principle of 'humanity' is explicitly expressed as a treaty norm it still remains vague and indefinite. The quote also indicates the close nexus between humanity and the Martens clause on which will be elaborated below in section 2.4.1.1, pages 102-122.

³²⁴ Blondel 1989:508. Ibid at 514, Blondel continues that: 'The universality of humanitarian work, which transcends national considerations to focus on the human condition rather than human nature, reflects [sic] the universality of suffering. The notion of humanity is inseparable from those of unity, universality and solidarity (from the Latin word *solidus*, meaning solid, whole). In western cultures, the concept of "humanitas" goes back to the Greek sophists who believed that the use of reason was mankind's distinguishing feature. This belief was adopted by the Roman stoics, particularly Cicero, who contrasted *homo romanus* with *homo humanus*, the cultured and moral human being. For Cicero, the contrast was no longer between Romans and Barbarians, but between humanity and inhumanity'.

³²⁵ Dunant 1986:72 and Pictet 1979:71 and at http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/fundamental-principles-commentary-010179?OpenDocument&style=Custo_Final.3&View=defaultBody7 accessed on 22 February 2010.

discipline on the march, of dignity and restraint in the country in which you are engaged. The memory of your own families will *make you considerate of the people of the country and will keep alive your respect for property*, and you may be sure that victory awaits you...³²⁶

That moral and humane considerations are inherently part of this branch of international law is furthermore exemplified by Napoleon's words:

My great maxim has always been, in politics and war alike, that every injury done to the enemy, even though permitted by the rules [of customary international law], is excusable only so far as it is absolutely necessary; everything beyond that is criminal.³²⁷

Pictet comments that confusion sometimes arises between the words human and humanitarian, humanism and humanitarianism. These abstract expressions, says Pictet, all derive from the same origin – the word ‘man’. Regarding ‘human’ and ‘humanitarian’, Pictet explains that by ‘human’ is meant ‘all that concerns man’; however, for purposes of IHL, this concept describes a man who is good to his fellow beings. ‘Humanitarian’ characterises any action beneficent to man.³²⁸ As explained by Blondel:

Without actually defining the word "humanitarian", IHL, like other branches of law, makes clear its aims, which are to ensure respect for human life and to promote health and dignity for all. It is concerned with men and women for their own sake, setting aside weapons, uniforms and ideologies, men and women who could very well be ourselves. Thus whatever we would wish for ourselves we should also wish for others; no matter how great the gulf which divides us from them, we all belong to the same family of man.³²⁹

³²⁶ 1986:52-53. [Emphasis added.]

³²⁷ Best 1983:49 quotes Napoleon. Likewise, Hall 1924:83 accepts that, since states are composed of moral beings: 'It is agreed that the use of wanton and gratuitous violence is not consistent with the character of a moral being. When violence is permitted at all, the amount which is permissible is that which is necessary to attain the object proposed'. This view leads Hall, *ibid* at 84, to define the law of war as the 'customary rules by which the maximum of violence which can be regarded as necessary at a given time is determined'. Already in 1924, it was noted that sentiments of 'humane feeling' were influencing this branch of law.

³²⁸ 1979:20 and at http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/fundamental-principles-commentary-010179?OpenDocument&style=Custo_Final.3&View=defaultBody3 accessed on 22 February 2010. Blondel 1989:509, referring to Pictet 1952:111, states regarding the notion of 'humanitarian' that: 'Although the word "humanitarian" rarely appears in the 1949 Geneva Conventions and their 1977 Additional Protocols, its meaning in this context may be inferred from a careful reading of those instruments. Some articles are particularly relevant. Article 3 common to the four Conventions provides that persons taking no active part in the hostilities shall be "treated humanely". The *Commentary* on this article correctly points out that it would be dangerous and well-nigh impossible to give an exhaustive definition of humane treatment. The expression must be understood in the spirit in which the Conventions were written, that is, as stated in the *Commentary* on Article 9, one that values "human life, and peace between man and man". Likewise [regarding Pictet 1952:108], Blondel, *ibid* at 509, submits that: 'Elsewhere, in the same spirit, the *Commentary* defines a humanitarian institution as one which focuses on "the condition of man, considered solely as a human being without regard to the value which he represents as a military, political, professional or other unit"'.

³²⁹ 1989:512. In this regard the preamble to *Additional Protocol II* of 1977 may be noted: '...the humanitarian principles enshrined in Article 3 common to the Geneva Conventions of 12 August 1949, constitute the foundation of respect for the *human person* in cases of armed conflict not of an international character..'. [Emphasis added.] Evans 2005:5 indicates that non-discrimination is becoming increasingly important for contemporary IHL.

On the other hand, regarding 'humanity' and 'humanitarianism', Pictet explains the following: By 'humanity' is meant a 'sentiment of active goodwill towards mankind', while 'humanitarianism' aims at the 'happiness of the human species' – it is deemed to be 'an attitude of humanity towards mankind, on a basis of universality'.³³⁰ (In passing it may be noted that this obviously has natural law implications):

Humanitarianism is not a religion in opposition to other religions, a moral philosophy opposed to other moral philosophies. It does however coincide with the precepts of many religions and moral codes. It is one of the rare meeting places where people of all beliefs can come together and grasp one another's hands, without betraying what is most intimate and sacred to each of them.³³¹

It is submitted that this quote expresses and explains the ratio of the whole of IHL, its principles and rules. It also indicates that the humanitarian essence of IHL constitutes an area of common concern for all people overcoming cultural and religious boundaries and prejudice. Therefore, humanity comprises an essential principle of IHL, which demands that *man (humankind) shall be treated humanely under all circumstances*, that 'everyone must respect the human person, his life, liberty and happiness – in other words, everything that constitutes his existence'.³³² 'Humanity,' which has been described as a value, derives from '...natural law and from shared moral commitments, and alternatively from the notion of "humanity" as a collective, and from dimensions of "humane" behaviour'.³³³ The notion of 'humanity' is inclusive and it also supports the idea of humaneness. It has been described as emanating from natural law rather than positive law.³³⁴ Furthermore, in the *Dictionary of the International Law of Armed Conflict* the term 'humanity' is defined as:

³³⁰ 1979:20-21 and at http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/fundamental-principles-commentary-010179?OpenDocument&style=Custo_Final.3&View=defaultBody3 accessed on 22 February 2010. According to Pictet 1979:22, the principle of humanity was formulated for the first time in 1955, as follows: 'The Red Cross fights against suffering and death. It demands that man shall be treated humanely under all circumstances'. Pictet, *ibid* at 34, also states that: 'Humanitarianism works toward the establishment of a social order which should be as advantageous as possible for the largest possible number of people. It takes man both as its objective and as its means, without deifying man'.

³³¹ Pictet 1979:34 and at http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/fundamental-principles-commentary-010179?OpenDocument&style=Custo_Final.3&View=defaultBody3 accessed on 22 February 2010.

³³² Pictet 1979:12, 22 and 26 as well as at http://www.icrc.org/web/eng/siteeng0.nsf/html/EA08067453343B76C1256D2600383BC4?OpenDocument&Style=Custo_Final.3&View=defaultBody2 and http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/fundamental-principles-commentary-010179?OpenDocument&style=Custo_Final.3&View=defaultBody3 accessed on 22 February 2010. Similarly, the principle of 'humanity' has been described as establishing the need for a compassionate approach to humankind during times of armed conflict. In relation to abortions performed during armed conflicts, this concept has been defined by De Freitas 2007:43 as: "Humanity" implies two important and closely related connotations, namely "kindness/compassion" and "mankind", both of which are applicable for IHL purposes. Humanity comprises an essential principle of IHL, and demands that *man (humankind) shall be treated humanely under all circumstances*, that everyone must respect the human person, his life, liberty and happiness – in other words, everything that constitutes his existence. On the other hand, humanity connotes that which has to do with mankind, implying such concepts such as "human being" and "life".

³³³ Teitel 2004:225 and 226.

³³⁴ Myburgh 2008:6-7.

One of the seven Fundamental Principles of the Red Cross and Red Crescent Movement. This principle is based on respect for the human being, is inseparable from the idea of peace, and sums up the Movement's ideal. The other Fundamental Principles therefore derive from it. Humanity means being sensible of and sharing the suffering of others, and preventing and alleviating it. Its purpose is to protect life against violence. It is the first step towards preventing and eliminating war, and an essential factor of true peace, which is attainable neither by domination nor by military superiority.³³⁵

Thus, while humanity may refer to human beings in a collective sense, it also connotes philanthropy and altruism. The laws of humanity and crimes against humanity are cited in international legal treaties with humanity cited as a source of international law. Humanity connotes *moral* force – relying on concepts such as 'humanity' and 'humanitarian' can be interpreted as taking the moral high ground.³³⁶

Pictet adds that the notion of *charity* is closely linked to that of humanity. He defines this notion as: 'Charity is an effort demanded of us, either inwardly or from the outside, which becomes a second nature, to relieve and put an end to the sufferings of others'. The call is for an altruistic love – love extending even to one's enemies. In this regard, Pictet states that pity is one of the driving forces of charity – 'It is a spontaneous movement, an instantaneous affective reaction to the suffering of others ... *It is also called compassion, that stirring of the soul which makes one responsive to the distress of others*, according to Larousse. Pity is like a forerunner of charity'.³³⁷

³³⁵ Verri 1992:58. The preamble of the *Statutes of the International Red Cross and Red Crescent Movement* lists as its first fundamental principle: '*Humanity* The International Red Cross and Red Crescent Movement, born of a desire to bring assistance without discrimination to the wounded on the battlefield, endeavours, in its international and national capacity, to prevent and alleviate human suffering wherever it may be found. Its purpose is to protect life and health and to ensure respect for the human being. It promotes mutual understanding, friendship, cooperation and lasting peace amongst all peoples'. [Emphasis added.] See also the discussion of the ICRC in section 2 of Chapter 4, pages 208-218 (and, in particular, pages 213-215).

³³⁶ Coupland 2001:969. Alternative definitions of 'humanity' are given by Coupland, *ibid* at 972, citing the Oxford English Dictionary 1989, 2nd ed, Oxford: Clarendon Press: 'One is "the human race; mankind; human beings collectively;" another is "the character or quality of being humane; behaviour or disposition towards others such as befits a human being"'. Coupland, *ibid* at 973, argues that both Pictet and the Red Cross Conference leading to the adoption of the Statute refer to the second meaning with a link established to the first one. Coupland, *ibid* at 986, states that these two views of humanity are co-dependent – the latter has developed as an essential aspect of the former.

³³⁷ 1979:21 and at http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/fundamental-principles-commentary-010179?OpenDocument&style=Custo_Final.3&View=defaultBody3 accessed on 22 February 2010. Pictet 1979:35 describes the interaction between justice and charity as: 'If we consider legal justice, we see at once that it differs profoundly from charity. It has been symbolized as a blindfolded woman holding scales. This symbol might also, of course, serve to represent charity, in one sense. Like justice, charity knows man only as a human being, and does not need to know his name. Like justice, charity holds the scales even between men. Like justice, charity gives for a valid reason. The analogy stops here however, for while justice rewards each person according to his rights, charity gives to each according to his suffering. To judge means to separate the good from the bad, the just from the unjust; to measure the degrees of individual responsibility. Charity on the other hand has nothing whatever to do with this kind of justice. It refuses to weigh the merits or faults of this or that individual. It goes much farther. Going beyond and above the opposition between good and evil, it attains, in full serenity, the level of wisdom. Then it becomes the very image of mercy, of goodness without limit, as exemplified by the expression of Lao Tse, *With a*

Pictet reflects the 'humanity' concepts of *compassion* and *humankind* in the fundamental precept of *whatsoever ye would that men should do to you, do ye even so to them* which leads to the attainment of preservation *via* mutual assistance. This represents a universal truth, for it is in accordance with human nature and the needs of society.³³⁸ As Pictet further indicates, this precept is advanced by many of the prominent religions of the world such as Buddhism, Christianity, Confucianism,

good man, I am good; with an evil man, I am also good'. See also Wortel 2009:786 and 800. The interconnectedness of IHL and charity is also evidenced by the fact that Francisco Suarez indeed wrote his treatise on war in Disputation XIII of *A Work on the Three Theological Virtues: Faith, Hope, and Charity* (1621) pertaining to charity itself.

³³⁸ 1979:33 and at http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/fundamental-principles-commentary-010179?OpenDocument&style=Custo_Final.3&View=defaultBody3 accessed on 22 February 2010. The principle of 'do unto others as you would have others do unto you' is found, for example, in the Bible in Matthew 7:12. Arguably this principle also reflects self-interest. Such a view necessarily leads to a consideration of the argument that *interests* provide the impetus for international concerns rather than *principles/values*. However, it is accepted that principles and values might overlap. See, for example, D'Aspremont 2007:7 and 15-17. Accordingly, *ibid* at 28-29, D'Aspremont succinctly formulated this argument regarding the principle of humanity, noting that the fact that: '...the moral principles "constitute the inspirational basis for rules of law" does not mean that States adopted these rules to promote any corresponding global values...In other words, global moral principles do not automatically constitute what prods international lawmakers to act when they adopt corresponding legal principles. In adopting rules that enshrine 'elementary considerations of humanity', as was indicated by the Court, States simply believe that promoting humanity is in the interest of all States as well as in the interest of all individuals whose well-being States promote...In particular, a consensus on the pursuit of the well-being of human beings cannot, as such, be considered a value. The well-being is intangible. It is a fundamentally contingent notion'. See likewise D'Aspremont, *ibid* at 29-30, regarding the interest basis of *ius cogens* norms.

It is submitted, however, that irrespective of whether arguments are made to base IHL on values such as humanity and dignity or whether IHL is based on interests, whether individual or collective, this branch of international law can be justified through both approaches. It is submitted that reliance on principles seems to be forward-looking and constitutive of aspirations of how future rules will be developed and/or interpreted. Relying on common or individual interests seems to entail a pragmatic, *ex post facto* approach, reliant on an antecedent interest and then developing and interpreting the law accordingly. Furthermore, as acknowledged, regardless of whether objective values or subjective interests are advocated, some overlapping might occur. In this regard, it is submitted that, both the interests and values in question remain external, non-legal phenomena with a natural law basis – they are derived through the use of right reason. Also, both components aim to further the betterment of mankind (whether individually or collectively). It is furthermore submitted that the reliance on mutability as the essential criterion to distinguish between values and interests seems (to the present author) unconvincing in the case of IHL as the protection of mankind against the horrors and suffering emanating from war seems to be an unchanging commitment. Labelling the protection of mankind against atrocities as a collective interest (rather than an objective, immutable value or standard) seems to reduce the question to semantics. Therefore, to summarise, the argument must be made that both approaches seem to advocate establishing international law (and, of course, IHL) on a non-legal, external basis. Also, it seems trifling, especially in IHL, to differentiate between *objective values* and *subjective interests* as both have similar aims and find similar application in practice. Lastly, it is submitted that, especially in IHL, aspirational, objective, unchanging values and standards must be attainable. Thus, due to the nature of war remaining the same from its inception, immutable goals in reaction thereto must be a reality. Hence, to put it succinctly, whether particular rules (like IHL), that have already emerged from early man's interaction with each other, are deemed to have been derived from pragmatic self-interest or from objective principles, makes no difference due to the fact that the interest to be protected, namely human dignity, has remained the same. The difference between an interest that has existed since time immemorial and an objective, unchangeable principle seems, to the present author at least, very little in terms of effect. Accordingly, the principle of 'do unto others as you would have them do unto you' is widely accepted, backed by history, has remained immutable, was not promulgated, exists *per se*, embodies an important moral concept and, naturally, postulates the highest norm against which any conduct/rules must be measured, therefore complying with all the traditional requirements of natural law. This argument attempts to indicate that *a principle could reflect self-interest without relinquishing its normative value*. See also the discussion of Pufendorf 1934:204-208.

Brahminism, Islam, Taoism and Judaism. Pictet opines that it also constitutes the golden rule of the positivists who are solely reliant on empirical observation and reason. Indeed, the advantage of cooperation and working together of men for the betterment of their lot seems self-evident, even in the absence of a transcendental concept to that effect.³³⁹

Pictet formulates the law of humanity in IHL as: 'Military necessity and the maintenance of public order must always be compatible with respect for the human person'. His formulation of the principle of humanitarian law indicates the notion that the claims of war are inferior to the claims of humanity: 'Belligerents shall not inflict harm on their adversaries out of proportion with the object of warfare, which is to destroy or weaken the military strength of the enemy'.³⁴⁰ The connection between IHL and humanity has been expressed thus: 'In essence, the law of armed conflict has been an attempt to find ways to make room for humanity even in the extreme case of war. Put another way, it is about the extent to which military necessity should give way to humanity and about striking the right balance between military and humanitarian concerns'.³⁴¹ This interaction has further been succinctly put: 'All the provisions of humanitarian law constitute no more than the affirmation, constantly renewed, that the victims of conflicts are first of all men and that nothing, not even war, can deprive them of the minimum things required by respect for the human person. This law demands that everyone shall be treated as a human being and not as an object, as an end in himself and not as a mere means to an end'.³⁴² Coupland proposes a definition of this concept

³³⁹ 1979:33 and at http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/fundamental-principles-commentary-010179?OpenDocument&style=Custo_Final.3&View=defaultBody3 accessed on 22 February 2010. Comparably, Evans 2005:6 opines that religious teachings could easily be used to establish notions of common humanity and to establish proper treatments to give to all people – even those who are not part of the particular religion. Hence, commands to treat all people respectfully abound from the fundamental texts of the three major monotheistic traditions of Judaism, Islam and Christianity. Accordingly, see Leviticus 19:17-18 and 34 as well as Matthew 5:43-44 in the Bible and the Qu'ran Suras 2 and 5. (For IHL rules from Islam in non-Qu'ranic materials, see Weeramantry's *The Revival of Customary International Humanitarian Law* in Maybee and Chakka 2006:37-38.) However, Evans, *ibid* at 8, admits that religious teachings and practices can also be detrimental to the notion of a common humanity as it can be a source of division between groups. Nonetheless, Evans, *ibid* at 13, suggests that religion may yet play a role to illustrate the 'cross-cultural relevance of the norms of international law and in convincing religious people that these norms are both acceptable and part of the [sic] their legal tradition, rather than an outside imposition'.

³⁴⁰ Pictet 1985:61-62. However, pragmatically, the full realisation of humanity in IHL is problematic as indicated by Evans 2005:12: 'At one level,...international humanitarian law is increasingly dependent on more humane and human rights based approaches to war. Yet, so long as the basic principles of international humanitarian law remain in place, full respect cannot be paid to the dignity and worth of the human person – even the civilian. The laws of war are just that – laws to regulate a state of conflict in which taking lives of combatants and the deprivation of freedom for prisoners of war are permitted. Even civilians, while they cannot be targeted, can be deprived of their lives, property, and freedom if this is necessary "collateral damage" from a proportionate and necessary military action'. It is submitted that this dichotomy is due to the inherent nature of armed conflicts and reality. Nonetheless, aspiring towards these objectives of humanity is an imperative in the process to ensure increased protection for those suffering as a result of conflict.

³⁴¹ Rogers 2008:195.

³⁴² Pictet 1979:26 and at <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/fundamental-principles-commentary->

'...namely that humanity arises from and signifies restraining the capacity for armed violence and limiting its effects on security and health. Humanity interpreted in these terms encompasses humanitarianism, morality, development, human rights and human security'.³⁴³ According to Rogers also, military necessity goes hand in hand with humanity as customary law accepts military necessity, that is, using force to conquer an enemy, but humanity acts as a countermeasure so that human suffering is not out of proportion to the damage inflicted nor force used without a purpose. Humanity is an important aspect to consider even in situations not directly treated by law (in this respect the Martens clause may be mentioned).³⁴⁴

Some understand the principles of humanity as a prohibition of such means and methods of warfare which are not needed for achieving the particular goal of the armed hostilities, especially the weakening of the enemy's military forces, and for gaining an indisputable military advantage. However, humanity as concept is not limited to the conduct of armed operations, since it also pertains to much broader aspects of human relations. Thus, humanity is found in the provisions of the *Geneva Conventions* of 1949 and the *Additional Protocols* of 1977 pertaining to 'humane treatment' of the wounded, sick and prisoners of war. 'Humane treatment' is the main concern and content of IHL.³⁴⁵ 'Humane treatment' has been held to constitute 'a minimum to be reserved for the individual to enable him to lead an acceptable existence in as normal a manner as possible'.³⁴⁶

Teitel states that the concept of 'humanity' is instrumental in reflecting contemporary political realities, that is the movement of an international community from a system based on the sovereignty of states to a global community where politics are fragmented, and the main concern is to ensure that a minimum standard of 'humanity' is maintained. 'Humanity' is sometimes defined by its breach. Accordingly, man should not act inhumanely towards his fellow man. It is apparent that this notion supplies a core line, in law and morals, and determines the parameters in which legitimate force may be exercised in the international legal order.³⁴⁷ The importance of 'humanity' as concept goes to an even more fundamental level than might be apparent at first glance. Accordingly, the concept of 'law of humanity' has served to distinguish between so-called 'civilized' and 'barbarian' nations as well as to justify various objectives in international affairs pertaining to,

010179?OpenDocument&style=Custo_Final.3&View=defaultBody3 accessed on 22 February 2010.

³⁴³ 2001:988.

³⁴⁴ 2008:195.

³⁴⁵ Pustogarov 1999:133.

³⁴⁶ Pictet 1979:27 and at http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/fundamental-principles-commentary-010179?OpenDocument&style=Custo_Final.3&View=defaultBody3 accessed on 22 February 2010.

³⁴⁷ Teitel 2004:225. Coupland 2001:984 states that 'humanity' places a limitation, to the greatest extent possible, on the effects of armed violence on people's health and security.

among others, slavery during the colonialising period, war and punishment. Indeed, it seems as though this essential concept of humanity suggested that international law actually existed. In a sense then, the international legal order was founded on the concept of 'humanity.' This notion led early theorists to determine that not all acts committed in war were acceptable through taking recourse to the restraints of natural law. Religious and moral convictions were believed to establish certain common values applicable to everyone even though these convictions were not codified or written. The current importance of 'humanity' has been seen in its ability to offer a normative limit. The extensive development of this concept indicates that there is a shift in current political sovereignty. The reliance on 'humanity' has been described as an 'attempt by the existing state-based international rights system to accommodate new political realities'.³⁴⁸

Furthermore, the value of 'humanity' has been employed to establish the 'universal' in human rights. However, the notions of what is universal and therefore applicable throughout the international legal order are most visible after armed conflict has occurred. In these circumstances, 'humanity' fulfils an important legitimation function as it establishes the borders of what conduct is inhumane and what justifies the selective use of force. In this regard, it has been submitted that the substantive provisions against 'crimes against humanity' as found in the *Charter of the International Military Tribunal* (used at Nuremberg) were an evident symbol of the universal nature of law. The far-reaching consequences of the jurisprudence after the war is evident in the basis of concepts like universal human dignity which are in turn at the heart of the international human rights regime.³⁴⁹

Teitel states that 'humanity' is also used as an instrument to ensure jurisdiction over a matter. This occurs due to the fact that traditional nationalism is being threatened in the contemporary international legal order. Accordingly, universal jurisdiction is assumed on the basis of 'humanity' in effect establishing a normative order resembling global legal sovereignty.³⁵⁰ It is submitted that this indicates the weight (*gravitas*) of this moral principle – it is used by the international community to ensure incontrovertible jurisdiction in cases.

Humanity, therefore, in the sense of altruistic compassion and love for others, constitutes the foundational element of IHL with its aims to alleviate the plight of war victims. Although criticised as a vague concept, humanity, as substantive legal criterion, is a flexible notion which introduces

³⁴⁸ Teitel 2004:225 and 227.

³⁴⁹ Teitel 2004:228.

³⁵⁰ 2004:231.

natural law concerns into the IHL debate. Furthermore, humanity reflects the sanction and acceptance of various religious and cultural traditions. Moreover, humanity does not only exist as a most compelling moral principle, but it has been explicitly accepted and postulated as a *legal* notion. Hence, the ICJ has accepted 'elementary considerations of humanity' as legal criterion.³⁵¹ Following suit, the ICTY also accepted 'elementary considerations of humanity' as legal criterion.³⁵² Furthermore, humanity has been sanctioned through treaty law in the important *Geneva Conventions* of 1949 in the so-called Martens clause. This clause limits the waging of war in light of the 'laws of humanity'. However, in positivist vein, the Martens clause has been criticised as being vague and open to various interpretations, although in natural law vein, it has simultaneously also been praised as an independent source of law and even as giving force to custom. The moral content inherent in this clause is apparent. The notion of 'humanity' at this stage was akin to the principle of proportionality, *id est* to limit the use of excessive violence during armed conflicts.³⁵³ Subsequently, the Martens clause will be considered in some detail as it has an important role to play in IHL as it exists as a nexus between the foundational principle of humanity and conventional treaty law.

2.4.1.1 Enforcing principles, with particular emphasis on humanity, through treaty law – a consideration of the Martens clause³⁵⁴

The Martens clause is an important, though problematic, inclusion in the debate surrounding 'humanity'. It was introduced by the Russian lawyer F. F. Martens into the 1899 *Convention on the Laws and Customs of War on Land* preamble and determined that:

...Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages

³⁵¹ See *Case concerning Military and Paramilitary activities in and against Nicaragua*, Judgment of 27 June 1986 (merits) par. 218, *Corfu Channel (merits)* ICJ Reports, Judgment of April 9th, 1949, 4 at 22 and *Advisory Opinion on Nuclear Weapons of 1996*, ICJ Reports 1996 par. 79.

³⁵² See, for example, *Prosecutor v Martić* No IT-95-11-R61 8 Mar 1996 at par. 13.

³⁵³ Teitel 2004:226.

³⁵⁴ Van Oppeln 2002:245 n. 55 states: 'In his report on minimum humanitarian standards submitted pursuant to Commission on Human Rights resolution 1997/21 of 5 January 1998, Kofi Annan concludes, on page 23 paragraph 85, that: '*Like common Article 3, the importance of the Martens clause should not be underestimated. It shows a concrete recognition and acceptance by States that rules of customary international law above and beyond existing treaty rules can apply to fighting inside countries.*' [Emphasis added.] See UN Doc. E/CN.4/1998/87 par. 85. See Coupland 2001:974-975 who interprets Ticehurst 1997:125-134 to find that: '...States' lawyers have had difficulty in applying belief in natural law to international humanitarian law because natural law lacks objectivity, but...the Martens Clause provides the objectivity, namely "dictates of public conscience".'

established between civilized nations, from the laws of humanity, and the requirements of the public conscience.

Meron believes that this clause has predecessors from antiquity stemming from *natural law* and *chivalry*.³⁵⁵ Pustogarov argues that the historical roots of this provision lead one back to the Brussels Conference of 1874. It was during this Conference, which Russia had convened, that a draft convention regarding the laws and customs of land warfare was put before the participants. The principle aim of this convention was to set up certain binding rules as to how warfare should be waged and to lessen the horrible effects of war, thus, indirectly seeking to protect the *principle of humanity* through regulation of the means and methods of warfare. The convention's initiator and author was the little known Russian author F. F. Martens. The convention which he put forward relied greatly upon the principles inserted in the *St. Petersburg Declaration* of 1868 and many generally accepted international customs. The overwhelming majority of the participants to the Conference, however, refused to accept this proposed convention. They were unwilling to accept that the waging of war could be limited by some international rules. The draft was however accepted in the form of the *Brussels Declaration* so as to render it without legal force.³⁵⁶

The first Peace Conference convened at The Hague some twenty-five years later. Again the author of the Conference was F. F. Martens, who proposed as one of the aspects on the programme, the acceptance of a convention on the laws and customs of land warfare. This was approved by the Conference and Martens was elected chairman of the commission that was charged to prepare the convention. Martens used the *Brussels Declaration* of 1874 as a draft. Now the question was whether this instrument should be accepted as an international convention or not. The *Declaration's* articles did not elicit grave objections, but problems started to occur as each article was scrutinised individually. During this discussion, the provisions regarding an army of occupation led to a serious problem when the Belgian delegate spoke against the provisions which gave rights and duties to occupying powers. Smaller nations also saw that these provisions favoured the larger nations at their expense. Martens knew that the decisive moment had come as

³⁵⁵ 2000b:79 n. 9 and 2006:18 n. 56 state: 'In 1643 the Articles and Ordinances of War for the Present Expedition of the Army of the Kingdom of Scotland concluded with an eloquent provision that established not only custom but also the law of nature as a residual source, and thus enhanced the principle of humanity, which is a part of the law of nature: "Matters, that are clear by the light and law of nature are presupposed; things unnecessary are passed over in silence; and other things may be judged by the common customs and constitutions of war; or may upon new emergents, be expressed afterward". See Francis Grose, *Military Antiquities* 127, 137 (1788), quoted in Theodor Meron, *War Crimes Law Comes Of Age* 10 (1998). This provision captures the spirit of the Martens clause'. See also Meron 1998:280-281.

³⁵⁶ Pustogarov 1999:125.

this turn of events could potentially disrupt the acceptance of the entire convention.³⁵⁷ The solution proposed by Martens, that caused the convention's unanimous acceptance without alteration of the initial articles, was to include in the convention's preamble a provision determining:

Until that time when it appears feasible to publish a more complete collection of the laws of war, the High Contracting Parties consider it appropriate to certify that in cases unforeseen by the resolutions they have approved, the population and the belligerents remain under the protection and the operation of the principles of international law, insofar as they follow from the customs established between civilized nations, from the laws of humanity and the dictates of the public conscience.³⁵⁸

Other subsequent Conventions have also included this clause and, hence, the 1907 *Hague Convention respecting the Laws and Customs of War on Land* preamble and all four of the *Geneva Conventions* of 1949 have subsumed the Martens clause.³⁵⁹ Subsequently, an adapted form of this clause was included in the *Additional Protocols* of 1977. Thus *Additional Protocol I* of 1977 contains this clause in article 1(2): 'In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from dictates of public conscience'. A part of this clause is also found in the preamble to *Additional Protocol II*: 'Recalling that, in cases not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates of the public conscience'. This is seen as a 'minimal form' of the Martens clause, with the emphasis on the 'principles of humanity' and the 'dictates of the public conscience'. Pustogarov, however, views this abridgment as a perversion of the Martens clause as it deduces the 'principles of humanity' from the humanitarian

³⁵⁷ Pustogarov 1999:125-126.

³⁵⁸ Pustogarov 1999:127.

³⁵⁹ Arts. 63/62/142/158 respectively of the four *Geneva Conventions* of 1949 determine: 'Each of the High Contracting Parties shall be at liberty to denounce the present Convention. The denunciation shall be notified in writing to the Swiss Federal Council, which shall transmit it to the Governments of all the High Contracting Parties. The denunciation shall take effect one year after the notification thereof has been made to the Swiss Federal Council. However, a denunciation of which notification has been made at a time when the denouncing Power is involved in a conflict shall not take effect until peace has been concluded, and until after operations connected with release and repatriation of the persons protected by the present Convention have been terminated. The denunciation shall have effect only in respect of the denouncing Power. It shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfill by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience'. The 1907 *Hague Convention respecting the Laws and Customs of War on Land* preamble continued with: '...Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience'. The preamble of the 1980 *Geneva Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons* which may be deemed to be excessively injurious or to have indiscriminate effects, also contains this clause, thus: '...in cases not covered by this Convention and its annexed Protocols or by other international agreements, the civilian population and the combatants shall at all times remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience..'

principles found in common article 3 of the four *Geneva Conventions* rather than from the generally recognised customs of civilized nations.³⁶⁰ Hayashi also states that *Protocol II* lacks the reference to 'principles of international law derived from established custom'. This occurred as: 'It was apparently felt that the regulation of non-international armed conflicts was too recent a matter for State practice to have sufficiently developed in this field'.³⁶¹ Likewise, the watered down version of the Martens clause in *Protocol I* has also come under fire from Meron who submits that:

The language of Protocol I, however, may have deprived the Martens clause of its intrinsic coherence and legal logic. By replacing “usages” with “established custom”, the Protocol conflates the emerging product (principles of international law) with one of its component factors (established custom) and raises questions about the function, role, and necessity of the uncodified principles of humanity and dictates of public conscience.³⁶²

However, it is respectfully argued in the present dissertation that principles preceded and informed customary rules and not vice versa. Hence, although it is acknowledged that principles frequently only become visible when posited in rules, it is argued that the natural law virtues provide the impetus for the formation of such customary rules.

It is clear from the different Conventions that the Martens clause has undergone some changes and even been slightly modified in certain cases. Meron states that the aim of the *Geneva Conventions* furnishes the reason for the different phrasing of the clause, namely that if Parties denounce the *Conventions* (mindful that the customary nature of these *Conventions* is basically uncontested) they would still be bound by the principles of the law of nations, as they result from the usages established among civilized peoples, by the laws of humanity and the dictates of the public conscience.³⁶³ In his commentaries on the *Geneva Conventions* of 1949, Pictet confirms this view that a state which denounces the *Geneva Conventions* will nonetheless be bound by the principles contained in those *Conventions* 'insofar as they are the expression of inalienable and universal rules of customary international law'. Pictet continues that irrespective of the vagueness and self-evident nature of this clause, it remains useful to reaffirm 'the value and permanence of the lofty principles underlying the Convention'. Furthermore, Pictet accepts that these principles have an independent existence from the *Conventions* and, subsequently, are not restricted to the areas covered by the *Conventions*.³⁶⁴ It is submitted that these views again reinforce the interconnectedness of principles

³⁶⁰ 1999:128.

³⁶¹ Hayashi 2008:144-145.

³⁶² 2000b:81. Similarly in Meron 2006:20.

³⁶³ 2000b:80 and 2006:19.

³⁶⁴ Pictet 1952:413, 1958:625, 1960b:648 and 1960a:282-283.

(and, especially, the central natural law virtue of humanity) and CIL even against the background of the favoured legal instrument of legal positivism – treaties. The developments of the clause in the different Conventions will consequently be briefly scrutinised.

From the *Hague Conventions* of 1899 and 1907 to the *Geneva Conventions* of 1949, it is clear that the term 'population' ('inhabitants' in the 1907 *Convention*) has been replaced by 'civilians' and the term 'belligerents' has been replaced by 'combatants'.³⁶⁵ 'Law of nations' replaced 'international law' and 'requirements' was replaced by 'dictates' from 1899 to 1907.³⁶⁶ The notion 'laws of humanity' is used in the *Conventions* of 1899, 1907 and the *Geneva Conventions* of 1949. The term 'principles of humanity' occur in the *Additional Protocols* of 1977. *Additional Protocol I* changes the Martens clause on one point, namely it omits the notion of the principles of international law emanating from 'civilized nations'. This has to do with the initial notion held that there existed uncivilized nations, which could not be held responsible for their actions under international law but which were nevertheless bound by natural law. However, with decolonisation, the principle of sovereign equality of all states and the notion of the universality of common international law, this distinction between civilized and uncivilized nations become irrelevant and outdated. This development is accordingly reflected in the *Additional Protocol I* of 1977. The remaining differences are due to substituting older, archaic words for modern legal terminology. It has been held that these differences of words did not change their essential meaning. In summarising the changes which have occurred in the Martens clause, it becomes apparent that neither its structure nor its content has materially changed. With the exception of the omission of the 'civilized nations' phrase, the remaining differences are related to modernising the clause's language in order that it conform to contemporary legal terminology.³⁶⁷

A very interesting point to note is where the Martens clause has been inserted in the relevant Conventions. With the exception of *Additional Protocol I* and the 1949 *Geneva Conventions*, where the clause enters the basic text, it has been found in the preamble to most international legal instruments pertaining to IHL.³⁶⁸ This leads to the interesting question of whether the Martens clause possesses a *normative character* or whether it *exposes a moral position*. Supporters of the latter notion adhere to the viewpoint that preambles only precede the norms of the instrument itself,

³⁶⁵ Pustogarov 1999:127 and Meron 2006:17.

³⁶⁶ Meron 2000b:79 and 2006:17.

³⁶⁷ Pustogarov 1999:127-129. See also Ticehurst 1997:129.

³⁶⁸ Kolb and Hyde 2008:63, Meron 2006:19 and Pustogarov 1999:129. See, for example, the preambles of *Additional Protocol II* of 1977; the 1907 *Hague Convention respecting the Laws and Customs of War on Land* and the 1980 *Geneva Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons*.

not establishing any norms themselves. On the other hand, the inclusion of the Martens clause in the text of certain Conventions (like the 1949 *Geneva Conventions*) gives it the force of a legal norm, but as IHL has universal and binding authority, this authority also applies to the Martens clause.³⁶⁹ Pustogarov relates the position and importance of the Martens clause thus:

As a whole the Martens clause is undoubtedly a unique phenomenon in international law: being initially one of the parts of the preamble to a convention, it is used most often as an independent provision; moreover, it is used in very varied situations – as part of the preamble to a convention, as norm of the Protocol, as a foundation for interpreting and grounding the Advisory Opinion of the International Court, not speaking about a subject for scholarly analysis.³⁷⁰

It is submitted that the positioning of the Martens clause echoes the dual significance of the natural law virtues, like humanity, for IHL. Accordingly, posited in the preamble, it embodies the aspirations and objectives of IHL, whereas inclusion thereof in the basic text of the treaty reflects its normative import.

Despite tentative beginnings, the Martens clause has come to embody a foundational idea of IHL as it contains the substantive principle of *humanity*, the importance of which has been emphasised in the previous sections. However, *quot homines tot sententiae*.³⁷¹ Accordingly, various writers have identified comparable or different uses and/or interpretations of this controversial clause. The present section will, therefore, endeavour to investigate some of these uses and interpretations which have been identified in international literature.

Unsurprisingly, the clause is used for various disputes other than combatant status in contemporary disputes.³⁷² This is evident from the fact that every codification contains *lacunae* and the Martens clause prevents the undermining of the customary law status of those aspects omitted.³⁷³ The clause was thus relied upon by the Nuremberg Military Tribunal. In the *Krupp* decision, the Tribunal declared:

The Preamble is much more than a pious declaration. It is a general clause, making the usages established among civilized nations, the laws of humanity and the dictates of public conscience into the legal

³⁶⁹ Pustogarov 1999:129-130.

³⁷⁰ 1999:130.

³⁷¹ As many persons, as many opinions. [Present author's translation.]

³⁷² Hayashi 2008:144 and Meron 2000b:79, 87 as well as 2006:18 and 27.

³⁷³ Meron 2000b:79-80 as well as 2006:18 and 27. Pustogarov 1999:134 also indicates this function of the Martens clause where the *Geneva Conventions* are silent on a particular problem. Gasser 1993:11 formulates it succinctly when he submits that the Martens clause is a “legal safety-net,” because the clause allows solutions based on basic humanitarian principles to be found when there are loopholes or *lacunae* in the existing positive law.

yardstick to be applied if and when the specific provisions of the Convention and the Regulations annexed to it do not cover specific cases occurring in warfare, or concomitant to warfare.³⁷⁴

As became evident from section 2.4 above (pages 75-91), in contrast with positive law, natural law is universally binding for both individuals and states. The Nuremberg tribunal relied exactly on these norms of natural law to hold the Nazi military command accountable for the atrocities conducted during the Second World War. *It confirmed the permanent significance and value of natural law as a fundamental basis of contemporary international law.* The Martens clause also has such abiding force as a connecting link between natural law and positive law.³⁷⁵

The Martens clause has not only been used in the Nuremberg Trials, but was also considered by the ICJ and other human rights bodies and stated in various IHL treaties regarding the means and methods of war. The clause – built from the sources of morality and law – was constructed initially as an additional or residual protection while the treaty law regarding IHL was being codified.³⁷⁶ A very possible reason for the popularity of the clause in international affairs, courts, tribunals and organisations may be found in its 'evasive yet appealing contents'. With regard to the spirit of the international humanitarian legal order, it seems apparent that the Martens clause finds application in both international and non-international armed conflicts. The legal value of the clause should then not be denied to any specific type of armed conflict.³⁷⁷

The importance of this clause is therefore confirmed by the fact that it brings the essential natural law virtue of IHL, namely the laws of humanity, to bear on both international and non-international armed conflicts.

However, a very important aspect regarding the historical origin of the Martens clause has been discussed by Cassese, namely that this celebrated clause was not proposed initially to further some or other humanitarian aim. Cassese submits that the clause was a way out of a diplomatic deadlock at the 1899 negotiations at The Hague between the smaller countries (led by Belgium) and the larger countries (which included Germany and Russia).³⁷⁸ Initially, the clause was solely directed at regulating the position of lawful combatants in occupied areas. It was with regard to the concern of

³⁷⁴ Case 58 1949 Law Reports of Trials of War Criminals Volume X at 133. Also cited *In re Krupp* 15 Ann. Dig. 620, 622 (U.S. Mil. Trib. 1948). Also quoted in Meron 2000b:80, 2006:19 and Kolb and Hyde 2008:63.

³⁷⁵ Pustogarov 1999:132.

³⁷⁶ Meron 2000b:78-79 and 2006:16-17.

³⁷⁷ Cassese 2000:188 and 209-210.

³⁷⁸ 2000:193 and 2001:122.

determining which persons, not part of the occupied country's armed forces, would be regarded as lawful combatants in the occupied area that the various countries dissented.³⁷⁹ Thus, if the history of the clause's origin is taken into account, it becomes apparent that the clause was a ploy to postpone the problem between the major powers and the lesser countries for a later discussion. The clause was accepted by the major powers as most of their needs were met, while the lesser countries accepted it to ensure that principles of international law or customary law existed to protect nationals of an occupied country who engaged with the occupying power in armed hostilities. However, Cassese states that Martens effectually promised the lesser countries half a loaf, while he in fact gave them pie in the sky.³⁸⁰

Is it possible, however, that Martens, in addition to creating a diplomatic ploy, also intended to create two new sources of law, namely the *law of humanity* and the *dictates of public conscience*? It has been submitted that by adopting a treaty provision to regulate matters that would otherwise have been regulated by customary law (influenced by humanity and dictates of public conscience), preference seems to have been afforded to a positivist approach. Cassese indicates that the action of Martens himself – a man not afraid to sing his own praises – never to claim praise for the clause, seems to indicate that his true reasons and motive for creating it were far from the lofty ideals currently attributed to it.³⁸¹ Should the clause, then, be discarded as a mere diplomatic gimmick without any legal value for the international humanitarian order? Cassese's succinct answer must be supported that:

It cannot be gainsaid that over the years the clause has had a great resonance in international relations. Clearly, in spite of its ambiguous wording and its undefinable purport, it has responded to a deeply felt and widespread demand in the international community: that the requirements of humanity and the pressure of public opinion be duly taken into account when regulating armed conflict.³⁸²

The next question which needs comment is whether the activity of the judiciaries, states and

³⁷⁹ Cassese 2000:193-194. The Belgian delegate was unhappy that, by accepting the parts of the *Brussels Declaration* relating to belligerent occupation, the lesser countries would be exposed to law changes, the requisitioning of property, raising of levies and the using of its civil servants by the occupying powers. Another aspect neglected by the *Brussels Declaration* relates to nationals not having protection when taking up arms against the occupiers. Inevitably this caused dissent and was what led to the adoption of the Martens clause. See also Meron 2006:18.

³⁸⁰ 2000:197-198.

³⁸¹ 2000:198-200. Martens apparently did not even deem the clause an exceptional contribution to the Conference. Furthermore, Cassese states that the clause was not popular in Martens' own lifetime. However, for the equation of the *principles of humanity* and the *dictates of public conscience* with the notions of *justice, equity and good conscience* in common law systems when statute law is lacking, see Verma's *Relevance of the Ratification of International Humanitarian Law Treaties by States* in Maybee and Chakka 2006:89.

³⁸² 2000:212 and 2001:122 deem the clause to have acquired a weight not intended by its creator. Meron 2006:24 concurs that public opinion has a role to play in contemporary international law.

legislators have led to the laws of humanity and the dictates of public conscience being elevated to independent sources of international law. In the cases citing the Martens clause three types of uses may be discerned according to Cassese, namely: the clause is used to confirm the interpretation of another international legal rule; the clause was used to move for an original formulation of existing rules of IHL through the paradigm of humanity; and the clause was used to dismiss contrary interpretations of IHL treaties. These types of uses of the clause seem to indicate a willingness to dress decisions in the humanitarian flavour of the clause, but not to create two substantive sources of law. Accordingly, the clause has rather been applied as a type of instruction as to the interpretation of international law or as an instrument through which to view the movement of contemporary IHL.³⁸³

In the *Kupreškić* case the ICTY held that:

More specifically, recourse might be had to the celebrated Martens Clause which, in the authoritative view of the International Court of Justice, has by now become part of customary international law. True, this Clause may not be taken to mean that the “principles of humanity” and the “dictates of public conscience” have been elevated to the rank of independent sources of international law, for this conclusion is belied by international practice. However, this Clause enjoins, as a minimum, reference to those principles and dictates any time a rule of international humanitarian law is not sufficiently rigorous or precise: in those instances the scope and purport of the rule must be defined with reference to those principles and dictates. In the case under discussion, this would entail that the prescriptions of Articles 57 and 58 (and of the corresponding customary rules) must be interpreted so as to construe as narrowly as possible the discretionary power to attack belligerents and, by the same token, so as to expand the protection accorded to civilians.³⁸⁴

This decision led Kolb and Hyde to state that the clause ensures that intended belligerent conduct should be in line with the principles of *humanity* and *compassion*. Thereby, they believe that a *moral* principle is established in the law. This clause may establish a threshold of humanitarian ideals that underlie IHL irrespective of changes that might occur with regard to the manner in which war is conducted especially due to technological advances.³⁸⁵

The importance of the Martens clause has been formulated as: 'International humanitarian law is described as a series of rules and principles to balance the two opposing interests, namely humanitarian concerns and military considerations. This balancing is often represented by the

³⁸³ Cassese 2000:202 and 208. Cassese gives as an example of the first type of case, *Klinge* Annual Digest and Reports of Public International Law Cases 1946 at 263, the second type may be found in K.W. Decision of 8 Feb 1950 as discussed in *30 Revue de droit pénal et de criminologie* (1949-1950): 562-568 and the third type may be seen in Colombia Constitutional Court case C-225/95 reported in Sassoli and Bouvier *How does Law protect in war?*

³⁸⁴ *The Prosecutor v Kupreškić et al.* Case No. IT-95-16-T, Judgment of 14 January 2000 par. 525.

³⁸⁵ Kolb and Hyde 2008:62-63.

Martens clause and military necessity, in both practical instruments and academic writings'.³⁸⁶

It has been submitted that the Martens clause concerns limitation and restraint and that its unique importance and value as a declaration of principle and consistent reference is due to its generality and *sui generis* nature.³⁸⁷ Pustogarov quotes Miyazaki as having submitted that the importance of the Martens clause will undoubtedly grow as the *law of humanity* develops and the world community is transformed into a *humane* community.³⁸⁸ The notion occurs that the Martens clause establishes protection through international law, as it is manifested in its principles, for the civilians and the enemy combatants in armed hostilities in any situation. This notion is incorrect according to Pustogarov because the clause evidently only points to those principles derived from the established customs of civilized nations, the laws of humanity and the dictates of public conscience and not to the principles of common international law. Indeed, in Pustogarov's view, this clause is part of CIL and not of positive law. Hence, its inclusion in the main text of *Additional Protocol I* enables one to appraise this clause as a norm *ius cogens* of IHL so that, where a positive norm does not exist, recourse must be had to the Martens clause.³⁸⁹

Some of the more controversial uses of the Martens clause can be elucidated. One such use pertains to the traditional two-element theory of CIL and how the Martens clause might affect it directly. As will be apparent from Chapter 3, the traditional theory requires evidence of state practice (*usus*) and *opinio iuris* before a rule can be classified as CIL. *Usus* entails sufficiently constant and widespread practice which conforms to the supposed rule. But, to identify rules of CIL with this requirement of *usus* can be a daunting task as state practice in non-international armed conflicts has only recently been accepted and, if state practice is construed to evidence actual compliance with a proposed rule of IHL, the notorious violations of IHL could be a significant hindrance to establish rules of CIL. The Martens clause has been called upon by courts against these concerns flowing from the doctrinal requirement of *usus* in the determination of CIHL.³⁹⁰

Another more controversial use of the Martens clause pertains to the role and place of general principles in the formal sources of international law. In *Protocol II's* exposition of the Martens

³⁸⁶ Hayashi 2008:135.

³⁸⁷ Best 1983:164.

³⁸⁸ Pustogarov 1999:130 quotes Miyazaki S. 1984. *The Martens Clause and International Humanitarian Law. Studies in Honour of J. Pictet*. Geneva-The Hague:333-444.

³⁸⁹ 1999:130-131. Also Verri 1992:69 submits and Sassoli and Bouvier 2006:139 concur, that this clause had indeed already achieved the status of being a customary norm and, accordingly, it was included in part or *in toto* in later instruments of international law. For norms of *ius cogens* see section 2.4.1.2, pages 122-140 below.

³⁹⁰ Hayashi 2008:145. See also the discussion on CIL in section 2 of Chapter 3, pages 160-186, below.

clause, the principles of humanity and dictates of public conscience are separated from custom. Hayashi states that the exposition of the *ICJ Statute* on the formal sources of international law does not exclude this view. General principles of law exist as a separate source of law apart from treaties and CIL. Although the classical interpretation of these principles has to do with principles found in municipal systems, a broader perspective entails that these general principles could include generic principles of law. It seems possible that there may be general principles which derive from neither custom nor those common rules of domestic legal systems. It seems as though courts invoke the Martens clause to address this kind of general principle.³⁹¹ It is submitted that these principles (which naturally include *humanity*) derive from *natural law* and, through the Martens clause, are applied by a conventional legal provision.

The Martens clause, therefore, constitutes an important link between natural law principles and the posited, conventional legal regime of the international legal order.

The interpretation of the Martens clause is problematic as there seems to be no universally accepted interpretation thereof.³⁹² The judicial content of the Martens clause may be reduced theoretically to four groups. Thus, in the narrowest sense the clause may be interpreted to serve as a mere reminder that CIL continues to be applied even after treaty norms have been accepted.³⁹³ In his dissenting opinion in the *Legality of the threat or use of nuclear weapons* case, however, Judge Shahabuddeen opines that the Martens clause does not merely serve to remind of the existence of other norms of international law, but that it has *normative value* in its own right and has the ability to function separately from other norms.³⁹⁴

³⁹¹ Hayashi 2008:145-146.

³⁹² Ticehurst 1997:126 and Cassese 2000:188 state that the interpretation of the clause is difficult, because it is so loosely worded. In this regard, compare the criticisms levelled against natural law, from which the Martens clause emanates, in section 2.4, pages 75-91, above.

³⁹³ Kolb and Hyde 2008:63, Meron 2000b:87, Pustogarov 1999:131 and Ticehurst 1997:126. Here the *Advisory Opinion on Nuclear Weapons of 1996, ICJ Reports 1996* paras 84 and 87 may be quoted where the ICJ stated that: 'In particular, the Court recalls that all States are bound by those rules in Additional Protocol 1 which, when adopted, were *merely the expression of the pre-existing customary law, such as the Martens Clause*, reaffirmed in the first article of Additional Protocol 1. The fact that certain types of weapons were not specifically dealt with by the 1974-1977 Conference does not permit the drawing of any legal conclusions relating to the substantive issues which the use of such weapons would raise'. [Emphasis added.] 'Finally, the Court points to the Martens Clause, whose continuing existence and applicability is not to be doubted, as an affirmation that the principles and rules of humanitarian law apply to nuclear weapons'. See also par. 78.

³⁹⁴ Ticehurst 1997:128. In his dissenting opinion, on page 405, Judge Shahabuddeen stated that: 'As is recognized in paragraphs 78 and 84 of the Court's Advisory Opinion, it is accepted that the Martens Clause is a rule of customary international law. That means that it has a normative character - that it lays down some norm of State conduct. It is difficult to see what norm of State conduct it lays down if all it does is to remind States of norms of conduct which exist wholly *dehors* the Clause'. As summarized by Ticehurst 1997:128: 'Judge Shahabuddeen stated that the principles of international law referred to in the Clause are derived from one or more of three different sources: usages established between civilized nations (referred to as "established custom" in Article 1[2] of Additional

A broader interpretation of the clause entails that generally international agreements are not exhaustive and with respect to IHL, the Martens clause excludes the principle that everything not prohibited is allowed.³⁹⁵ An even wider interpretation of the Martens clause indicates that actions performed during armed hostilities are not to be evaluated only in terms of treaties and customs but also from those principles upon which the Martens clause relied.³⁹⁶ The widest interpretation of the clause entails not binding its authority to the law of armed conflict, but considering it as intrinsically part of IHL. Those advocating this approach also envisage the role of the Martens clause growing in importance and even becoming a norm of common international law.³⁹⁷

What is problematic about the Martens clause is that it is 'very loosely worded and has consequently given rise to a multiplicity of often conflicting interpretations'. In addition, because of its 'evasive yet appealing contents', the clause has often been used and relied upon in international law. In the words of Cassese: '... the Martens Clause proclaimed for the first time that there may exist principles or rules of customary *international law* resulting not only from state

Protocol I), the laws of humanity (referred to as the "principles of humanity" in Article 1[2]) and the requirements of the public conscience (referred to as the "dictates of public conscience" in Article 1[2]). It appears that, when determining the full extent of the laws of armed conflict, the Martens Clause provides authority for looking beyond treaty law and custom to consider principles of humanity and the dictates of the public conscience'. On page 405-406 of his dissent Judge Shahabuddeen stated that: 'These statements [referring to the comments of the 1899 *Hague Convention Respecting the Laws and Customs of War on Land* in its preamble] support an impression that the Martens Clause was intended to fill gaps left by conventional international law and to do so in a practical way. How? The Martens Clause bears the marks of its period; it is not easy of interpretation. One acknowledges the distinction between usages and law. However, as the word "remain" shows, the provision implied that there were already in existence certain principles of the law of nations which operated to provide practical protection to "the inhabitants and the belligerents" in the event of protection not being available under conventional texts. In view of the implications of that word, the Clause could not be confined to principles of the law of nations waiting, uncertainly, to be born in future. The reference to the principles of the law of nations derived from the mentioned sources was descriptive of the character of existing principles of the law of nations and not merely a condition of the future emergence of such principles. It may be added that, in its 1977 formulation, the relevant phrase now reads, "derived from established custom, from the principles of humanity and from the dictates of public conscience". Since "established custom" alone would suffice to identify a rule of customary international law, a cumulative reading is not probable. It should follow that "the principles of international law" (the new wording) could also be sufficiently derived "from the principles of humanity and from the dictates of public conscience"; as mentioned above, those "principles of international law" could be regarded as including principles of international law already derived "from the principles of humanity and from the dictates of public conscience". *In effect, the Martens clause provided authority for treating the principles of humanity and the dictates of public conscience as principles of international law, leaving the precise content of the standard implied by these principles of international law to be ascertained in the light of changing conditions, inclusive of changes in the means and methods of warfare and the outlook and tolerance levels of the international community. The principles would remain constant, but their practical effect would vary from time to time: they could justify a method of warfare in one age and prohibit it in another*'. [Emphasis added.]

³⁹⁵ Meron 2000b:87 and 2006:27, Pustogarov 1999:131 and Ticehurst 1997:126.

³⁹⁶ Pustogarov 1999:131 and Ticehurst 1997:126. Thus, as Kolb and Hyde 2008:63 state, the clause may serve as the foundation for interpreting IHL through the paradigm of humanitarian ideals.

³⁹⁷ Pustogarov 1999:131.

practice, but also from the laws of humanity and the dictates of public conscience'.³⁹⁸ The three trends determined by Cassese regarding how the clause is interpreted in international jurisprudence include, firstly, that the clause functions only to interpret international principles and rules. This relates to the view mentioned above that not all conduct not specifically prohibited by treaty law or customary rule is by implication lawful. However, this view may also see the clause as an interpretative guideline in cases where uncertainty may arise regarding principles and rules of IHL so that the claims of humanity and the public conscience may be taken into consideration. The second interpretation relates to the impact the clause has on the sources of international law, broadening the traditional sources, as the arguments advocate, to include 'laws of humanity' and 'dictates of public conscience' as two independent sources of law (directly creating new norms). Another theory in this line of thought deems those 'principles' which states accept as being in conformity with humanity or the dictates of public conscience to be elevated to legal standards (indirect norm creation). This second view is deemed to be very radical. The third view deems the clause to contain ideas that have 'motivated and inspired the development of international humanitarian law'.³⁹⁹ In this regard notice might be taken of *Prosecutor v Martić* where the ICTY stated that:

Furthermore, the prohibition against attacking the civilian population as such, as well as individual civilians, and the general principle limiting the means and methods of warfare also derive from the "Martens Clause". This clause has been incorporated into basic humanitarian instruments and states that "in cases not covered by (the relevant instruments), civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity, and from the dictates of public conscience". *Moreover, these norms also emanate from the elementary considerations of humanity which constitute the foundation of the entire body of international humanitarian law applicable to all armed conflicts.*⁴⁰⁰

It is submitted that the ICTY's *dicta* succinctly postulates the argument made by this dissertation for accepting the elementary considerations of humanity as constitutive of IHL's foundation.

In turn, Hayashi ascribes three functions to the Martens clause in contemporary international jurisprudence, namely the affirmative function, the attenuating function and the dislocating function. The affirmative function entails that courts invoke the Martens clause to re-emphasise CIL and its function. This, as is apparent from its acceptance by Cassese, Meron, Ticehurst and others above, is a very uncontroversial use of the Martens clause that merely states the applicability

³⁹⁸ 2000:188-189. [Emphasis in original.]

³⁹⁹ 2000:189-193.

⁴⁰⁰ No IT-95-11-R61 8 Mar 1996 at par. 13. [Emphasis added.]

of CIL irrespective of the content, existence or applicability of treaty law. The ICTY, for example, uses the Martens clause in this fashion to confirm the existence and applicability of CIL rules with regard to non-international armed conflicts, when the defence raises the omission of certain rules from *Additional Protocol II* as illustrative of the rules' doubtful nature. Although the argument may be raised that the usage of the Martens clause in this manner amounts to stating the obvious and is therefore pointless, nothing prohibits courts and tribunals from using the clause in such a way especially since the Martens clause has, according to Hayashi, gained the 'iconic power to highlight the importance of customary international law'.⁴⁰¹ It is submitted that invoking the Martens clause is not pointless as, in effect, it entails a resort to the natural law foundation of IHL which is morally and legally persuasive.

The attenuating function pertains to those cases where recourse is had to the Martens clause in order to vary the weight which is attached to *usus* in the two-pronged theory of CIL. The Martens clause is used in this instance to attenuate the requirement of *usus*, thus contributing to an increased possibility to identify a rule of CIL even when evidence of *usus* is difficult to produce. This is a more creative, and thus, inevitably, more controversial use of the Martens clause conducted by the ICTY.⁴⁰² As example of this use of the Martens clause by the ICTY, Hayashi refers to the Trial Chamber decision in the *Kupreškić* case where, in the absence of sufficient state practice regarding the prohibition of reprisals against civilians, *opinio iuris* was to play an increasingly important role, due to the Martens clause, for the determination of whether the prohibition had been subsumed as a rule of CIL.⁴⁰³ The ICTY summarised its position:

Admittedly, there does not seem to have emerged recently a body of State practice consistently supporting the proposition that one of the elements of custom, namely *usus* or *diuturnitas* has taken shape. *This is however an area where opinio iuris sive necessitatis may play a much greater role than usus, as a result of the aforementioned Martens Clause.* In the light of the way States and courts have implemented it, *this Clause clearly shows that principles of international humanitarian law may emerge through a customary process under the pressure of the demands of humanity or the dictates of public conscience, even where State practice is scant or inconsistent.* The other element, in the form of *opinio necessitatis*, crystallising as a result of the imperatives of humanity or public conscience, may turn out to be the decisive element heralding the emergence of a general rule or principle of humanitarian law....⁴⁰⁴

Hayashi states that the *Kupreškić* case is the only case in which the ICTY articulates the attenuating

⁴⁰¹ 2008:146-147 refers to the *Prosecutor v Hadžihasanović, Alagić and Kubara (Decision on Joint Challenge to Jurisdiction, 12 November 2002)* as an example of the affirmative use of the Martens clause by the ICTY. See also Ticehurst 1997:129.

⁴⁰² Hayashi 2008:146-148 and Meron 2000b:88.

⁴⁰³ 2008:148. The relevant passages from *Prosecutor v Kupreškić* ICTY Judgment 14 January 2000 Case IT-95-16-T are paragraphs 525, 526, 527 and 531.

⁴⁰⁴ *Prosecutor v Kupreškić* ICTY Judgment 14 January 2000 Case IT-95-16-T par. 527. [Emphasis added.]

function of the Martens clause so clearly. However, Hayashi also states that the ICTY refrains from discussing *usus* in various cases, rather referring to the Martens clause in an attempt to loosen the bonds which are imposed by the traditional two-pronged theory of CIL.⁴⁰⁵

Cassese says succinctly that presently this clause could be taken to have an indirect effect on traditional sources of international law in particular the customary process. It seems as if the clause equates laws of humanity and the dictates of public conscience with state practice as historical sources of principles of international law. By equating these three sources, *opinio iuris* might increase in importance when it comes to establishing a principle derived from the laws of humanity or the dictates of public conscience (though not from, for example, military or economic demands) since by establishing one or both of these elements, it is unnecessary to further illustrate *usus* which is merely a component of equal worth. Therefore, the Martens clause arguably functions within the sources of international law, but in the domain of IHL, the clause also loosens the requirement of *usus* and elevates the requirement of *opinio iuris*.⁴⁰⁶ This approach, it will be asserted in Chapter 3, is important for the ascertainment of CIHL.⁴⁰⁷ By using the Martens clause in this fashion, flexibility will be introduced into the process of ascertaining CIHL which is bound to be normative and aspirational rather than concrete.

The dislocating function pertains to those situations where the Martens clause is used to dislocate CIL and replace it with general principles. This is the most controversial use of the Martens clause and is another attempt to alleviate the challenge occurring from the strict application of the two-element theory of CIL.⁴⁰⁸ *Prima facie*, this dislocating use of the Martens clause appears comparable with the use thereof in the *Kupreškić* case, but the ICJ never seemed to have an attenuating role in mind for the Martens clause in the *Nicaragua* and *Nuclear weapons cases*. It rather seems, as Hayashi states, that the Martens clause was used in these cases as a direct source of the identified rules. If this is the case then '...the identified rules are norms that are not based on

⁴⁰⁵ 2008:148.

⁴⁰⁶ Cassese 2000:213-214 and 2001:122. See likewise Meron 2006:27-28.

⁴⁰⁷ See section 3 of Chapter 3, pages 186-197, below.

⁴⁰⁸ 2008:146 and 149. Examples are given by Hayashi: 'In the Military and Paramilitary activities in and against Nicaragua case in 1986 [par. 218], common Article 3 of the Geneva Conventions was found by the ICJ to be applicable to the case as "fundamental general principles of humanitarian law." There was no examination of state practice. In place of such an examination, the ICJ offered the Martens clause and "elementary considerations of humanity." Similarly, in the Legality of Nuclear Weapons case [paras 78-79], in identifying the principles of civilian protection and the prohibition of unnecessary suffering as principles of international humanitarian law, the ICJ omitted the examination of state practice. There was only a generic description of the wide accession to the Hague and Geneva Conventions. In place of the examination of state practice, the ICJ again offered the Martens clause and "elementary considerations of humanity".'

custom...Customary international law as a source of obligations is dislocated by the Martens clause, and possibly by the elementary considerations of humanity, and its place is filled by general principles they themselves embody'. However, as Hayashi states, the dislocating function of the Martens clause causes unique tensions even while trying to lessen the tensions of the traditional two-element theory of CIL as consensus supports CIL, but general principles (as the Martens clause reflects them) are not similarly grounded in consensus. This causes a revolutionary vision of international law irreconcilable with the *de facto* vision thereof as norms will be binding on states irrespective of the state's exhibition of acceptance thereof through customary or treaty law. The latter proposition may still be acceptable if the states are not regarded as the sole authors of international law.⁴⁰⁹ It must be postulated that deeming acceptance to constitute the basis of international law is positivist in orientation.

However, *for IHL*, as specialised branch of international law, a natural law foundation has been argued in the present chapter. Accordingly, this dislocating function is potentially an important use of the Martens clause in IHL as it is based on universal, natural law virtues.

The principal parts of the Martens clause, especially the 'laws of humanity' and the 'dictates of public conscience', have also been interpreted in various different ways. Criticism includes that these notions are so vague and indefinite that they cannot be adequately transformed into a juridical format.⁴¹⁰ Meron, however, states that these notions have acted as restraints on the liberty of states to do whatever is not prohibited by treaties or customary rules. A complication in the use of this clause lies in the traditional law of war notions of power and reciprocity still dominating the scene in contrast with the ethical normativity contained in the Martens clause. As it was put succinctly by Meron:

Given the reality of power, reciprocity, and the interests of the parties involved in armed conflicts, it is a wonder that the Martens clause has attained such centrality in international discourse and that progress in humanizing international humanitarian law, in which this clause has played an important role, has been so significant. Although this development could not have occurred without the dramatically growing influence of the ICRC, NGOs, the media, and public opinion, the rhetorical and ethical code words of the Martens clause itself have clearly exerted a strong pull toward normativity.⁴¹¹

It is indeed the rhetorical and ethical strength of the language used in the clause which might

⁴⁰⁹ 2008:149-151.

⁴¹⁰ Pustogarov 1999:132. Hence, Pustogarov, *ibid* at 133, finds that the 'principles of humanity' element of the clause has also been criticised as being vague and expressed in such a variety of forms that it is unsuitable for the expression of legal norms.

⁴¹¹ 2000b:88-89. Likewise Meron 2006:29.

furnish a reason as to why it (still) influences the shaping and interpretation of IHL – these aspects have alleviated the vague and indeterminate content of the clause.⁴¹² It is submitted that the Martens clause has been relied on by international role players precisely because it provides an ethically focused set of natural law principles in the provisions of important IHL treaties. The Martens clause, therefore, projects natural law principles into a posited instrument of IHL.

Pustogarov opines that the notion contained in the Martens clause of 'the principles deriving from the customs established among civilized nations' causes little discussion as the existence of customary law is generally recognised. Greater problems of interpretation occur with regard to the 'dictates of public conscience'. This is due to the uncertainty as to what actually constitutes 'the public conscience'. Certain viewpoints maintain that public conscience can be determined through statements, resolutions or other documents which emanate from institutions, organisations or private individuals. Others rely on more authoritative documents like the resolutions of the General Assembly of the United Nations. Pustogarov submits that the viewpoints and appraisals of jurists and juridical organisations have received too much emphasis in the determination of the 'public conscience'. He continues that the 'public conscience' is constituted through various factors and that the viewpoints of jurists, juridical organisations and juridical literature do not have a decisive role to play in the determination thereof.⁴¹³ Meron states that 'dictates of public conscience' can be approached in two ways, namely firstly, that these dictates are the public opinion that moulds the actions of parties to a conflict and furthers the development of IHL and, secondly, the dictates may be seen as embodying *opinio iuris* and, even though the public opinion may differ from the opinion of governments (the opinion that actually constitutes *opinio iuris*), it invariably influences the latter.⁴¹⁴ Meron considers public opinion and public conscience as follows:

Is “public conscience” as it appears in the Martens Clause, with its moral overtones, the same as public opinion? Whose public conscience is meant? That of one belligerent, both or all belligerents, an alliance, a bloc, the United Nations? By definition, public conscience and public opinion have a popular basis. Under the influence of the civil society, nongovernmental organizations (NGOs), and the media, the common assumption tends to be that public opinion is a force for good and that it invariably serves humanitarian causes. Alas, this is not always true...[T]he question remains how to mold public opinion through the infusion of moderating and humanitarian views to make it worthy of public conscience. This is a challenge that we cannot ignore.⁴¹⁵

As it has been succinctly put: 'The Martens clause, together with the elementary considerations of

⁴¹² Meron 2006:18 and 2000a:245.

⁴¹³ 1999:132.

⁴¹⁴ 2000b:83 and 2006:23.

⁴¹⁵ 2006:25.

humanity, advocates that the moral and humane dimension be given a place regardless of interests of states'.⁴¹⁶ This moral and humane dimension is apparent from the fact that the Martens clause has been deemed to invoke the need for using international human rights law in order to supplement the IHL and to fill any *lacunae* contained therein.⁴¹⁷ It is submitted that this approach will strengthen the humanitarian endeavour immensely. By supplanting state interests with elementary considerations of humanity, IHL would return to its original source, as it has been argued throughout Chapter 2. In modern international jurisprudence, with its renewed emphasis on the human being, this return to the *fons et origo* of IHL seems not only inevitable, but imminently necessary. *Hence, the Martens clause should serve as a focal point through which the moral and humane dimension of international law could be furthered and bolstered.*

The applicability of the Martens clause, however, has certain limits. Thus, in the *Legality of the threat or use of nuclear weapons* case the ICJ refused to ban nuclear weapons leading Meron to state that: 'Nevertheless, the Martens Clause does not allow one to build castles of sand. Except in extreme cases, its reference to principles of humanity and dictates of public conscience cannot, alone, delegitimize weapons and methods of war, especially in contested cases'. Thus, recourse to normal principles of international law like proportionality, distinction and the prohibition of unnecessary suffering may be had to combat objectionable weapons and methods of war. Pushing the Martens clause to cover these aspects may be undesirable as governments are not yet willing to accept humanity and the dictates of public conscience as binding sources of law.⁴¹⁸ *However, it must be questioned on what authority it is stated that governments must be willing to accept humanity and the dictates of public conscience as binding sources of law before the Martens clause can be invoked to prevent suffering seeing that suffering is suffering no matter what government opposes this or not. Perhaps the time has come for a clarion call to all states to openly acknowledge humanity and the dictates of public conscience as binding principles of law (especially IHL). The acceptance or rejection of such a proposition will reflect whether the commitment of states to the protection of the human being is indeed bona or mala fide.*

Pustogarov's summary on the Martens clause is insightful: he maintains that the Martens clause is part of CIL and has a normative nature aimed at the protection of mankind essentially during times of armed conflict. In IHL, the Martens clause is a norm of *ius cogens*. Thus, when there exists a

⁴¹⁶ Hayashi 2008:151.

⁴¹⁷ Kolb and Hyde 2008:63.

⁴¹⁸ Meron 2000b:88 and 2006:28.

lacuna in IHL to address a particular situation, recourse must be had to the Martens clause with the objective of reaching a satisfactory result. Furthermore, the ambit of the Martens clause might broaden since it unites rules, norms and principles of positive law with rules, norms and principles of natural law. CIL norms and principles form a perpetual source of positive international law. This increases the focus on positivism and the subsequent decline of natural law. However, the development of the Martens clause indicates the prematurity of holding natural law to be a mere transitional step to positivism. Hence, as experience indicates, the focus should be on the increasing functions and importance of the Martens clause as it is destined to have a long existence.⁴¹⁹ Accordingly, arguments based on natural law were made in order to attempt to move the ICJ to find nuclear weapons illegal. These natural law arguments were made to ensure that the Court look further than the positive international legal norms. The relevance of the Martens clause to this situation lies in the fact that the Martens clause indicates that IHL furnishes not only a positive legal code but also a *moral* code. This ensures that smaller states and individual members of the international community can have an influence on the evolution of IHL.⁴²⁰

The Martens clause may be used by NGOs and governments to further the law's attempts to reflect human rights concerns. The clause has been used by tribunals, international conferences and UN rapporteurs in a theoretical sense, but, as Meron states, whether the clause has been useful in practice, on the battleground, and especially in internal conflicts, is highly questionable.⁴²¹ The value of the Martens clause relates to the fact that it can act as fundamental guidance when interpreting international customary or treaty law. Thus, when a rule is uncertain, its interpretation should be so that it conforms to the standards of humanity and the claims of public conscience. If the existence of considerations of humanity is accepted as a general principle of international law, the Martens clause would be the origin of that principle and it would be applicable only in humanitarian law as a type of *lex specialis*.⁴²²

Cassese summarises the value of the Martens clause in his finding that the clause, despite the ambiguity in its formulation and its indefinable objective, has resonated with a deeply felt need in the international community to take the aspects of humanity and public opinion into account when

⁴¹⁹ Pustogarov 1999:134-135.

⁴²⁰ Ticehurst 1997:132-133.

⁴²¹ 2000b:88 and 2006:28.

⁴²² Cassese 2000:212-213. However, two problematic aspects may be discerned, namely whether the considerations of humanity are part of *ius cogens* and how should their ambit and purport be established? See also Meron 2006:27 regarding the use of the Martens clause in interpreting IHL in line with humanity and the dictates of public conscience.

addressing armed hostilities. The fact that the clause resonated with the prevalent sentiments of the international community is self-evident from the frequency with which it has been evoked or relied upon by (domestic and international) courts, international lawmakers and diplomats. Irrespective of the inherent legal value of the Martens clause, it is very evident that this clause struck a chord with the international community and has impacted international law and, especially, IHL. Cassese believes that the essential (and general) advantage of the clause (which Martens himself might not have foreseen) is that it addressed the laws of humanity not as a moral concern but from an apparently positivist perspective. Prior to the Martens clause international treaties had merely stated the significance of the laws of humanity and humanitarian considerations. Accordingly, states were not under a legal imperative to uphold the laws of humanity, but were rather called upon to not disregard these moral principles during wartime. The Martens clause stated for the first time that principles or rules of CIL might exist which emanated not only from *usus* but also from the laws of humanity and the dictates of public conscience. Such an extraordinary blend of natural law and positivism needs to be commended.⁴²³

However, Cassese advocates that the clause should not be restated in treaties and other international instruments since the ambiguity of the clause detracts from its value and the 'ritualistic and rather hollow habit of proclaiming' the clause repeatedly seems to serve no purpose. The popularity of the clause relates to the notion that humanitarian aims can be furthered by states in its name, although Cassese submits that states might do better to attempt a restatement of the clause.⁴²⁴ Kolb and Hyde, on the other hand, state that, in practice, the Martens clause is not relied on as much as it should or could be.⁴²⁵ The Martens clause did not enter international law through humanitarian considerations since it was part of diplomatic power struggles. However, despite its shaky foundations and motives, it has become important for international relations. The effect of the legal construct is clearly much more important than the purpose of its author.⁴²⁶

In summary, Ticehurst states that positivism is the dominant philosophy of international law. Conventions and CIL therefore regulate the obligations of the international community. This is important for IHL as powerful military states, refusing to ratify conventions or consent to the emergence of corresponding customary norms, can control the content of IHL. The Martens clause constitutes a link between the positive norms of IHL and natural law. Natural law was initially

⁴²³ 2000:188-189 and 212.

⁴²⁴ 2000:215-216.

⁴²⁵ 2008:64.

⁴²⁶ Cassese 2000:216.

rejected as it was held to be subjective. Hence, contradictory norms of natural law were supported by opposing parties. The Martens clause, however, introduces an objective method to establish natural law – the dictates of public conscience. This makes IHL more robust and ensures that *all* states are allowed to participate in its development.⁴²⁷

It must be submitted that irrespective of whether Martens himself aimed the clause to address humanitarian concerns or not, the clause – like any literary work – has taken up a life of its own and has come to be accepted as such in the international community. The initial motive for the creation of this clause is not as important as the implications it has taken on in contemporary international society. It has become an important instrument through which natural law notions of morality have been linked with the positivist orientated humanitarian law regime, which (as was established in the present chapter) originated from morality. The clause serves as a legal construct to include and embed 'humanity' – the essential moral value – in the international humanitarian legal context. In this regard, the clause might be seen as an instrument through which the different philosophical paradigms that have influenced IHL, namely natural law and legal positivism, might be reconciled. The vagueness and ambiguity inherent to the clause are simultaneously its main advantage and also its biggest disadvantage – the clause can be viewed as supplementary to or in opposition with CIL. However, due to the essential natural law foundation of IHL as well as the Martens clause's ethical underpinnings and the desire in contemporary jurisprudence to further humanitarian aims, the Martens clause may serve as a useful gateway to reconcile a part of the law, which although it was established on natural law, has subsequently been influenced by legal positivism's drive for codified, written, consensual legal instruments, with its true foundation.

Consequently, it remains to consider the other principles through which considerations of humanity may be furthered in IHL, namely norms of *ius cogens* and obligations *erga omnes*.

2.4.1.2. Enforcing substantive principles, including humanity, through conceptual principles – a consideration of norms of *ius cogens* and obligations *erga omnes*

As was mentioned in the introduction to the present section, certain principles have emerged in the international (humanitarian) arena that differ from the substantive principles, like humanity, upon

⁴²⁷ 1997:133.

which, it was argued in the present chapter, particularly IHL was established. These principles were labelled 'conceptual principles' in order to distinguish them from substantive principles. Accordingly, as will be indicated when briefly considering their origin, in contrast to the historical substantive principles referred to, these principles are a recent phenomenon in international law, which emanated from the labours of the International Law Commission (ILC) and the ICJ and, which has subsequently been largely accepted by the international community. Furthermore, while substantive principles embody natural law virtues and objectives, these conceptual principles function on a different level. The conceptual principles do not engage with values directly, but rather postulate requirements with which substantive norms must comply in order to benefit from the consequences and effects of being subsumed by these conceptual principles, that is, of being accorded the status of *higher norms* of international law. In this regard, two of these conceptual principles, namely *ius cogens* norms, which cannot be derogated from and obligations *erga omnes*, which are obligations owed by a state to the entire international community and in the enforcement of which all states have a vested interest, will be considered.⁴²⁸ The present section will investigate how these conceptual principles have furthered humanity. In the process, this section will also consider the various candidate rules that have been advanced for inclusion in either *ius cogens* or obligations *erga omnes*, focusing especially on whether IHL rules have (or could be) subsumed by these categories of conceptual principles since this would entrench the IHL rules even more and strengthen them immensely.

Ius cogens are a set of legal norms in the international legal order which are regarded as higher and more strict rules of CIL than any others. These norms cannot be altered through agreement by states as they operate as *absolutes* within the legal system.⁴²⁹ These rules attempt to protect interests which are not merely states' individual interests.⁴³⁰ Some have attempted to base essential norms for the protection of community values on *ius cogens*, where state practice, in contrast to *opinio iuris*, would be less important.⁴³¹ Weisburd also indicates that norms of *ius cogens* are rules

⁴²⁸ For these definitions of *ius cogens* and *erga omnes* see, for example, Dugard 2005:43.

⁴²⁹ Woodcock 2006:262 and Meurant 1987:246. Hall 1924:382 had already alluded to a requirement that: '...at least renders voidable, all agreements which are at variance with the fundamental principles of international law and their undisputed applications...'. Oppenheim 1937:706 also states: 'It is a unanimously recognised customary rule of International Law that obligations which are at variance with universally recognised principles of International Law cannot be the object of a treaty'. Nonetheless, MacDonald 1987:118 indicates that the comments of the latter two, positivist, writers were not deeply embedded in their conceptions of international law, but merely comprise observations. See also generally Weil 1983:423-424 and MacDonald, *ibid* at 146-148.

⁴³⁰ Meurant 1987:246. However, see Ragazzi 2002:195-196 regarding the possibility of regional norms of *ius cogens*.

⁴³¹ Meron 2006:370. Compare Simma and Alston 1988-1989:104. See also Pellet 2006:759 and 777 for the view that an 'intensified *opinio*' is sought by the ICJ to find that a norm has a peremptory nature thereby indicating its usual CIL nature.

of customary law which cannot be derogated from through treaty or acquiescence.⁴³² The notion of *ius cogens* seems to have developed gradually after World War I. It seems that by 1937 two types of *ius cogens* norms were accepted, namely discrete rules that had become compulsory and rules *contra bonos mores*.⁴³³ After World War II *ius cogens* continued to be scrutinised.⁴³⁴ World War II represents a significant milestone for international legal thought. Due to the obvious abuse of unlimited sovereignty and the implicit need which arose for general, absolute and universal values to which a state could be bound in the future in order to prevent a repeat of the atrocious hostilities, the existing notion of consensus as the underlying basis of the international order had to give way. It seemed as though a new institutional basis was sought on which to re-establish international law. Therefore, a renewed appreciation emanated for the 'importance of values, such as peace, human rights, economic and cultural rights, and self-determination, for the future development of the international community and its legal system'.⁴³⁵ This process led to presentations on the subject of *ius cogens* to the ILC, various draft articles and, eventually, the acceptance of an article thereon during the Vienna Conference of 1966 which was included in the *Vienna Convention on the Law of Treaties*.⁴³⁶ Accordingly, article 53 of the *Vienna Convention on the Law of Treaties*, which codified this principle, states that:

Treaties conflicting with a peremptory norm of general international law (ius cogens)

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.⁴³⁷

⁴³² 1995:10. See Bianchi 2008:493 who acknowledges that the approach holding *ius cogens* to emerge from treaty law stands in complete opposition to the approach maintaining that it emanates from CIL – the latter approach being coherent with the wording of article 53 of the *Vienna Convention on the Law of Treaties* which refers to peremptory norms as part of principles of general international law. See also Verdross 1937:573 who includes *ius cogens* under general principles of international law as well as indicate that it may not be derogated from by treaty or CIL.

⁴³³ Verdross 1937:572. See also Weisburd 1995:10-11.

⁴³⁴ Weisburd 1995:12.

⁴³⁵ MacDonald 1987:118 and 129.

⁴³⁶ Weisburd 1995:12-16.

⁴³⁷ Bianchi 2008:492-493 indicates the natural law influence in this inclusion by referring to Dupuy's remarks at the Vienna Conference: 'René-Jean Dupuy, at the time a member of the Holy See's delegation to the Vienna Conference, accurately noted that the inclusion of Article 53 in the VCLT sanctioned the "positivization" of natural law. In other words, to have codified in a treaty a normative category with an open-ended character, the content of which could become intelligible only by reference to some natural law postulates, was tantamount to dignifying the latter's otherwise uncertain foundation by granting it the status of positive law'. Ragazzi 2002:43-44 and 203-204 notes that article 53 embodies a ground on which an international treaty may be deemed invalid – conflict with a norm *ius cogens*. However, a peremptory norm emerging after a treaty may also render the latter invalid, hence article 64 of the *Vienna Convention on the Law of Treaties* determines: 'Emergence of a new peremptory norm of general international law ("*ius cogens*")'. If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates'. Ragazzi, *ibid* at 47, comments that *ius cogens* has developed and is now used outside its original paradigm of invalidating treaties in conflict with it. Accordingly, *ius cogens* has become important in the codification of the law pertaining to state responsibility. See also MacDonald 1987:135-136. A debate rages whether article 53 only binds signatories to the *Vienna Convention*

Due to political considerations, it was impossible to include any kind of list of *ius cogens* norms in article 53 of the *Vienna Convention on the Law of Treaties*. The drafters of article 53 rather decided to advance three tests, which, upon being met, will indicate whether a particular norm is part of *ius cogens* or not.⁴³⁸ Precisely because the *Vienna Convention* does not include a list of *ius cogens* norms, the lists advocated for in international jurisprudence will be considered below and, since the focus of the present dissertation is on IHL and CIHL, consideration will be given as to whether any of the proposed rules of the ICRC Study on CIHL could possibly be subsumed under this category of norms. It has been submitted that the idea of *ius cogens* advocated in article 53 is 'that of rules of general international law which are peremptory not only because States have recognized that there must be no derogation from them, but also because of the *values* that these rules are called on to protect and promote'.⁴³⁹ Therefore, in this argument, the peremptory nature of these rules is not solely dependent on their recognition by states as such. Accordingly, it has been submitted that *ius cogens* serves to protect the public interests of the international community and to further the standards of *morality* accepted by the international community of states.⁴⁴⁰ Hence, Meron also submits that the establishment of the hierarchical notion of *ius cogens* norms illustrates the desire of the international society to postulate a 'normative order in which higher rights are invoked as a particularly compelling moral and legal barrier to derogations from and violations of human rights'.⁴⁴¹ It is evident that the core component of *ius cogens* relates to the 'need to establish common values and standards which will have precedence over state sovereignty and which will accordingly restructure international society'.⁴⁴² It is submitted that this desire is inevitable in the light of the nature of international law, as it was discussed above,⁴⁴³ namely that the same entities make and are subject to the law. It seems necessary that there must exist certain norms of a higher nature, which will serve as an overarching framework when behaviour is evaluated in this decentralised system. Furthermore, it seems self-evident that the international humanitarian legal system needs norms that establish and protect common values and standards since the IHL system itself was vested thereon.

or all states. Accordingly, Weil 1983:429-430 indicates the view that these peremptory norms create obligations for all; Weisburd 1995:17 reflects the view that only party states may rely on article 53 and MacDonald, *ibid* at 132, indicates that article 53 reflects CIL.

⁴³⁸ Ragazzi 2002:50. See Ragazzi, *ibid* at 51-59, for the three tests generally.

⁴³⁹ Ragazzi 2002:49. [Emphasis added.]

⁴⁴⁰ MacDonald 1987:130. Compare Verdross 1966:58 who submits that these rules of *ius cogens* are not aimed to address the needs of individual states, but are rather intended to address the loftier interests of the international community as a whole.

⁴⁴¹ Meron 1987:350.

⁴⁴² MacDonald 1987:134.

⁴⁴³ See section 2.3 generally and page 71, footnote 250 and its accompanying text in particular.

The notion of *ius cogens* assumes the acknowledgment of certain fundamental universal norms, but (and this is the reason for *ius cogens* being viewed as controversial) it is difficult to ascertain authoritatively which norms or values have peremptory force and which do not.⁴⁴⁴ This view emanates from the positivist concern, which was reflected above,⁴⁴⁵ regarding the manipulable nature of natural law to which these norms are linked. Hence, the relationship between *ius cogens* (or 'peremptory norms') and human rights have been described as 'intrinsic'.⁴⁴⁶ Furthermore, the importance of norms of *ius cogens* in relation to human rights – but arguably also pertaining to IHL – has been succinctly put in that human rights seems to form the essential component of *ius cogens*. With the recognition of *ius cogens* the invoking of ethical and moral concerns in the international legal order now happens openly. The prior international law approach 'of hiding ethical and political considerations behind the screen of the objectivity of positive law rules derived directly or inductively from the will of states yields to the express acknowledgment that rules can be hierarchically ordered on the basis of their underlying values. The inner moral aspiration of the law thus materialized in international law with the advent of *ius cogens*'.⁴⁴⁷ By establishing the *ius cogens* nature of any rule of international law (and, of course, IHL), therefore, significantly strengthens its moral and ethical foundation. These considerations are very important when viewing the *ius cogens* nature of IHL, especially regarding IHL rules that have essentially been extrapolated from human rights law as subsuming IHL rules and principles, and thus would greatly enhance the moral nature thereof.

An important consideration relates to the contemporary views on the interaction between *ius cogens* and various sources of international law, despite its formulation in article 53 of the *Vienna Convention*. It seems as though some maintain that *ius cogens* applies to CIL and to treaties. In the former case, if a norm of CIL is also deemed to be a norm of *ius cogens*, then subsequent state practice contrary to the particular norm will be invalid and not able to change the norm as might be the case with a regular rule of CIL.⁴⁴⁸ However, other scholars maintain that peremptory norms may emerge from any of the formal sources of international law, namely treaties, custom and general principles of law.⁴⁴⁹ Nonetheless, there exists disagreement as to whether *ius cogens* norms

⁴⁴⁴ Quéguiner 2008:170.

⁴⁴⁵ See section 2.4, pages 80-81 and 84-85 above.

⁴⁴⁶ Bianchi 2008:491.

⁴⁴⁷ Bianchi 2008:495.

⁴⁴⁸ Weisburd 1995:18-19.

⁴⁴⁹ Weil 1983:425. See Ragazzi 2002:47 who states that a novel approach in international law writings is to accept *ius cogens* as part of general international law.

are subsumed by CIL. Hannikainen and Brownlie submit that CIL is an appropriate source for *ius cogens* as it constitutes the paradigm through which 'generally binding international law on important moral issues' can be furthered. However, Weil disagrees that *ius cogens* norms are truly part of CIL as they can be postulated even despite a lack of *usus* and *opinio iuris*. *Ius cogens* norms will be supported, on the one hand, by very strong substantive considerations so that the possibility of a persistent objector emerging thereto will be prevented. Furthermore, many states support *ius cogens* through their widespread practice in the guise of inaction. *Ius cogens*, on the other hand, does not seem to need any conformity in practice and, thus, norms thereof could emerge without significant supportive practice. In fact, *ius cogens* seem to ignore contrary practice, treaties and declarations except if they are also part of *ius cogens*. Therefore, unlike other forms of CIL, *ius cogens* norms are more static and insusceptible to change.⁴⁵⁰ These considerations, it is submitted, must be viewed in the light of the comments of the following chapter regarding the modern approach pertaining to the ascertainment of CIL rules, which have a significant moral component and that focuses on *opinio iuris* rather than state practice.⁴⁵¹ It seems that the critique against *ius cogens* norms as part of CIL emerges due to a very doctrinaire approach to what constitutes CIL and, as will be seen in Chapter 3, this traditional approach for the establishment of CIL (especially, those branches of CIL which embody moral considerations like CIHL and customary human rights) has been relaxed significantly in practice so that the critique must lose much of its validity.

The benefits of norms of *ius cogens* are evident in IHL. For example, even important treaties like the *Geneva Conventions* and the *Additional Protocols* may be denounced similarly to any other international treaty, yet it has been submitted that customary rules which are part of *ius cogens*, on the other hand, may not be denounced as they are not at the individual state's discretion.⁴⁵² Further consequences of a norm having the status of *ius cogens* include, *inter alia*, that the norm will not be diluted, that adherence to the norm is not reliant on a reciprocal duty of another and that persistent and prolonged objections towards the norm will not cause the norm to be modified or lose its validity.⁴⁵³ Being accorded *ius cogens* status would therefore enhance a particular rule significantly.

⁴⁵⁰ Roberts 2001:783-784 refers to Hannikainen L. 1988. *Peremptory Norms (Ius Cogens) in International Law* 226-242; Brownlie I. 1998. *Principles of Public International Law*. 5th ed. 514-517 and Weil 1983:427. See also Roberts, *ibid* at 790. Simma and Alston 1988-1989:103 indicate that a comparison between the phrase 'international community of states as a whole' and the 'general practice' required for the formation of CIL, leads to the conclusion that 'the threshold requirement for the emergence of *ius cogens*, namely the generality, or universality, of acceptance and recognition, is set at least as high as that necessary for the development of general (or universal) customary law'.

⁴⁵¹ See section 3 of Chapter 3, pages 186-197, below.

⁴⁵² Gasser 1993:88.

⁴⁵³ Quéguiner 2008:172.

It must be noted that as a result of accepting norms of *ius cogens* a universally binding set of rules would emerge in the international arena. Unsurprisingly, therefore, these norms which could potentially bind all states have been especially vehemently criticised. Accordingly, Weisburd states that scholars disagree regarding whether norms of *ius cogens* emanate from positive law or natural law, thus calling into question the validity of this concept since there is no core understanding of it. He continues that it seems problematic to accept a concept as a legal rule if its content is so vague that confusion ensues over it (both between different academics and as far as individual academics are concerned).⁴⁵⁴ Weisburd continues that the methods used to attempt to ascertain whether a particular norm is one of *ius cogens* are insufficient to determine that a norm is applicable in all situations in which it is implicated. He submits a guideline as to what such a method should comprise, namely that the widest possible range of situations must be identified in which the intended rule should apply, then information should be gathered about those situations to establish the costs and benefits of applying the rule and, after all these steps, the status of the rule should be determined. However, international law tends to rely on either the positive actions of states or on natural law – both of which are held by Weisburd to be insufficiently careful in taking the actual workings of the proposed rule into account. Thus, relying on state practice for the ascertainment of *ius cogens* norms is held to be undesirable since even if the practice is unambiguous, which is unlikely, practice might often still be inapposite. Relying on natural law for the ascertainment of *ius cogens* norms also raises concerns. Hence, the Verdrossian reliance on the 'ethics of a particular community' as constitutive of *ius cogens* may lead to a risk of assuming that if it is desirable for some subjects to not perform some action, it *ipso facto* follows that the specific action must also be rendered illegal. However, Weisburd finds this to be a *non sequitur*. Also, relying on natural law to ascertain *ius cogens* rules may, in practice, result in a court-centred approach to the ascertainment thereof, since the evaluating of the moral criteria relevant to a natural law perspective seems to be closer to the workings of a court rather than to other international institutions, but courts are not adequately equipped to pronounce such policy judgments. This causes concern regarding the sufficiency of theoretical criteria to identify *ius cogens* norms precisely and none of the methods

⁴⁵⁴ 1995:28-29 also states that scholars are not able to apply their individual approaches to *ius cogens* consistently, for example, Hannikainen emphasises state practice to form a customary and a *ius cogens* rule, but lowers the amount of practice needed while evaluating particular norms of *ius cogens*. See Hannikainen L. 1988. *Peremptory Norms (Ius Cogens) in International Law* 236-237 and 464. Weisburd 1995:19-20 referring to Rozakis C.L. 1976. *The Concept of Ius Cogens in the Law of Treaties* 89-91, continues that some maintain that *ius cogens* is only defensible when viewed as part of natural law. However, this view is not universal. Rozakis, for example, opines that a general rule of CIL, which has emerged through the normal CIL process, can change a CIL rule that forms part of *ius cogens*. However, it could be questioned whether this would be so in all cases of *ius cogens*, like, for example, the prohibition on slavery.

used to establish these norms would produce norms whose benefits will necessarily outnumber the costs involved. Thus, the appropriateness of norms of *ius cogens* is called into question.⁴⁵⁵ Weisburd, therefore, finds the notion of *ius cogens* to be intellectually indefensible and of dubious utility in the international arena.⁴⁵⁶

Indeed, it seems as though the international community is slow to react against supposed violations of norms of *ius cogens* and that international tribunals rarely rely solely on *ius cogens* to decide cases.⁴⁵⁷ However, it is submitted that Weisburd himself indicates that a holistic approach to *ius cogens* norms is necessary. Why could natural law, morality, *opinio iuris* and state practice not be considered collectively rather than individually? It is submitted that much of the criticism is directed at an overly doctrinaire approach to the ascertainment of *ius cogens* norms. Bearing in mind that the present investigation is directed at postulating *ius cogens* norms for IHL, it has been argued that principles are inherent in this branch of law. Indeed, some principles are held by the present study to comprise the *raison d'être* of IHL. Inevitably, then, some of these principles must be non-derogable. A holistic approach should therefore be followed in determining these rules, thus considering natural law, morality, *opinio iuris* and *usus* cumulatively rather than frustrate the whole endeavour by adhering rigidly to a doctrinaire approach which is not necessarily appropriate for ascertaining *ius cogens* norms of IHL.

Attempts of positivism to negate norms of *ius cogens* have led Verdross to formulate a response which reflects the broader legal positivism/natural law debate in IHL as it has been observed in the present study as well:

These examples [for instance conventions binding a state to sterilize its women, kill its children or reduce its army to inefficacy] prove in a particularly obvious way the absurd consequences of that pseudo-positivistic doctrine which denies the prohibition of immoral treaties in international law and pretends that international treaties may contain any stipulations whatsoever. These fruits show us with terrifying clarity the *dogmatic positivism which wishes to separate positive law from its ethical mother soil*. A truly realistic analysis of the law shows us that every positive juridical order has its roots in the *ethics* of a certain community, that it cannot be understood apart from its *moral basis*. Positivism, allegedly giving us a realistic doctrine, is, therefore, not realistic at all because it arbitrarily narrows the picture of the law and only sees its surface.⁴⁵⁸

⁴⁵⁵ Weisburd 1995:29-31. Compare Dugard 2005:43.

⁴⁵⁶ 1995:1 and 24. Would the concept of *ius cogens* be saved if an international court subscribed to it? Weisburd 1995:39 states that the ICJ is used rather infrequently by states and, when it is used, its judgments are often ignored thereby illustrating a lack of respect for the ICJ by the main actors in international law. This causes concerns as to whether there is any theoretical or practical legitimacy in the ICJ (or a less illustrious tribunal) to determine the content of norms of *ius cogens*.

⁴⁵⁷ Weisburd 1995:18.

⁴⁵⁸ 1937:576. [Emphasis added.]

It is submitted that although Verdross formulated this response before the critique of Weil on both *ius cogens* norms and Verdross' reference to the 'ethics of the community', it still holds true, since there are overarching fundamental, moral concerns which cannot be overridden by treaty law. It is these aspects, which *ius cogens* norms attempt to protect and, as such, irrespective of whether there is disagreement over its ascertainment, must be promoted.

During the Vienna Conference of 1966, states submitted possible norms which could be deemed *ius cogens*, including rules of humanitarian law in warfare, the prohibition on the use of force and genocide. The specific content of norms of *ius cogens*, however, seems to change and differ over time. Nonetheless, the *rule against the threat or use of force*, established in article 2(4) of the *UN Charter*, as well as the prohibition of *genocide* seems to be generally accepted as such norms. Other norms arguably of *ius cogens* are those prohibiting grave violations of humanitarian law or crimes against humanity.⁴⁵⁹ Pictet concurs that the provisions of humanitarian law are peremptory (*ius cogens*) and not *dispositive*.⁴⁶⁰ Similarly, Verdross argues that all rules which emanate from general international law, intended for a humanitarian objective, have the nature of *ius cogens* norms as they are not directed at fulfilling the needs of an individual state, but rather of those *interests of humanity* in its entirety. Consequently, treaties attempting to further slavery or mistreating POWs in violation to the treaty regime applicable thereto, are deemed to be void even though the relevant contracting states are not party to the particular humanitarian treaties, since 'the humanitarian principles underlying these conventions are basic principles of general international law with the character of *ius cogens*'.⁴⁶¹ The question as to whether the whole body of IHL may be viewed as *ius cogens* seems to receive a negative answer, although inalienable rights do exist with regard to protected persons and grave breaches of the provisions of the *Geneva Conventions*.⁴⁶² In the *Kupreškić* case, for instance, the ICTY determined that '...most norms of international humanitarian law, in particular those prohibiting war crimes, crimes against humanity and genocide, are also peremptory norms of international law or *ius cogens*, i.e. of a non-derogable and overriding character'.⁴⁶³ Likewise, Ragazzi accepts the prohibition of aggression and the protection of certain, but not all, human rights to be uncontroversially peremptory in nature, with the remainder of the

⁴⁵⁹ Weisburd 1995:12-16 and 22-23 refers also to the right to self-determination as a possible, though controversial, norm of *ius cogens*. See also Verdross 1966:60, Dinstejn 2004:878 as well as Simma and Alston 1988-1989:103 regarding the prohibition of the use or threat of force.

⁴⁶⁰ 1985:87. 'Dispositive' refers to *ius dispositivum*, which, according to Verdross 1966:58, refers to rules of international law that are 'not imperative but of a yielding nature'. See also Thirlway 1972:120.

⁴⁶¹ 1966:59.

⁴⁶² Quéguiner 2008:170. Compare also the comments of Simma and Alston 1988-1989:103.

⁴⁶³ ICTY, *Kupreškić* case, Trial Chamber, January 14, 2000, par. 520. See also Quéguiner 2008:172.

notion's substantive content unclear.⁴⁶⁴ Regarding the essential foundational principles of IHL, as they were discussed above, and their status as norms of *ius cogens*, Schindler notes that the ICJ stated that the fundamental rules of IHL constituted 'intransgressible principles' of CIL in the *Nuclear weapons* case. In this manner the ICJ qualified these fundamental principles of IHL as forming part of the most basic norms of the international society. However, the ICJ refrained from pronouncing on the question as to whether these principles were also subsumed by *ius cogens* as it was not necessary to decide this question for the case. However, the ILC gave an affirmative answer to this question 'in its report of 2001 on "Draft articles on responsibility of States for internationally wrongful acts"'. It stated: "In the light of the International Court's description of the basic rules of international humanitarian law applicable in armed conflicts as 'intransgressible' in character, it would also seem justified to treat these as peremptory".⁴⁶⁵ Subsequently, the principle of humanity, as expounded above, is submitted to be peremptory in IHL.

It remains to consider the ICRC Study on CIHL to propose further possible *ius cogens* norms in CIHL. It is submitted that this consideration must be understood in the light of the voices that have advocated for the acceptance of IHL (and, especially, human rights law), in its entirety, as being peremptory. Regarding the Study, then, it is submitted that proposed rules 31 (although this rule has been criticised⁴⁶⁶) and 32, regarding the protection afforded to humanitarian relief personnel and objects, might be regarded as norms of *ius cogens*, since their function is so tied to the preservation of human dignity and humanity that violating their rights would be *contra bonos mores* (in a Verdrossian sense). Proposed rule 47(a)-(c), regarding the prohibition of attacking persons *hors de combat*, is equally important for the protection of humanity and it seems inevitable that states will accept this rule (which has the support of antiquity as was seen above regarding the classical

⁴⁶⁴ 2002:48. MacDonald 1987:132-133 divides norms of *ius cogens* into three categories, namely those rules which emanate from the beginning of the twentieth century like, for example, slavery and 'an agreement for the assertion of proprietary rights over the ocean'; the rules that arose after the Second World War, including genocide, the threat or resort to force and 'an agreement not to give effect to certain rules enshrined in the *Geneva Conventions* on waging war' and those rules which are accepted by many, but not the required majority of states such as the agreement to give aid where the right to self-determination is exercised and an unequal treaty.

⁴⁶⁵ 2003:179-180. For 'intransgressible principles', see the *Advisory Opinion on Nuclear Weapons of 1996*, ICJ Reports 1996 par. 79: '...a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and "elementary considerations of humanity" as the Court put it in its Judgment of 9 April 1949 in the *Corfu Channel* case (*I. C. J. Reports 1949*, p. 22), that the *Hague* and *Geneva Conventions* have enjoyed a broad accession. Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law'. Compare *Advisory opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Advisory Opinion of 9 July 2004 [2004] ICJ Rep. par. 157. See further the United Nations, International Law Commission, Report on the work of its fifty-third Session (23 April – 1 June and 2 July – 10 August 2001), p 284, par. 5 (on article 40).

⁴⁶⁶ See, for example, Bellinger and Haynes 2007:448, 450-454 and Breau 2007:179-182. However, see also the reply of Henckaerts 2007b:484.

writers⁴⁶⁷) as one which cannot be derogated from. The human rights influence in this rule also contributes to this submission. It is submitted further, especially in the light of the support for many rules of human rights law as part of *ius cogens* (and again emphasising the clarion call in international jurisprudence for accepting IHL as part of *ius cogens*) that those proposed rules of the ICRC Study which essentially extrapolate human rights provisions to IHL, will constitute excellent candidates for recognition and acceptance as norms of *ius cogens*. Hence, it is suggested that proposed rules 87-104 purport to further and protect human dignity and ensure a measure of humanity for civilians and persons *hors de combat* during times of warfare and, as such, should be recognised and accepted by the international community as norms of *ius cogens*. Arguably, a similar argument might be made for the *ius cogens* status of proposed rules 118-120 (regarding the treatment of persons deprived of their freedom and, in particular, women and children) and proposed rules 134-138 (pertaining to the specific protection of women, children, the sick, the elderly and the infirm). Finally, in light of the ICTY's statement in the *Kupreškić* case, that war crimes could be subsumed as a norm of *ius cogens*,⁴⁶⁸ proposed rules 156-161 would be likely candidates for recognition and acceptance by the international community as norms from which no derogation is allowed. Consequently, it is hoped that this brief survey will indicate the importance of the ICRC Study as a platform from which, for example, the peremptory nature of certain CIHL rules might be indicated. However, such an investigation must be done cognisant of the criticisms and approvals levelled at the various individual rules from international writers. It is submitted that the proposed rules mentioned above are largely uncontroversial and, by indicating their possible peremptory status, their persuasive and normative value must inevitably be strengthened.

Obligations *erga omnes* will be discussed as another conceptual principle in international law that accords a higher status to particular substantive rules and principles.

The *Barcelona Traction, Light and Power Company Limited Case* is the *locus classicus* where the ICJ formulated obligations *erga omnes*:

33....an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising *vis-à-vis* another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.

34. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of

⁴⁶⁷ See section 2.2, pages 37-58, above.

⁴⁶⁸ ICTY, *Kupreškić* case, Trial Chamber, January 14, 2000, par. 520.

aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.⁴⁶⁹

Concerns have been expressed whether it was in fact necessary for the ICJ to refer to obligations *erga omnes* in the *Barcelona Traction Case*, but due to the acceptance of this concept in international practice, literature and judicial decisions, it is evident that this concept is viable, although questions still remain as to the origin thereof.⁴⁷⁰ Ragazzi accepts that the ICJ's reference to obligations *erga omnes* was part of an *obiter dictum*, but he asserts that the notion nonetheless carries weight seeing that *obiter dicta* can better elucidate a particular aspect raised by parties to proceedings and, due to the nature of international law, in the absence of legislation, judicial decisions (including comments made in passing) become very important for the clear exposition of international law. Ragazzi concludes that the reference to obligations *erga omnes* was not gratuitous, but showed the ICJ's 'attempt to provide a "full measure of exhaustiveness" in its response to the arguments put forward by the parties in the course of the proceedings'. Furthermore, all the judges, including the only dissenting judge, unanimously supported this notion. The approval of this notion is also apparent in the subsequent use made of the concept by the ICJ.⁴⁷¹ However, in light of the contemporary acceptance of this notion's existence, discussion ought to be on the elucidation and clarification of it rather than on its origins in the pronouncement of the ICJ.⁴⁷² Accordingly, the examples mentioned by the ICJ and that have emanated from international literature will be considered. This will then be followed by the author's own proposals towards obligations *erga omnes* in especially IHL since the inclusion of IHL rules and principles in obligations *erga omnes* will also strengthen their normativity.

Thus, the first example, invoked by the ICJ, is the 'outlawing of acts of aggression'.⁴⁷³ Ragazzi submits that the conception of aggression, as it has emerged, is close to 'the threat to or breach of peace'. Hence, aggression is deemed 'the most serious and dangerous form of the illegal use of force'. Also, prior to the United Nations Charter, CIL already included rules against acts of aggression and the illegal use of force. The development of this rule was clearly widespread and, as

⁴⁶⁹ *Barcelona Traction, Light and Power Company Limited Case* 1970 ICJ Rep 3 at 32.

⁴⁷⁰ Ragazzi 2002:4-5.

⁴⁷¹ Ragazzi 2002:6-7, 11-12 and 17. The ICJ accepted the concept of obligations *erga omnes* in, for example, the *Case Concerning East Timor* 1995 ICJ Rep 90 at par. 29 and the *Advisory opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Advisory Opinion of 9 July 2004 [2004] ICJ Rep. par. 157.

⁴⁷² Ragazzi 2002:17.

⁴⁷³ *Barcelona Traction, Light and Power Company Limited Case* 1970 ICJ Rep 3 par. 34. See also articles 1(1) and 2(4) of the Charter of the United Nations.

such, the prohibition on acts of aggression is accepted as part of norms of *ius cogens*.⁴⁷⁴ The second example mentioned in the *Barcelona Traction Case* of an obligation *erga omnes* is the prohibition against genocide.⁴⁷⁵ Mention of this crime already had its tentative origins in the Nuremberg Trials, but has subsequently also been subsumed, like the prohibition of acts of aggression, by CIL. Ragazzi states that there exists widespread support that this customary rule against genocide forms part of *ius cogens*.⁴⁷⁶ Furthermore, in the *Advisory Opinion on the Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* the ICJ held the origins of the *Genocide Convention* to indicate that the United Nations intended to reject and punish genocide 'as "a crime under international law" involving a denial of the right of existence of entire human groups, a denial which shocks the *conscience of mankind* and results in great losses to *humanity*, and which is contrary to *moral law* and to the spirit and aims of the United Nations'. Two consequences emerge from this understanding, namely the principles upon which the *Genocide Convention* is premised are identified by states as binding even in the absence of a conventional obligation and the universal nature of both the rejection and condemnation of genocide and of the cooperation of states needed 'to liberate mankind from such an odious scourge (Preamble to the Convention)'. Hence, the *Genocide Convention* aims to protect the existence of certain groups and, simultaneously, to confirm and promote the 'most elementary principles of morality'. In a treaty like the *Genocide Convention*, states 'do not have any interests of their own; they merely have, one and all, a common interest, namely the accomplishment of those high purposes which are the *raison d'être* of the convention'.⁴⁷⁷ The similarities between this advisory opinion and the *Barcelona Traction case* include the idea of a *collective, common interest*. Furthermore, like the 'elementary considerations of humanity' in the *Corfu Channel case*, the *Genocide Convention Advisory Opinion* also reflects upon humanitarian and moral concerns, which, as stated above, inevitably raises a close nexus with obligations *erga omnes* due to the inherent nature thereof as aimed to the entire community of states.⁴⁷⁸ Illustrative of the importance of morality for international law, is Ragazzi's observation that:

⁴⁷⁴ Ragazzi 2002:75-77. Hence, Ragazzi, *ibid* at 90, concludes that '[i]t is incontrovertible that the prohibition of aggression is valid *erga omnes*: it is opposable to all States without exception and affects the interests of all'. For the *ius cogens* nature of this norm, see page 130 above.

⁴⁷⁵ *Barcelona Traction, Light and Power Company Limited Case* 1970 ICJ Rep 3 par. 34.

⁴⁷⁶ 2002:94-95. Nonetheless, serious problems remain regarding the punishment of genocide. Hence, the question arises whether states can vest universal jurisdiction for the punishment of genocide. Ragazzi comments that it has been stated that the notion of obligations *erga omnes* might have a role to play in broadening the area of universal jurisdiction. For the *ius cogens* nature of the prohibition of genocide, see page 130 above.

⁴⁷⁷ *Advisory Opinion on the Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* 1951 ICJ Rep 15 at 23. [Emphasis added.]

⁴⁷⁸ Ragazzi 2002:102.

...the important element of analogy with the dictum on obligations *erga omnes* is that the International Court derived the universal effect of the principles underlying the Genocide Convention from the conception that genocide is contrary to *moral law* and the spirit and aims of the United Nations, and on this premise it acknowledged that the legal prohibition of genocide is recognized as binding on all States alike, whether or not they are parties to the Genocide Convention. In other words, in its reasoning on the character *erga omnes* of the legal prohibition of genocide, the International Court did not only rely on the positive element of recognition by States, but also on the underlying *moral considerations* of this prohibition.⁴⁷⁹

It is submitted that genocide is an atrocity which frequently accompanies or occurs during times of armed conflict. Genocide is also particularly abhorrent *morally*. In the present chapter, the emphasis has been on the influence of morality on IHL. It seems possible, therefore, to extrapolate these considerations regarding genocide by analogy to the broader discipline of IHL in view of their fundamental premise of protecting humanity. The ideal, then, would be to argue for the subsuming of IHL in its entirety into obligations *erga omnes*, but naturally this would not be attainable. Nonetheless, because of the similar foundations of the explicitly recognised example of genocide and IHL in general, some common ground must exist and this will be scrutinised in more detail below.

The third example of an obligation *erga omnes*, emanating from the *Barcelona Traction Case*, is the protection from slavery.⁴⁸⁰ In light of the various developments in international human rights law instruments prohibiting slavery, parallel developments in national law and due to state declarations to this effect, Ragazzi deems the protection against slavery to form part of a customary rule which applies universally in the form of a norm of *ius cogens*.⁴⁸¹ The fourth and final example of an obligation *erga omnes*, emanating from the *Barcelona Traction Case*, is the protection from racial discrimination.⁴⁸² This is another rule which enjoys enormous support in the contemporary international order as forming a customary rule which applies as a norm of *ius cogens*. This rule has a similar peremptory nature to the other rules deemed to be obligations *erga omnes* by the ICJ. A final aspect to note is the Court's reference to 'principles and rules concerning the basic rights of the human person'. Evidently, as Ragazzi observes, this reference alludes to the possibility that both rules and principles may give rise to obligations *erga omnes*. It is submitted that including principles as source from which obligations *erga omnes* may arise, brings that concept closer to *ius*

⁴⁷⁹ 2002:103-104. [Emphasis added.] Nonetheless, Ragazzi, *ibid* at 216, adds the caveat that care should be taken not to summarily infer common political aims and 'universal obligations reflecting basic moral values' in the contemporary international order. It is submitted that the latter sentiment, while cautioning arbitrary derivations of common moral and political objectives, nonetheless accept the possibility of such objectives.

⁴⁸⁰ *Barcelona Traction, Light and Power Company Limited Case* 1970 ICJ Rep 3 par. 34.

⁴⁸¹ 2002:108. For the *ius cogens* nature of slavery see page 130 above.

⁴⁸² *Barcelona Traction, Light and Power Company Limited Case* 1970 ICJ Rep 3 par. 34.

cogens, the examples of which embody both principles and rules. In fact, the opinion has been mentioned that '...the very nature of *ius cogens*, which places it at the level of the fundamental principles of the international system, makes it more likely that principles rather than rules have a peremptory character'.⁴⁸³ Certain conclusions may be drawn from an evaluation of the examples of obligations *erga omnes* identified by the ICJ, namely:

- (1) all four examples relate to narrowly defined obligations (outlawing of aggression rather than, more broadly, the illegal use of force; outlawing of genocide rather than, more broadly, crimes against humanity; protection from slavery rather than, more broadly, all kinds of unlawful restrictions on freedom; protection from racial discrimination rather than, more broadly, all kinds of discrimination);
- (2) while two out of the four examples are expressed in terms of the “outlawing” of certain practices, and the two others in terms of the “protection from” certain other practices, all four examples are essentially those of negative obligations (or prohibitions), rather than positive obligations;
- (3) all four examples are those of “obligations”, or “duties”, in the strict sense (i.e. what “one ought or ought not to do”), to the exclusion of other fundamental legal conceptions;
- (4) all four examples are those of obligations deriving from rules of general international law belonging to *ius cogens* and codified by international treaties to which a high number of States have become parties; and
- (5) all four examples are those of obligations instrumental to the main political objectives of the present time, namely the preservation of peace and the promotion of fundamental human rights, which in turn reflect basic goods (or moral values), first and foremost life and human dignity.⁴⁸⁴

Furthermore, building on the finding that the examples reflect *moral values*, Ragazzi states:

Thus, from the words and examples used by the International Court, it is clear that the rationale for the universal opposability of obligations *erga omnes* is not to be found in an extrinsic principle, such as the presumed or effective predominance of the will of the majority of States over a dissenting minority, but in *the recognition of the universal validity of the basic moral values that these obligations are meant to protect*. Each of the four obligations *erga omnes* listed by the International Court reflects an exceptionless moral norm (or moral absolute) prohibiting an act which, in moral terms, is intrinsically evil (*malum in se*). No State can elude the binding force of these obligations, not only because States recognize that it must be so, but also (and more fundamentally) because nobody can claim special exemptions from moral absolutes.⁴⁸⁵

Although these conclusions were made regarding the specific examples emanating from the *Barcelona Traction Case*, they may serve as a framework through which other norms possibly eligible for selection as obligations *erga omnes* might be viewed. Accordingly, Ragazzi submits that the Court only chose three human rights as examples of obligations *erga omnes*, which clearly shows that the notion of obligations *erga omnes* cannot be used indiscriminately in terms of every rule and principle relating to human rights. Evidently, each proposed obligation must be rigorously considered on its own merit in order to ascertain its *erga omnes* status or not. Also, it is not a

⁴⁸³ Ragazzi 2002:120-121 and 136-137.

⁴⁸⁴ Ragazzi 2002:132-134 and 215. Nonetheless, it is not submitted that these observations will be applicable to all obligations of *erga omnes*, they have merely been identified in relation to the specific examples given by the ICJ in the *Barcelona Traction Case*.

⁴⁸⁵ 2002:183.

prerequisite that a proposed obligation, in order to qualify as an obligation *erga omnes*, must have been accepted and recognised as a norm of *ius cogens* by the international community of states as a whole. Hence, the weight and amount of evidence to be adduced to establish an obligation *erga omnes* will vary according to the particular circumstances of the case. Ragazzi submits that the essential conclusion to draw from obligations *erga omnes* is that they reflect *fundamental moral values* and, hence, must be carefully and rigorously established.⁴⁸⁶

It is submitted that this view will also apply when attempting to elucidate rules of IHL, which reflect obligations *erga omnes*.

It is therefore necessary to scrutinise the IHL norms that might also be obligations *erga omnes* since such findings would improve the value of their normative content. An important question when considering *erga omnes* obligations and IHL, posed by Ragazzi, is whether an obligation *erga omnes* must necessarily have a prohibitory content. Prohibitions bind absolutely, and giving effect to positive prescriptions might be dependent on the particular circumstances. In IHL, an example of a positive obligation *erga omnes*, which has been proposed, is that found in common article 1 to the four *Geneva Conventions* of 1949 where the 'High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances'. Hence, the proposed obligation entails the performance of the contractual obligations and to ensure, through actions, that another party, which has not respected its obligations, be brought back to comply with its obligations.⁴⁸⁷ Common article 1 to the *Conventions* and *Protocol I* therefore entails that states undertake to respect and to ensure respect for IHL. The ICJ has found this rule to belong to CIL and also to apply to non-international conflicts.⁴⁸⁸ This principle thus entails that not only the state which is affected directly by the particular violation, but also all other states must take measures to ensure respect for IHL. These obligations under IHL are therefore obligations *erga omnes*.⁴⁸⁹ Also third party states have a right to urge respect for these norms and an obligation not to encourage violations of them, including perhaps even an obligation to discourage violations.⁴⁹⁰

It is submitted that the whole endeavour to promote and further respect for IHL has been accepted

⁴⁸⁶ 2002:134-135, 140, 145, 182-188 and 215-216.

⁴⁸⁷ Ragazzi 2002:151-152.

⁴⁸⁸ *Case concerning Military and Paramilitary activities in and against Nicaragua*, Judgment of 27 June 1986 (merits) paras 115, 216, 220, 255 and 256.

⁴⁸⁹ Sassoli and Bouvier 2006:283. See also Paust 2006:602, Fleck 2006:182, Henckaerts and Doswald-Beck 2005:495-498 as well as Meron 2000a:249. It is submitted by the author that the *erga omnes* finding is strengthened regarding the *Geneva Conventions* in the light of the universal ratification thereof.

⁴⁹⁰ Meron 1987:355.

to comprise an obligation *erga omnes*, which bolsters this branch of law to a large extent.

Regarding the potential interaction between obligations *erga omnes* and the *principle of humanity* as it emerged from the *Corfu Channel Case*, Ragazzi submits a very important point namely that 'The International Court did not employ the expression "obligation *erga omnes*". However, by referring to "elementary considerations of humanity", which are binding on all States in all circumstances, it relied on a concept which is functionally equivalent to the concept of obligations *erga omnes*'.⁴⁹¹ This, it is submitted, has significant consequences for IHL which, as argued for in the present dissertation, is premised on humanity. By seemingly equating 'elementary considerations of humanity' with obligations *erga omnes*, the argument made above, in connection with the analogy between the prohibition of genocide and IHL rules, is strengthened. This is further advanced when heed is taken of Ragazzi's finding that the examples of obligations *erga omnes*, cited by the ICJ, reflect moral values to which exception cannot be taken and which are inevitably binding.⁴⁹² It is submitted that this argument pertains *a fortiori* to the natural law/moral conception of IHL as it has been advanced in the present dissertation. Consequently, the investigation will again turn to the ICRC Study in order to determine whether any of the proposed rules thereof might be construed as obligations *erga omnes*. *In limine*, it must be re-emphasised that, importantly for IHL, common article 1 of the *Geneva Conventions* and *Additional Protocol I* has been deemed to constitute an obligation *erga omnes*. Turning, then, to the ICRC Study on CIHL, proposed rule 144, which essentially reflects the customary nature of common article 1 to the *Geneva Conventions*, is submitted to be subsumed under obligations *erga omnes*.⁴⁹³ Furthermore, it is submitted that proposed rule 94, regarding the prohibition of slavery during armed conflict, must be accepted as an obligation *erga omnes* due to the acknowledgment of the ICJ of the *erga omnes* status of the general prohibition of slavery. Naturally, if the more general prohibition is accepted to constitute an *erga omnes* obligation then the acceptance must also hold true in the narrower sense prohibiting slavery in wartime. Due to the importance of moral values, for the finding of a norm to pertain to obligations *erga omnes*, it could be argued that the treatment of civilians and persons *hors de combat* (proposed rules 47 and 87-138) must constitute obligations *erga omnes*, but due to

⁴⁹¹ Ragazzi 2002:84-86 and 90. *Corfu Channel (merits)* ICJ Reports, 1949, p.22: 'The obligations incumbent upon the Albanian authorities consisted in notifying, for the benefit of shipping in general, the existence of a minefield in Albanian territorial waters and in warning the approaching British warships of the imminent danger to which the minefield exposed them. Such obligations are based, not on the Hague Convention of 1907, No. VIII, which is applicable in time of war, but on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war; the principle of the freedom of maritime communication; and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States'.

⁴⁹² 2002:183.

⁴⁹³ For the proposed rule 144 reflecting common article 1, see Henckaerts and Doswald-Beck 2005:509-513.

limitations on resources and time, it seems unlikely to attract the concern of all states. Finally, it might be arguable that the duty encapsulated in proposed rule 161 for states to cooperate in the investigation of war crimes and the persecution of suspects, might be an obligation *erga omnes*, since the community of states as a whole has an interest in this duty and, depending on how important the moral concerns inherent in this duty is deemed to be, it might be construed as binding on all states.⁴⁹⁴ Again the ICRC Study (with its attendant criticisms) is valuable in postulating some candidate rules for inclusion in the conceptual principle of obligations *erga omnes*.

Essentially, the aim of both norms of *ius cogens* and obligations *erga omnes* is to protect *fundamental moral values* and, as such, both concepts require the support of the international community.⁴⁹⁵ It is submitted that this is especially relevant for IHL, which, in the view presented in this dissertation, is based upon fundamental moral concerns. MacDonald also observes that both concepts form part of an attempt to establish 'principles of a constitutional nature upon which to establish the international order'.⁴⁹⁶ Accordingly, the *erga omnes* theory, like the *ius cogens* theory, is based on *ethical* considerations for the universal protection of particular fundamental norms. However, the determination of the specific obligations is difficult and the *omnes* to whom the obligations are owed is ambiguous.⁴⁹⁷

From this section, certain inevitable conclusions must be drawn. Despite arguments from scholars against the possibility of norms of a higher nature in the international law, the acknowledgment of the international community of norms of *ius cogens* and obligations *erga omnes* signifies their *de facto* acceptance of a higher normative threshold. However, as was stated by Ragazzi, it seems inevitable that these higher norms must take their validity, their impetus, from non-legal aspects, hence, he submits, *moral values* and it is submitted in this dissertation that these values are very important. Clearly from this section moral values exist in the international community and comprise one of the driving forces in the international law in a broader sense; how much more then would they not find application in IHL? Hence, the importance of norms of *ius cogens* and obligations *erga omnes* are emphasised as they also link up with non-legal values and principles and thereby further the whole international legal process. It is submitted that since neither norms of *ius cogens* nor obligations *erga omnes* are *numeri clausi* these conceptions are important for every field

⁴⁹⁴ Note, however, that Garraway 2007:396 questions the wording of this proposed rule, deeming the requirement to 'make every effort to the extent possible' very high and, accordingly, contentious.

⁴⁹⁵ Ragazzi 2002:189.

⁴⁹⁶ 1987:139.

⁴⁹⁷ Weil 1983:432.

of international law. Thus, IHL has been proposed for acceptance into one of these categories, although in its broadest sense this seems unlikely as was the case with international human rights. It must nonetheless be accepted that certain principles of IHL might indeed be subsumed under one or both of these categories and, hence, be demanded to be respected through moral principles. In this regard, the present section tentatively indicates some of the proposed rules emanating from the ICRC Study on CIHL which could be construed as either norms of *ius cogens* or obligations *erga omnes*. (In the process, the utility of the Study – and its attendant criticisms – was also made apparent.) As has been done throughout the dissertation, the value of non-legal, moral criteria for international law and, especially, IHL is stressed. Evidently, those (proposed) rules unambiguously accepted as *ius cogens* norms or *erga omnes* obligations will have a significantly enhanced status and would, inevitably, contribute to the humanitarian endeavour. Moreover, the principle of humanity – the foundational principle of IHL – was, arguably, also seen to be subsumed by *ius cogens* and *erga omnes*, thereby strengthening its normative basis. Accordingly, the 'elementary considerations of humanity' alluded to by the *Advisory Opinion on the Geneva Convention* itself might have the character of an obligation *erga omnes*.

The following section will consider various substantive principles which have been accepted in IHL. The consideration thereof will serve to tie together the historical existence of principles in IHL (as it was argued for earlier in the present chapter) and how these rules have developed into rules of CIHL. These considerations must nonetheless be viewed against the understanding of the existence in the international law of conceptual principles like *ius cogens* and *erga omnes* obligations through which these principles and rules may be enhanced.

2.4.1.3 A consideration of the fundamental rules and principles of IHL identified prior to the ICRC Study on CIHL

After arguing for the reinstatement of principles to their rightful place as the *fons et origo* of IHL, it has become necessary to consider various substantive principles to have been identified in the IHL discourse. It has been confirmed that there are certain principles of IHL which are applicable at all times, everywhere and in every situation. These are deemed to apply even to states that have not yet ratified or signed treaties because they are deemed to embody the use of nations. The Martens clause itself refers to the 'principles of the law of nations.' Principles have an important function to fulfil in any facet of the law, but (as was indicated in the present chapter) this is especially true of

IHL. This function has been described as that 'they serve in a sense as the bone structure in a living body, providing guidelines in unforeseen cases and constituting a complete summary of the whole, easy to understand and indispensable for the purposes of dissemination'.⁴⁹⁸

The entire body of written and unwritten IHL is based on certain fundamental principles. At the meeting of the Council of Delegates of the National Red Cross Societies in Geneva in 1975, Haug proposed that a declaration, containing the fundamental rules of IHL, be drawn up. The International Committee of the Red Cross expressed its willingness to study this proposal. The outcome of this project was the draft discussed at the San Remo International Institute of Humanitarian Law in 1977. These condensed principles, containing the essence of IHL pertaining to armed hostilities, were determined to include that:⁴⁹⁹

1. Persons *hors de combat* and the persons who are not directly participating in the hostilities are entitled to respect for their lives, physical and moral integrity. These persons are to be treated and protected humanely without adverse distinction and irrespective of their circumstances.⁵⁰⁰
2. It is not allowed to kill or even to injure an opponent who surrenders or who has been rendered *hors de combat*.⁵⁰¹
3. The wounded and sick person shall be collected and cared for by the party to the hostilities who has them in its power. Protection also applies to medical personnel, establishments, vehicles and instruments. The Red Cross emblem is the sign of such protection and must be respected.⁵⁰²
4. Captured combatants and civilians in the opposing party's power, are entitled to respect for their lives, dignity, personal rights and convictions. They are to be protected against all acts of violence and reprisals. They also have the right to correspond with their families and to receive relief.⁵⁰³
5. Every person shall be entitled to benefit from fundamental judicial guarantees. No person shall be held responsible for an act he did not commit, or be subjected to physical or mental torture, corporal punishment or cruel or degrading treatment.⁵⁰⁴
6. Parties to hostilities and the members of their armed forces do not have an unlimited choice

⁴⁹⁸ Pictet 1985:59.

⁴⁹⁹ International Committee of the Red Cross 1978:247-249, Gasser 1993:15-16 and Sassoli and Bouvier 2006:81.

⁵⁰⁰ Compare proposed rules 1 and 87-105 of the ICRC Study.

⁵⁰¹ Compare proposed rules 47, 87 and 89 of the ICRC Study.

⁵⁰² Compare proposed rules 25-30 and 109-111 of the ICRC Study.

⁵⁰³ Compare proposed rules 87-105, 118-128 and 146 of the ICRC Study.

⁵⁰⁴ Compare proposed rules 90-91 and 100-102 of the ICRC Study.

of methods and means of warfare. No means and methods of warfare are allowed which will cause unnecessary losses or excessive suffering.⁵⁰⁵

7. Parties to hostilities must at all times make a distinction between the civilian population and the combatants so that the former may be spared.⁵⁰⁶ Attacks may only be directed against military objectives. The principle of distinction between civilian persons and objects and belligerents and military objectives forms one of the main foundations of international humanitarian law.⁵⁰⁷

It must be noted, however, that these principles, contained in the draft of the ‘fundamental rules of humanitarian law applicable in armed conflicts’, do not have the authority of an international legal instrument, nor do they overrule the provisions of treaties. Their goal was to ‘facilitate the dissemination of knowledge of international humanitarian law’.⁵⁰⁸

It is consequently necessary to consider the substantive principles proposed by Jean Pictet 20 years prior to the Study by the ICRC on CHIL. These principles he mainly derived from the relevant Conventions and Protocols. He distinguished between common principles, principles pertaining to the law of Geneva and principles pertaining to the law of The Hague.⁵⁰⁹ Before the study of the ICRC can be considered in any detail (in Chapter 4), it is necessary to consider these principles briefly. However, in order to illustrate the close nexus between the *principles* identified by Pictet and the *customary rules* postulated by the ICRC Study, footnotes will contain the rules of the study largely or exactly corresponding to the principles of Pictet. Through this process the role of non-legal standards and principles in international law will become more evident, as will the development of such non-legal materials into juridical rules within twenty years.⁵¹⁰

Certain principles are *common* to both the Law of Geneva and Human Rights. Accordingly, the principle of inviolability is stated: ‘The individual has a right to the respect of his life, integrity, both physical and moral, and of the attributes inseparable from his personality’.⁵¹¹ This principle, in

⁵⁰⁵ Compare proposed rules 15-21 and 70 of the ICRC Study.

⁵⁰⁶ Compare proposed rules 1-6 of the ICRC Study. See also Oppenheim 1940:171-172.

⁵⁰⁷ Compare proposed rules 7-10 of the ICRC Study. See also Quéguiner 2008:161-162, Breau 2007:169 and Narveson 1993:147.

⁵⁰⁸ International Committee of the Red Cross 1978:247-248.

⁵⁰⁹ 1985:63-78.

⁵¹⁰ An exposition of all 161 rules of the ICRC Study is reflected below in the appendix. However, naturally, Henckaerts and Doswald-Beck 2005 *Customary International Humanitarian Law, Volume 1-Rules* comprise the ICRC Study. For what follows a list of the ICRC Study rules may be found in Henckaerts 2005b:198-212.

⁵¹¹ Pictet 1985:63.

turn, governs certain principles of application, namely:

- ‘1. A man who has fallen in combat is inviolable: an enemy surrendering shall have his life spared.⁵¹²
2. Torture, degrading or inhuman punishment is forbidden.⁵¹³
3. Everyone is entitled to recognition as a person before the law.
4. Everyone has the right to respect for his honour, his family rights, his convictions and customs.⁵¹⁴
5. Anyone who is suffering shall be sheltered and given the care which his condition requires.
6. Everyone has the right to exchange news with his family and receive relief.⁵¹⁵
7. No one may be arbitrarily deprived of his own property^{516, 517}.

The second common principle is that of non-discrimination which states that: ‘All persons shall be treated without any distinction based on race, sex, nationality, language, social standing, wealth, political, philosophical or religious opinions or on any other similar criteria’.⁵¹⁸ This principle is supplemented with a principle of application: ‘Differences in treatment should however be made for the benefit of individuals in order to counter inequalities resulting from their personal situation, their needs or their distress’.⁵¹⁹

The third common principle is that of security which states that: ‘Everyone has the right to security of person’.⁵²⁰ This principle also gives rise to certain principles of application, namely:

- ‘1. No one shall be held responsible for an act which he has not committed.⁵²¹
2. Reprisals, collective punishments, the taking of hostages and deportations shall be prohibited.⁵²²
3. Everyone shall benefit from customary legal guarantees.
4. No one may renounce the rights accorded to him by the humanitarian Conventions’.⁵²³

The principles pertaining to the law of *Geneva* include the principle of neutrality: ‘Humanitarian assistance is never an interference in the conflict’.⁵²⁴ This principle also gives rise to certain principles of application, namely:

⁵¹² Compare proposed rule 87.

⁵¹³ Compare proposed rule 90.

⁵¹⁴ Compare proposed rules 104 and 105.

⁵¹⁵ Compare proposed rule 125 which applies in the context of a person deprived of his/her liberty.

⁵¹⁶ Compare proposed rule 122 which applies in the context of a person deprived of his/her liberty.

⁵¹⁷ Pictet 1985:64-66.

⁵¹⁸ Compare proposed rule 88.

⁵¹⁹ Pictet 1985:66-67.

⁵²⁰ Pictet 1985:67.

⁵²¹ Compare proposed rule 151.

⁵²² Compare proposed rules 144-148 regarding reprisals, proposed rule 103 regarding collective punishments and proposed rule 96 regarding hostages.

⁵²³ Pictet 1985:67-68.

⁵²⁴ Pictet 1985:68.

- ‘1. In exchange for the immunity granted to it, medical personnel must abstain from any hostile act.’⁵²⁵
2. Medical personnel are given protection as healers.
3. No one shall be compelled to give any information concerning the wounded and sick who are or have been under his care if such information would in his opinion prove harmful to them or to their families.
4. No one shall be molested or convicted for having given treatment to the wounded or sick’.⁵²⁶

Subsequent is the principle of Normality: ‘Protected persons must be able to lead as normal a life as possible’. From this principle a principle of application is derived, namely: ‘Wartime captivity is not a punishment, but only a means of keeping an adversary from being in a position to do harm’.⁵²⁷

The third principle relates to protection: ‘The state must ensure the protection, both national and international, of persons fallen into its power’.⁵²⁸ This principle gives rise to principles of application, namely:

- ‘1. The prisoner is not in the power of the troops who have captured him, but of the state on which these depend.
2. The enemy state is responsible for the condition and upkeep of persons of whom it has to guard and, in occupied territory, for the maintenance of public order and services.’⁵²⁹
3. The victims of conflicts shall be provided with an international protector once they no longer have a natural protector’.⁵³⁰

The foremost principle pertaining to the law of *The Hague* is that: ‘Belligerents shall not inflict harm on their adversaries out of proportion with the object of warfare, which is to destroy or weaken the military strength of the enemy’. From this principle flow three other principles, including the principle of limitation *ratione personae*: ‘The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations’.⁵³¹ This principle also gives rise to principles of application, namely:

- ‘1. The parties to the conflict shall at all times distinguish between the civilian population and combatants, so as to spare the population and civilian objects.’⁵³²
2. The civilian population as such, as well as individual civilians, shall not be the object of attack...(even) by way of reprisals.’⁵³³
3. Acts or threats of violence the primary purpose of which is to spread terror among the

⁵²⁵ Compare proposed rule 25.

⁵²⁶ Pictet 1985:69-70.

⁵²⁷ Pictet 1985:70.

⁵²⁸ Pictet 1985:71.

⁵²⁹ Compare proposed rule 118.

⁵³⁰ Pictet 1985:71.

⁵³¹ Pictet 1985:62 and 71-72.

⁵³² Compare proposed rule 1.

⁵³³ Compare proposed rule 6.

- civilian population are prohibited.⁵³⁴
4. The parties to the conflict shall take all possible precautions to spare the civilian population or, at least, to cause the least possible incidental injuries and damage.⁵³⁵
 5. Only members of the armed forces have the right to attack the enemy and to resist him^{536, 537}.

The second general principle is the principle of limitation *ratione loci*: ‘Attacks must be limited strictly to military objectives’.⁵³⁸ The principles of application which emanate from this principle include:

- ‘1. It is prohibited to attack localities which are undefended.’⁵³⁹
2. It is forbidden to commit any acts of hostility against buildings dedicated to science or charity and against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples.⁵⁴⁰
3. It is forbidden to attack works and installations which may release forces dangerous to the civilian population.⁵⁴¹
4. The population shall not be used to shield military objectives from attacks.⁵⁴²
5. Civilian objects shall not be the object of attack or of reprisals. It is forbidden to destroy or remove objects indispensable to the survival of the population.⁵⁴³
6. Pillage is prohibited^{544, 545}.

The third general principle is the principle of limitation *ratione conditionis*: ‘It is prohibited to employ against anyone weapons and methods of warfare of a nature to cause superfluous injury or unnecessary suffering’.⁵⁴⁶ The principles of application which emanate from this principle include:

- ‘1. Indiscriminate attacks are prohibited.’⁵⁴⁷
2. Attacks are forbidden which may be expected to cause loss and injury to civilians and damage to civilian objects which would be excessive in relation to the concrete and direct military advantage anticipated.⁵⁴⁸
3. Care shall be taken in warfare to protect the natural environment.⁵⁴⁹
4. Starvation of civilians as a method of warfare is prohibited.⁵⁵⁰
5. Acts of war based on perfidy are prohibited^{551, 552}.

⁵³⁴ Compare proposed rule 2.

⁵³⁵ Compare proposed rule 15.

⁵³⁶ Compare proposed rule 3.

⁵³⁷ Pictet 1985:72-73.

⁵³⁸ Pictet 1985:73. Compare proposed rule 7.

⁵³⁹ Compare proposed rule 37.

⁵⁴⁰ Compare proposed rule 38.

⁵⁴¹ Compare proposed rule 42.

⁵⁴² Compare proposed rule 97.

⁵⁴³ Compare proposed rule 147.

⁵⁴⁴ Compare proposed rule 52.

⁵⁴⁵ Pictet 1985:73-75.

⁵⁴⁶ Pictet 1985:75. Compare proposed rule 70.

⁵⁴⁷ Compare proposed rule 11.

⁵⁴⁸ Compare proposed rule 14.

⁵⁴⁹ Compare proposed rules 43-45.

⁵⁵⁰ Compare proposed rule 53.

⁵⁵¹ Compare proposed rule 65.

It seems evident from this comparison between the proposed rules of the ICRC Study and the principles identified by Pictet that an essential core of IHL norms can be postulated. Furthermore, this finding is strengthened by the different approaches to the ascertainment of the norms, namely Pictet, as a single author, sought to establish *principles* of IHL whereas the ICRC Study, conducted by many researchers on various different levels, intended to indicate *customary rules* of IHL. In light of the argument furthered in the present dissertation, this development of principles into customary rules within twenty years seems to confirm the argument that CIHL, as the initial conventional source of substance for IHL, embodied immutable, natural law principles. The interaction between principles and CIHL is, accordingly, re-asserted. It will be indicated in Chapter 4, when the ICRC Study is considered, that the pertinent inclusion of principles significantly strengthens and enhances the Study's endeavour. However, it is submitted that a joint reading of the ICRC Study and the Pictet principles will bolster these rules of IHL even more. Such a reading would confirm both the customary and principled nature of the particular norms thereby enhancing their normative status.

The present chapter argues for the acceptance of the natural law, moral basis of IHL. It was indicated that ancient societies already relied on certain (customary) rules in an attempt to regulate the effects of armed hostilities. It was submitted that these rules *ab initio* intended to further certain principles. It was furthermore indicated that eminent writers on IHL also invoked many principles to regulate warfare. The emphasis was clearly placed on the protection of *humanity* and *human dignity* and this was evidently the motivating factor behind the codification of IHL. Subsequently, humanity as a principle which constitutes altruism and humane conduct was considered to be the essential substantive principle upon which IHL was premised. However, due to the increase of legal positivism and notions like state sovereignty in contemporary international law, legal practitioners have been loath to rely directly on humanity as substantive principle. Due to the argument furthered in the present chapter, this impoverishes IHL significantly seeing that its original, objective-setting, *raison d'être* was relegated to an inferior position to those sources that were built on it! This, essentially, undermined the fundamental component upon which CIHL and treaty law was based, to the detriment of those very sources. The need to restore humanity to its original position is evident. Accordingly, the present section investigated humanity and the possibilities of invoking it directly in IHL. Ironically, seeing that humanity, as principle, preceded

⁵⁵² Pictet 1985:76-77.

customary and treaty law, but inevitably, due to the realities of international law, consideration was given to the treaty provision – the Martens clause – and other conceptual principles which could potentially embody and further humanity. (The interaction between humanity and CIHL will be considered in the following chapters.) It was indicated that the Martens clause provides an important nexus between natural law ideals and positivist provisions. As such, the Martens clause is submitted to be an important instrument through which the essential, natural law basis of IHL might be restored to its rightful place. On account of this finding, the ICRC Study could be criticised for its omission of a discussion on the Martens clause.

Consequently, this section considered the conceptual principles of *ius cogens* and obligations *erga omnes* through which a higher status could be given to legal rules and principles. It was indicated that these rules particularly promoted *morally important rules and principles* and, accordingly, their importance for the promotion of IHL rules, and especially humanity, was apparent. Also, the natural law/legal positivism dichotomy emerged again as it became evident that various of the criticisms levelled against the uses of the Martens clause and norms of *ius cogens* emanated from the positivist desire for the rigid, dogmatic adherence to traditional, theoretical approaches. Inevitably, then, using the Martens clause to attenuate the requirement of *usus* and/or deeming *ius cogens* to pertain to CIL, thereby altering the traditional elements of CIL, would draw criticism from positivists. However, being mindful of the importance of principles for IHL, it must be questioned as to whether this criticism is valid. Finally, this section investigated the principles of IHL, identified by Jean Pictet in 1985, and compared them with the CIHL rules proposed in the ICRC Study. Unsurprisingly, due to the universal, moral, and natural foundation of IHL, very many of these principles have now been accepted as customary. It is submitted that, after re-evaluating principles in IHL, their continued importance for this branch of law is certain.

2.5 A synopsis of the findings of the investigation regarding the aims and nature of IHL

From the aforementioned it is evident that, at various times, different philosophical paradigms have influenced international (humanitarian) law, but the fact is that IHL – a branch of international law – has a very evident basis, namely natural law. It is further to be noted that even prior to the first modern conventions in international law, philosophical writers already accepted the existence of certain principles, values, norms and rules which were, however, not authoritatively posited in a binding document. This again re-emphasises that non-legal moral elements have influenced the

international humanitarian legal order since time immemorial. This is apparent from the historical battlefield conduct and theoretical development of IHL. Arguably the notion that the laws of war started from Lieber's Code and Dunant's *Memory of Solferino*, might be true in a formal sense, deeming conventional law to indicate when 'laws' emerge. However, customary rules have existed for a much longer time and, indeed, the publicists of the sixteenth and later centuries could already create elaborate rules applicable during times of armed conflict. Naturally, these rules emanated from principles, in particular considerations of humanity, and CIHL, which re-emphasises the essential natural law basis of IHL and the importance of CIHL for this branch of law. Evidently, therefore, morality and natural law underlie IHL. It is argued that these sources have remained applicable directly as sources of IHL; have contributed and informed the development of treaty and customary rules and, as will be apparent from the following chapters, are important for the interpretation and application of treaty and customary rules.

It was further indicated that IHL (as branch of international law based on natural law virtues) has been criticised as not being 'law', since it lacks an overarching sovereign, compulsory court and policing system. However, it was shown to be incontrovertible that IHL is accepted by states to regulate their conduct in hostilities. Thus, due to the fact that this branch of law functions between equals, without a compulsory court and policing system, it is in fact very flexible. This is also due to the original reason for IHL, namely to alleviate the harshness of armed conduct. Why else would ancient civilizations have created *any* rules applicable in wartime? Indeed, it seems natural that simple principles would have been formulated which would adequately address the needs of the international order. As was indicated in this section, natural law has again begun to influence the substantive rules of the contemporary international legal order. Natural law was considered to elucidate the theoretical foundation of IHL as an objective, immutable, normative system. The influence of legal positivism and the historical school thereon was also considered. The chapter then turned to a substantive consideration of IHL's central natural law virtue, namely humanity, in order to address the traditional critique that natural law principles are vague and manipulable. It was indicated that this concept entails altruism and compassion for others, in short, aiming at the protection of human dignity. It was further considered how this natural law virtue might be invoked directly in IHL, seeing that the unenforceability of natural law principles is another important (positivist) critique that was indicated earlier. Subsequently, the Martens clause as treaty provision and norms of *ius cogens* and obligations *erga omnes* as principles were considered as legal instruments which may be used to further humanity as substantive principle in IHL conventionally. In furthering humanity thus, it is respectfully submitted that IHL would be bolstered and enhanced

since its foundational principle will be consciously enforced in the contemporary international legal order. Finally, by considering and comparing the principles of IHL identified by Jean Pictet in 1985, with the CIHL rules proposed by the ICRC Study, the interconnectedness of principles and CIHL was again reinforced and, in the process, the normative status of the CIHL rules of the ICRC was enhanced.

Presently, the interaction between IHL and international human rights will be considered. The two regimes have a comparable orientation and frequently supplement each other.⁵⁵³ International human rights also rely on principles, arguably derived from natural law, which are largely accepted in the international community. Shouldn't the rules and principles of IHL, by analogy, be accepted with stronger reason in light of the dire situation in which they are activated? Furthermore, it is argued that *humanity* is also a central principle in international human rights law and, therefore, a consideration of international human rights law would by analogy benefit the understanding thereof in IHL. Also, especially, regarding reliance on *ius cogens* and obligations *erga omnes*, international human rights and IHL could significantly cross-pollinate each other.

3 A brief comparison of IHL and international human rights law

IHL is not the only branch of law that endeavours to promote concepts of humanity and human dignity. It is also not the only universal branch of law which relies on morality to achieve its aims. International human rights law is a branch comparable to IHL in these regards, as it also aims to further humanity and human dignity, applies universally and invokes moral principles to reach its goals. It may indeed be questioned as to whether it is necessary to label these two branches of law as 'international' since they are inherently universal. Furthermore, because they influence and reinforce each other with natural law principles, a comparison between them is in order.

International human rights aim to ensure the fundamental rights and freedoms of individuals at all times and to protect them from social evils (IHL has a similar function, of course, in wartime). The main role-player in this regard is the United Nations, being the successor to the League of Nations (various role-players influence IHL such as, for example, the ICRC). With regard to the written sources of these laws, IHL originated with the *Geneva Convention* in 1864, while the law of human

⁵⁵³ For their overlapping and similar purpose, see also Fleck 2006:191-193.

rights began with the *Universal Declaration* of 1948. Some deem these two branches to have the same historic and philosophical origin. This is due to both branches having their origin in prehistory, arising from the need to ensure that the human being was protected from whichever antagonists were menacing him. Two parallel lines developed: one limiting the effects of war and the other protecting the human being against arbitrary treatment.⁵⁵⁴ Others argue that these branches emanate from different and separate historical and doctrinal roots, but with the principle of *humanity* currently as the common denominator between them.⁵⁵⁵ In this regard the ICTY put it succinctly in the *Furundzija* case that:

The *essence* of the whole corpus of international humanitarian law as well as human rights law lies in the *protection of the human dignity of every person*, whatever his or her gender. The general principle of respect for human dignity is the basic underpinning and indeed the very *raison d'être* of international humanitarian law and human rights law; indeed in modern times it has become of such paramount importance as to permeate the whole body of international law. This principle is intended to shield human beings from outrages upon their personal dignity, whether such outrages are carried out by unlawfully attacking the body or by humiliating and debasing the honour, the self-respect or the mental well being of a person.⁵⁵⁶

It is clear that human rights law is of a more general nature, applying always, whereas IHL only applies where an armed conflict has arisen. Also the judicial systems applicable are different, as one branch operates in wartime and the other also in peacetime. Human rights law mainly focuses on relations between a state and its own citizens, while IHL applies mostly to the relationships between the state and the population of its enemy. These branches are closely connected, even mutually complementary, but they remain distinct.⁵⁵⁷ Hence, Meron argues that human rights law, or at least its minimum non-derogable content, remains applicable during armed conflicts and, thus, can help to fill *lacunae* in the existing IHL. The converse is that IHL might also protect certain rights derogated from under human rights law, since IHL, unlike human rights law, does not allow derogation of rights due to emergency as it was constructed for a situation of the highest

⁵⁵⁴ Pictet 1985:3. See Beyani in Chatham House 2005:56 who indicates that IHL predates the modern corpus of human rights law.

⁵⁵⁵ Meron 2000a:245. Dugard 2005:537 states: 'Humanitarian law and human rights law have different sources and rules but they are both premised on respect for human dignity and therefore are separate parts of a single order committed to respect for human rights in armed conflicts'. See also Khalil's *The Treatment of Persons in Armed Conflict and the Universal Declaration of Human Rights* in Maybee and Chakka 2006:163; Beyani in Chatham House 2005:57; UN Doc. E/CN.4/1998/87 par. 99 and UN Doc. E/CN.4/1999/92 par. 25.

⁵⁵⁶ ICTY, *Furundzija* case, Trial Chamber II, December 10, 1998, par. 183. [Emphasis added.] Meron 2000a:266-267 deems this statement of the ICTY to hold that respect for human dignity was the essential foundational principle of both IHL and human rights law. See also Krieger 2006:275-276 who indicates that IHL and human rights attempts to protect human dignity.

⁵⁵⁷ Pictet 1985:3 and Baggamwalla 2006:13. Also see Teitel 2004:375 and Kretzmer in Chatham House 2005:53. See the *Advisory opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Advisory Opinion of 9 July 2004 [2004] ICJ Rep. par. 106 for the interaction between IHL and human rights law.

emergency, namely war.⁵⁵⁸ A further distinction is that the law of war allows the killing and wounding of innocent individuals who are not directly participating in an armed conflict due to, for example, lawful collateral damage as well as specific deprivations of individual liberty without recourse to a court. Hence, IHL governs the relations between opponents, who are formally equal, and, due to its links with the medieval tradition of chivalry, a rudimentary basis for fair play is present. Human rights law is concerned with human dignity and physical integrity in all situations. These rules apply to the relations existing between unequals like the government and governed.⁵⁵⁹

Meron observes that from the aforementioned it is evident that referring to the 'humanisation of humanitarian law' – that is the process of human rights and principles of humanity being brought to bear on IHL – is thus a *contradictio in terminis* because effecting such a *humanisation* will only come about when all kinds of armed conflict have been eliminated.⁵⁶⁰ Despite this view, it has been submitted that any aid and support which the *humanisation* of the *law of war* can furnish to lessen individual suffering and protect dignity – however imperfect – is important and, accordingly, enjoys moral and political support. The realistic goals of such a *humanisation* of the law entail the promoting of the proper treatment of civilians and prisoners of war and the protection of civilian objects. This process will, however, have limited influence in dissuading states from waging war in the first place. The influence of human rights law on the development of IHL is evident, according to Meron, when considering the work of courts (such as, for example, the ICJ in the *Nicaragua* case), tribunals (for example the *ad hoc* tribunals for the former Yugoslavia and Rwanda) and international organisations (such as, for example, the ICRC CIHL Study). Few bodies have to apply IHL apart from the Yugoslavia and Rwanda Tribunals, hence human rights bodies have come to fill this 'institutional gap and give IHL an even more pro-human-rights orientation'.⁵⁶¹ This inevitably leads to cross-pollination of principles and standards between these two branches of international law. However, the distinction between human rights and IHL has become blurred when considering (humanitarian) rules that require the registration of detainees, protections given to civilians, combatants and other persons regardless of their status.⁵⁶²

⁵⁵⁸ 2000a:267 and 273. See Fleck 2006:191-193. For the derogation of human rights, see UN Doc. E/CN.4/1998/87 par. 50.

⁵⁵⁹ Meron 2000a:240.

⁵⁶⁰ 2000a:239-240. See also the remarks of Teitel 2002:374-377.

⁵⁶¹ Meron 2000a:241, 244 and 247.

⁵⁶² Balgamwalla 2006:13. For this complementarity between IHL and human rights law see also Krieger 2006:275-276. See also Paust 2006:605 who submits that: 'Moreover, customary and universally applicable human rights apply during war and provide at least the same or similar rights and restraints'.

Also, human rights law has been credited with influencing the *Geneva Conventions* and *Additional Protocols*. Thus, parallelism of substantive content occurs in connection with the right to life, discrimination on grounds of race, sex or gender, arbitrary detention and due process of law. 'This parallelism and growing convergence enriches humanitarian law, as it does international human rights'. Furthermore, rules pertaining to crimes against humanity, those embodied in common article 3 of the 1949 *Geneva Conventions* and some found in the *ICC Statute*, are indistinguishable from human rights rules according to Meron. Therefore, IHL and its institutions have become important protectors of human rights.⁵⁶³ Blondel places IHL and human rights on a similar plane, in that the latter is also rooted in the conviction that man is invested with a special, intangible dignity. It is on this plane that the irreducibility of human dignity forms the basis of IHL and human rights law, and that, consequently, both of these fields seek to protect humanity from arbitrary treatment, indiscriminate violence and malice. The interaction between human rights law and IHL has been described in that '[h]uman rights and humanitarian law do not belong to any particular individual, ethnic group, social class or geographical region, but unite all human beings in the struggle for dignity and liberty'.⁵⁶⁴

Clearly these branches of law contain universal and fundamental precepts. This, it is submitted, is important in situations where neither regime might find application. It is argued that certain fundamental, non-derogable standards of humanity will be derivable from human rights law and both the Geneva and Hague branches of IHL (evidently in the form of CIHL) which will be expected to find application by the international community irrespective of the classification of the particular situation.⁵⁶⁵ The importance of reverting to these fundamental principles of humanity in situations which do not meet the threshold for an armed conflict is important in Meron's view, since neither the statutes of Rome (except those pertaining to crimes against humanity and the crime of genocide which are not conflict dependent), nor the *ad hoc* tribunals nor the ICRC Study address these situations which are no more than isolated, sporadic acts of violence or riots.⁵⁶⁶ Gasser also

⁵⁶³ 2000a:253; 266.

⁵⁶⁴ Blondel 1989:513-514.

⁵⁶⁵ Meron 2000a:274 refers to these problematic situations where neither regime might apply, namely the threshold for IHL to apply is not reached; the role-player is a non-state party; the relevant state party to the conflict is not a party to the relevant treaties or where a 'derogation from the specified standards is invoked'. See also Doswald-Beck in Chatham House 2005:50, UN Doc. E/CN.4/1998/87 paras 40-41 and 71 and UN Doc. E/CN.4/1999/92 par. 3.

⁵⁶⁶ 2000a:275. Gasser 1988:38-39 deems certain consequences to follow these outbursts of violence within a specific territory (which it must be noted, also ensues in the case where the threshold for a non-international armed conflict has in fact been crossed) including disrupting political stability, undermining of the legal system and therefore the rule of law through recourse to force, economic stagnation and weakening; social change and, most significantly, humanitarian concerns emanate from the adverse effects to human dignity, life, health, freedom and welfare. Desiring to alleviate these problems, Gasser, *ibid* at 39, proposes a Code of Conduct in such conflicts, premised on

acknowledges the universal applicability of human rights and customary law, thus, even in situations of violence which do not cross the threshold of being 'armed conflicts'. Likewise certain 'inalienable rights' may be part of customary law or may even embody *ius cogens* norms, which would then bind all states in these situations. In this regard, Gasser continues that common article 3 of the *Geneva Conventions*, based on customary law, forms part of *ius cogens* and hence applies to all forms of conflict.⁵⁶⁷ Indeed, Gasser draws the parallel that the author of the present study is also attempting to make, namely that '[h]umanitarian law, too, is no more than the application of basic rules or *fundamental principles* of general international law to the specific problems of armed conflicts'.⁵⁶⁸ It needs to be indicated that the United Nations has also considered the viability of introducing *fundamental standards of humanity* to regulate situations of internal violence. The UN position entails that the answer does not lie in updating treaty law, but rather advocates for a renewed focus on CIL. In this regard, it was argued that by identifying CIL rules some of the problems pertaining to the scope of treaty law may be obviated and, identifying such CIL rules, 'will assist in the identification of fundamental standards of humanity'.⁵⁶⁹ Briefly, the UN finds that '...fundamental standards of humanity call for the protection of victims of abuses in all circumstances, with full respect for the inherent dignity of the human person'.⁵⁷⁰ These findings of the UN confirm the fundamental interconnectedness of CIL and humanity, thereby confirming the present dissertation's objective of reinvestigating this essential relationship in order to enhance the protection afforded under IHL.

the notions that excessive injury to human beings must be avoided and that a person who suffers must be given aid irrespective of whether such a person was the subject of a lawful or unlawful act which caused the suffering. The reasons for Gasser's Code is formulated, *ibid* at 45-47, namely to provide for the adaptation of inalienable rights under human rights treaty law to the particular problems and needs arising from these internal disturbances, these type of disturbances cause significant problems for the authorities who are to maintain or restore order and whereas the rules of international law, *latu sensu*, binds states, the argument is made that IHL, as *lex specialis*, binds all parties to the conflict, including non-governmental parties in non-international armed conflicts, hence, to bind perpetrators of internal disturbances, international law alone is insufficient.

⁵⁶⁷ 1988:43-44. The Code proposed by Gasser, *ibid* at 46, does not '...propose new rules of law, but it simply recalls rules generally considered as being part of customary law or appearing to express general legal principles. The fundamental nature of the rights protected by these rules should ensure their overall and undisputed acceptance'. The rules proposed by Gasser, *ibid* at 51-53, include respect for the human being's inherent dignity; specific actions like murder, cruel, inhuman or degrading punishment, torture; limitation of police force to the minimum required; protection of individuals against the arbitrary deprivation of their freedom; humane treatment for those deprived of their freedom; the principle of *nulla poena sine lege*; due process assurances; treatment of sick and wounded without discrimination; respect for children deprived of their freedom, in accordance with their age; investigations and reports on missing persons to family members and instructing everyone in the proposed rules to ensure compliance therewith.

⁵⁶⁸ 1988:49. [Emphasis added.]

⁵⁶⁹ Hence, the United Nations has attempted to identify *fundamental standards of humanity* as the most appropriate means of identifying the obligations of the various groups engaged, see UN Doc. E/CN.4/1998/87 paras 8, 39, 65, 83 and 88. See also UN Doc. E/CN.4/1999/92 paras 23-24 expressing the hope that the ICRC Study might elucidate the rules which apply to internal conflicts.

⁵⁷⁰ UN Doc. E/CN.4/1999/92 par. 25 also indicates the possible relevance of the Martens clause for regulating internal conflicts.

Moreover, if these arguments were accepted, it is submitted that the rules thus established would constitute a bare minimum in any (armed) conflict. Accordingly, truly universal and *ius cogens* norms would be visibly established in IHL. Also there is an emergence of a hierarchy – certain common fundamental rules and principles derived from IHL and human rights law will apply not only to international and non-international armed conflicts, but also to conflicts not traditionally subsumed by IHL like internal disturbances and riots. More specialised customary rules could be derived for both international and non-international armed conflicts (obviously more detailed regimes where legal development has occurred since these are the areas IHL targets, not internal disturbances). Finally certain rules might be derived as CIL for either non-international or international armed conflicts due to their specific characteristics. With this hierarchical view, it would then be possible to illustrate the foundational principles, invariably based on humanity, applicable to all conflicts.

From the preceding it is evident that IHL and human rights law function together and in isolation – during peace human rights law will apply, but during armed conflicts IHL takes up the role of *lex specialis*. Nonetheless, human rights law may still be relevant during times of armed hostilities to fill *lacunae* and, as such, remains important for the study of IHL. This is especially true when considering the natural law basis of both branches of law. Both aim to promote humanity and to ensure respect for human dignity. The influence of human rights on IHL is especially evident when considering the various formulations of the rules of IHL. Many significant IHL treaties came into existence after 1948 (when the *Universal Declaration* was adopted). Therefore, conventional international human rights law was in effect at hand to supply aid in the formulation of rules which were philosophically and conceptually directed at serving a comparable objective during times of armed hostilities. Cross-pollination between these two fundamentally linked regimes was thus inevitable and vital. These branches reinforce each other and both represent a nexus where transcendental natural law principles become manifested in the positive law. Furthermore, as these branches of law represent attempts to further objectives desired by the whole of mankind irrespective of cultural orientation, religion, race, gender or any other distinction, they effectively constitute universal standards and goals. This is also apparent from the fact that the fundamental principles underpinning these branches could arguably be used in situations heretofore unregulated such as, for example, internal disturbances and riots. Humanity has a vested interest in the successful implementation of these branches of law since they aim to better human life in all circumstances. As such, the universal nature of these branches of law is apparent.

4. Conclusion

IHL has been influenced by natural law principles since its inception. Hence, ancient societies accepted primitive (customary) rules to regulate the volatile relationship of armed conflict that occurred between them from time to time. It does not matter whether the argument is made that it was not principles but rather common interests that informed IHL, since, firstly, both entail a higher, aspirational concept and, secondly, seeing that the objectives in armed conflicts, namely to prevent and alleviate suffering by protecting humanity and human dignity, have remained essentially the same from those first tentative and primitive rules right up to the vast number of rules subsumed today by treaty, custom and other law. These requirements of protecting human dignity and humanity were essentially the driving force behind the initial codifications of IHL as well since these virtues influenced the Geneva law relating to the protection of war victims and, albeit indirectly, The Hague law addressing means and methods of warfare. Also it was indicated that the initial publicists on IHL moved for a rational understanding of IHL. Importantly, these writers advocated for many substantive rules and principles, especially influenced by considerations of humanity. Indeed, many of the rules and principles proposed by these various writers were shown to be reflected in the very recent ICRC Study on CIHL. It is submitted that by indicating the similarity between various rules to have arisen through the *de facto* practice of ancient communities and through the eminent jurists with contemporary IHL, the present dissertation clearly illustrates the existence of *timeless and objective norms* in IHL. It is argued that the common denominator between these rules is the consideration of humanity.

In arguing for the centrality of natural law virtues like humanity in IHL, it was necessary to reconsider the debate of whether IHL is indeed law or merely morality. It was confirmed that IHL is in fact law. Consequently a more in-depth investigation of the natural law basis thereof was conducted. The theoretical approaches of theocentric and anthropocentric natural law to IHL were also discussed. It is submitted that, rather than holding one of these approaches to embody *the* complete explanation of IHL, both ought to be seen as reflective and descriptive of prevailing influences in IHL. Hence, theocentric natural law reflects the natural law, higher principle-influenced origins of IHL. Although it could be argued that the initial rules of IHL emerged for self-preservation, it is submitted that the objectives which gave rise to these rules have remained the same up to the present day. Accordingly, since these objectives (of protecting humanity and human

dignity) inform and give rise to the substantive rules of IHL, it is evident that these rules emanating in pursuance thereof reflect unchanging, perpetual commitments in IHL, which were never reliant on promulgation (although it is evident that promulgation aided in their application) and, therefore, regardless of whether pragmatic self-interest or other principles are deemed to constitute the first source, these rules comply with natural law's requirements and may concisely be termed natural law principles.⁵⁷¹ Theocentric natural law, therefore, postulates the original source of IHL, to which, a return must be made in the contemporary international legal order for improved protection against armed hostilities. Anthropocentric natural law, it is submitted, emerged from a particular epoch in legal thought which essentially focused on an individual human and his interaction with the state. The extrapolation of this approach to international relations provided a further perspective through which the authority of natural law over states *inter se* could be explained. Furthermore, the emphasis on state sovereignty and consensual legal procedures emanated from these views, which have had an influential impact on the conception of modern international (humanitarian) law, especially regarding treaty negotiation, CIL formation and conceptual principles like *ius cogens* and obligations *erga omnes*. Many of the anthropocentric natural law criticisms against international law (and, by extension, IHL) emanate from a disillusionment that states neglected to act in a particular way after the idea of state sovereignty gained a firm foothold. These criticisms are still relevant in the contemporary international community, but significant strides have been made in an attempt to pierce the proverbial 'veil' of state sovereignty.

Knowledge of the anthropocentric approach to natural law, then, contributes to an improved understanding of contemporary fears in the international community relating, for example, to the imposition of legal rules on states to which they have not agreed. These fears are evident when considering the criticisms levelled against notions of *ius cogens* and obligations *erga omnes* as well as CIL (and CIHL) itself and the ICRC Study on CIHL in particular. The essential natural law basis of IHL was therefore clearly established in this chapter.

The scrutiny then turned to the substantive content of the essential natural law principle of IHL, namely humanity. It was indicated that this principle entailed notions of compassion, altruism and

⁵⁷¹ It is submitted that an essential example would be the principle of *do unto others as you would have them do unto you*. Arguably this principle also embodies pragmatic self-interest. However, it is a very widely accepted principle, backed by history, which has remained unchanged, is not reliant on promulgation as it exists *per se*, embodies an important moral concept and, naturally, postulates the highest norm against which any conduct/rules must be measured, therefore, complying with all the traditional requirements of natural law. This argument attempts to indicate that a principle could reflect self-interest without relinquishing its normative value. See discussion in footnote 338, page 98, above.

charity. Its function as a countermeasure for military necessity was re-emphasised, thereby confirming its centrality in the IHL debate. However, being a natural law virtue, scepticism exists regarding its implementation. Therefore, the consideration turned to the Martens clause, a treaty provision, which embodies the laws of humanity and, accordingly, provides it with conventional support. The importance of this treaty provision for CIHL was also indicated and will become important again in the following two chapters as it provides an alternative (and, it must be indicated, more fundamental) element with which to ascertain rules of CIHL. The possibility of strengthening humanity through principles like *ius cogens* and obligations *erga omnes* was also considered. It was indicated that both of these principles, arguably, include humanity within their higher set of norms in the international legal system thereby bolstering significantly the essential virtue of IHL. The interaction between the principles postulated by Jean Pictet and the proposed rules of the ICRC Study on CIHL was considered thereafter. It was indicated that very many of these norms correlated with each other, thus confirming the close nexus between principles and CIHL in IHL. Also, it was indicated that norms subsumed both as principles and rules of CIHL were more robust and therefore enhanced. Accordingly, it is hoped that investigations such as the present one will bolster the ICRC Study's findings with the needed fundamental approach.

Lastly, the cross-pollination of IHL and international human rights was also indicated since this significant phenomenon has re-aligned IHL with its essential origin and has had an influence on the ascertainment of its source of customary law, which will be addressed in the next chapter. It might be mentioned in passing that the argument for the inclusion of standards and principles in legal discourse reverberates in the writings of Ronald Dworkin. He accepted the existence of principles as an independent source of law which, although controversial and numberless, has weight – *gravitas* – something which ordinary legal rules lacked. It is submitted that this approach finds especial applicability in IHL.⁵⁷² On this view, the moral principles argued for in the present dissertation will be directly applicable as law in the IHL arena.

It also became apparent from this Chapter that legal positivism gained the ascendancy at various times during the development of IHL and was largely responsible for the emphasis placed on written, codified treaties pertaining to this branch of law. However, it became apparent from an evaluation of the rules relied on by the primitive societies that CIHL was the initial source of substance for IHL and, as such, furnished the essential reservoir of rules and principles (which as

⁵⁷² Dworkin 1977:22, 26, 40 and 44. Ibid at 22, Dworkin defines a principle as a standard that should be observed as 'it is a requirement of justice or fairness or some other dimension of morality'.

was argued are inherent to many of these customs) from which the codifications were derived. Thus, the importance of CIHL was further indicated in that it informed treaty law. However, because CIHL was influenced and informed by natural virtues, it follows that these virtues came to bear, through CIHL, on treaty law. However, due to the nature of written conventions, these virtues of natural law as they manifested in CIHL (which is itself a flexible type of law) became petrified. After the atrocities of the World Wars, natural law objectives, which focused on the human being, re-emerged and gained the ascendancy. Nonetheless, although the substantive norms of the international community now became immersed in natural law, they were still formulated in legal positivism's favoured instruments – treaties.⁵⁷³ It is submitted that this approach eventually led to the ICRC Study on CIHL as well. Whether the moral and natural law foundations of IHL were retained in the process is doubted.

In sum, then, principles like *humanity* were seen to form the foundation of IHL, while *CIHL* reflected a substantial attempt to further the objectives of this branch of international law. The next two chapters deal with this third source through which principles like humanity may be furthered, and which coincidentally comprises the initial conventional source of substance for IHL. Consequently, Chapter 3 will discuss CIL and CIHL generally, including the traditional and modern methods of ascertainment, and the advantages and criticisms and suggestions to improve the functioning of this cardinal source of international (humanitarian) law. Chapter 4 will consider the ICRC Study on CIHL directly since this *magnum opus* has become probably the most important contemporary restatement of CIHL and, aside from forming the background against which the present dissertation was conducted, any discussion on CIHL must, inevitably, include a consideration thereof.

⁵⁷³ See also generally Weston, Falk, Charlesworth and Strauss 2006:106 for the view that before World War II, international law relied less on treaty law as is the case presently, relying rather on principles, doctrines and rules which emanated from the customary practices of states.

CHAPTER 3

CUSTOMARY INTERNATIONAL LAW AS SOURCE OF INTERNATIONAL HUMANITARIAN LAW

“But,” you say, “the law, by not authorizing, forbids the exaction.” There are many things that do not come under the law or into court, and in these the conventions of human life, that are more binding than any law, show us the way. No law forbids us to divulge the secrets of friends; no law bids us keep faith even with an enemy. What law binds us to keep a promise that we have made to anyone?¹

1. Introduction

Chapter 2 clearly indicates that international humanitarian law (IHL) was inspired by *moral considerations – the natural law basis of IHL became apparent*. It was argued that the foundational *principles and standards* inherent to IHL must be acknowledged as an independent source thereof. Furthermore, it was illustrated that historically the initial, conventional rules applicable to armed hostilities were *customary* in nature seeing that ancient societies habitually began to observe certain (unwritten) rules in order to regulate the effects of armed hostilities. These customary rules were therefore closely linked to the principles and standards they were meant to further and, accordingly, natural law virtues and principles came to permeate and inform customary international humanitarian law (CIHL) to a significant extent. Naturally, CIHL also developed certain rules over time that were independent of any moral considerations, but the fact remains that the essential core of its rules has been influenced by *principles and standards*. It is to this unwritten source of IHL that the present chapter turns. *CIHL is an instrument through which the natural law foundation of IHL could (and should) be strengthened and, as such, embodies an invaluable source of IHL*.

The present chapter constitutes a continuation of the previous chapter, especially pertaining to how natural law may influence the ascertainment of customary international law (CIL). Henceforth, it will be argued that a re-conception of the method relied on to determine CIHL is necessary because it is a unique branch of international law, premised on natural law virtues like humanity. It is the premise of this dissertation that a rigid application of article 38(1)(b) of the *Statute of the*

¹ L. Annaeus Seneca. 1964. *The Loeb Classical Library Moral Essays* Volume III Translation by J. W. Basore. London: William Heinemann Ltd. De Beneficiis V xxi.1:353.

International Court of Justice (ICJ) to this branch of law dealing with armed conflicts entails an unjustifiable equation of different branches of CIL. It is respectfully indicated that not all CIL is created equal. Thus, *this chapter will consider an approach to the ascertainment of CIHL in conformity with its natural law basis*. In the process reference will also be made to the traditional approach of ascertaining CIL since the constitutive elements thereof will remain important for the proposed approach to CIHL. By reconsidering the approach to establish CIHL, this chapter also provides the paradigm through which the methodological approach of the ICRC Study on CIHL will be considered.

In limine, however, the nature and position of CIL as source of international (humanitarian) law needs to be considered briefly before conducting the investigation into the appropriate method of its establishment. In this regard, the traditional approach to ascertain CIL will be considered by the current dissertation, together with the advantages and disadvantages thereof, before postulating the unique natural law approach to the determination of CIHL.

2. Introductory considerations regarding the nature and position of CIHL as well as the traditional method to the ascertainment thereof

It is apparent from Chapter 2 that the international legal system lacks both a compulsory legislator and a judiciary. Due to the absence of an overarching body to formulate authoritative rules, binding on the whole international community, recourse to CIL inevitably increases seeing that these rules emanate informally from the conduct of states *vis-à-vis* other states.² CIL has been defined as a unique form of *cooperation* that includes certain characteristics, including the creation of a nexus point which indicates what will be accepted to constitute cooperation, considerations as to why a state would postulate and/or accept a rule as one of law (*opinio iuris*), and the connection of the specific rule with the broader international legal system.³ Verri defines custom in the context of

² Kammerhofer 2004:536, 550 and 552, submits that it is also due to the nature of international law, as it was expounded in Chapter 2, section 2.3, pages 69-75, above, that the international legal order lacks an overarching constitution, which could postulate the rules of custom-creation or the origin of those rules, and, therefore, that establishing CIL is extremely problematic. (Evidently, the nature of international law contributes to the importance of CIL as source of law as well as the inherent difficulties to its determination.) See also Kammerhofer, *ibid* at 524.

³ Norman and Trachtman 2005:543. Reisman 1987:133 defines custom as: 'Custom...concerns the *implicit* creation of norms through the behavior of a few politically relevant actors who are frequently unaware that law is being, or has been, made. Custom is supposedly indistinguishable from the aggregate flow of community behavior and thus has traditionally been associated with primitive societies lacking institutional articulation'. Similarly Kopelmanas 1937:127-128 finds that the international legislative framework is insufficient for addressing all the needs of the international community. This insufficiency causes significant legal creative action on the part of the subjects

IHL, as a:

[c]omprehensive and uniform repetition of behaviour over a long period, in the belief that such behaviour is obligatory. In the law of armed conflict, custom has often preceded written regulations, sometimes, as with parlementaires and truces, by thousands of years. The laws of war stem from the practice of war. They are adopted because they are necessary, and thereafter become customs. These tentative innovations are repeated over and over again and observed in good faith. Little by little they become routine and in the end are respected by all. Custom then often becomes part of positive international law, which may in turn lead to a custom that becomes binding even on States not party to international instruments.⁴

From this quote the main (traditional) constitutive elements of CIHL (and, in this case, this also applies to the broader source of CIL) can be derived, namely repetitive conduct (*usus*) in the belief that the behaviour is legally obligatory (*opinio iuris*). It will be seen that the determination of customary rules through these traditional elements leads to many complexities. Hence, an investigation will be conducted into whether this process to elucidate customary rules in IHL might be undertaken in a more fundamental manner. Subsequently, it will be ascertained whether the findings of the ICRC Study *might be enhanced by applying to it the more fundamental approach considered in the present chapter*.

From the preceding definition of CIHL by Verri, the controversial *nature* of CIL (and CIHL) also becomes apparent. These rules emerge because they are necessary. As was indicated in the Chapter 2, ancient societies began by introducing and observing some rules during wartime in order to lessen the effects of the hostilities. This source of IHL is therefore closely connected to the *moral, humanitarian aims* of IHL since it is expedient law – initially these rules emerged piecemeal as they were required to further the *moral objectives* of societies. Furthermore, the definition of Verri indicates that a widely accepted custom becomes part of conventional international law and, importantly, due to its nature, becomes binding *universally*. This has far-reaching consequences as states will be bound regardless of whether they have ratified the rule or not. It is submitted that this is especially true for norms that have a *substantial moral content*. Those morally influenced

themselves and, accordingly, a significant number of international rules have their origin in custom. Thus, unlike rules which are based on the authority of an agent, custom relies on the repetition of actions by entities which may not *ab initio* have any powers. See also Kelly 2000:460-464 who defines customary law as 'the internalized normative convictions or beliefs of a social group derived from the material of practice'. Kunz 1953:665 defines the *procedure* of international custom as one intended for the establishment of general rules of international law. International law determines the requirements necessary for this procedure of custom to create such general rules, namely *usus* and *opinio iuris* which are equally important. This definition clearly approaches custom as a process which leads to norms of international law.

⁴ Verri 1992:38. For a confirmation that the rules in treaties embodying already existing CIL or having crystallised into custom after the negotiation of the treaty are universally binding on non-parties and armed opposition groups in the case of IHL, see Kalshoven and Zegveld 2001:16. For a confirmation of CIHL preceding treaty law, see Bruderlein 1991:581.

branches of international law, like IHL and CIL, therefore, serve as a unique nexus between natural law principles and objectives, on the one hand, and positive conventional law, on the other.

Determining the nature of CIL is, according to Kunz, a general problem of law. However, while advanced domestic legal systems have less need to have recourse to customary law, the same cannot be said of the international legal order where customary law was the basis for all general international law.⁵ Indeed, CIL, according to Oppenheim, is the 'older and the original source of International Law in particular as well as of the law in general'.⁶ Hence, it has been submitted that CIL embodies a reservoir of the wisdom, traditions, religious precepts and moral principles of the entire global community.⁷ This is also the view taken by the current dissertation.

CIL deals with a variety of disputes, pertaining to, *inter alia*, territorial integrity, human rights and the use of force to settle international disputes. As these diverse areas have distinct characteristics,

⁵ 1953:663. Similarly, Kopelmanas 1937:128 maintains that '...the problem of custom is so intimately connected with all the fundamental problems of law that it is impossible to treat these latter questions without an exhaustive study of the former'. Kunz 1953:663-664 continues that three reasons can be identified as to why no certainty has been reached on the nature of customary law, namely the ambiguous concept 'source' should be dropped as legal concept as it leads to confusion with 'evidence' or the foundation of the international legal order; the notion of customary law as a tacit agreement is in opposition with *de facto* state practice and essentially entails a fiction and maintaining that custom is not merely the procedure for formulating international law rules but rather the evidence or proof of an already existing rule of international law. (The latter theory Kunz, *ibid* at 664, finds led to the 'extremely bad drafting of Article 38(1) of the Statute of the International Court of Justice'.)

⁶ 1937:24. See also Cohen 2007:79 and Ahamad's *Inaugural Address* in Maybee and Chakka 2006:21. *Ibid* at 7, Oppenheim submits that CIL, irrespective of any theoretical concerns, remains an essential source of any type of law since 'there is, in fact, no community and no State in the world which could exist with written law only. Everywhere there is customary law in existence besides the written law'. For the importance of CIL to treaty law, see MacLaren and Schwendimann 2005:1219-1220. See also *Advisory Opinion on Nuclear Weapons of 1996*, ICJ Reports 1996 par.84. For the opinion that a number of *principles* exist *behind* the treaty rules, which inspire and inform them, see Pictet 1985:59. Compare Oppenheim, *ibid* at 26, who also finds that custom, the original source of international law, gives effect and power to treaties; hence, treaties' ability to state rules of international law is due to the customary rule of *pacta sunt servanda*. See similarly, Cohen, *ibid* at 81, Kelly 2000:452, Pellet 2006:778, Guzman 2005:121 and Weeramantry's *The Revival of Customary International Humanitarian Law* in Maybee and Chakka, *ibid* at 27. Weeramantry, *ibid*, in fact opines that CIL is *the* most important source of international law since all other rules emanate from it and it has the ability to universalise IHL. Nonetheless, for the (positivist) belief that article 38 of the *ICJ Statute* accords treaty a privileged position above CIL, see Henckaerts 2008:117, Weeramantry, *ibid* at 25-26, Henckaerts' *The ICRC Study on Customary International Humanitarian Law – An Assessment* in Maybee and Chakka, *ibid* at 43, Pellet, *ibid* at 774-777, and Cohen, *ibid* at 77. In light of the possibility that a treaty and CIL rule might be applicable to the same situation, Thirlway 2006:131-133 refers to the principles of *lex specialis derogat generali* and *lex posterior derogat priori* in order to determine which rule should enjoy preference. See also Oppenheim, *ibid* at 24, regarding the influence of CIL on treaty law, the investigation of Chodosh 1995:996 and 1011-1050 pertaining to how the treaty/custom distinction should be interpreted, the comments of the *Case concerning Military and Paramilitary activities in and against Nicaragua*, Judgment of 27 June 1986 (merits) paras 178 and 179 that treaty and CIL remain separate sources and the *North Sea Continental Shelf Cases* 1969 ICJ Rep 3 paras 60-82 (see especially par. 69) for the view that a treaty may codify a pre-existing custom or crystallise an emerging custom or lead to a CIL rule due to the treaty and subsequent state practice. See in this regard Bugnion 2008:69-70, Thirlway 2006:131-132, Pellet, *ibid* at 779, Ragazzi 2002:102, Chodosh, *ibid* at 1033, Charney 1986:971, Henckaerts 2005b:183, Cryer 2006:242 as well as Sassòli and Bouvier 2006:135. See also Baxter 1965-1966:277 regarding multilateral treaties and CIL. See generally Gamble 1981:310-313.

⁷ Weeramantry's *The Revival of Customary International Humanitarian Law* in Maybee and Chakka 2006:26.

differentiation between them is necessary – not all customary law is 'created equal; not all law is equally or peremptorily binding'.⁸ It is asserted that these views and complexities are especially relevant for CIHL. *As will be seen below, the customary law applicable in war must be differentiated from other branches of CIL due to its unique stature and characteristics.*⁹

CIL's *sui generis* nature is further evident, according to Kammerhofer, in that it serves as its own foundation, thus there exists a CIL of CIL. Consequently, a distinction is possible between substantive norms of CIL, like the prohibition of cruel, inhuman or degrading treatment, and the norms that regulate the creation of the first type – the so-called *meta-rules* on the creation of CIL – i.e. *usus* and *opinio iuris*.¹⁰ It is the aim of the present chapter to indicate that the natural law basis of CIHL ought to permeate *both* components – the substantive rules of CIHL and the elements and method(s) relied on to ascertain them. If the natural law basis of IHL is not taken into account during the process of establishing the substantive rules, it seems inevitable that these rules will not reflect their true moral pedigree and, as such, will lose much of their impetus.

Since the traditional approach to establish custom is so deeply entrenched in international jurisprudential debate and since it furthermore influenced the methodological approach of the ICRC Study on CIHL, it is necessary to consider it presently. However, a word of caution is in order here. It is not the intention of this dissertation to assume the Herculean task of collecting and summarising the entirety of the literature available on this subject. Also, this dissertation is occupied mainly with CIHL – not CIL – and, it will be submitted, this causes certain important differences regarding the establishment of customary law. *Therefore, succinctly put, the aim of the current section is to consider briefly the traditional elements in the determination of custom, some of their difficulties and advantages insofar as they are relevant, and to reconsider the ascertainment of CIHL in line with the natural law foundation thereof identified in the present dissertation.*

As was indicated in Chapter 2, legal positivists have moved for the certainty inherent in codifications of rules in treaty law *often at the expense of* unwritten legal sources like CIL. Nonetheless, CIL endured as source of international law. However, this desire for legal certainty in codifications has led to article 38 of the *ICJ Statute* becoming the starting point for the majority of

⁸ Norman and Trachtman 2005:544. Meron 2005:817 indicates that CIL and CIHL should not be equated: 'I shall limit myself to the observation that, at least in the field of humanitarian law, customary law continues to thrive and to depend in significant measure on the traditional assessment of both state practice and *opinio iuris*'. It is submitted that the present chapter will scrutinise the truth of this support for the traditional approach to establishing CIHL.

⁹ See sections 3, 4 and 5, pages 186-203, below.

¹⁰ 2004:524 and 531. Kammerhofer adds that these types of norms are frequently confused. See also *ibid* at 538-539.

discussions regarding the sources of international law. Accordingly, Cassese opines that this (*treaty*) article embodies the most authoritative definition of *custom* although it has been questioned.¹¹ The finding must be supported that it is somewhat unusual that the provisions (which emanate from a particular legal source) directing a specific international court regarding the sources it ought to accept and apply should be accepted as illustrative of the essential approach to ascertaining international legal sources.¹² Regardless of this controversy, it has been held that article 38(1)(b) of the *ICJ Statute* (which entails that 'the Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (b) international custom, as evidence of a general practice accepted as law') embodies the view that custom comprises two aspects: general practice (*usus* or *diuturnitas*) and the belief/conviction that said practice reflects, or is, law (*opinio iuris*).¹³ In passing, however, it must be indicated that during the drafting of what was to become article 38, Argentina proposed to rephrase, *inter alia*, the provision pertaining to CIL from 'international custom, as evidence of a general practice, which is accepted as law' to 'international custom as evidence of a practice *founded on principles of humanity and justice*, and accepted as law'. Such a reformulation emphasises the essential principles argued for in

¹¹ 2001:119 and 1986:180. Dunbar 1978-1980:2 states that international arbitration tribunals have also accepted this definition as authoritative. See also Ragazzi 2002:53 who also accepts article 38 as having been traditionally regarded as an authoritative statement of international law's sources.

¹² Kammerhofer 2004:541 confirms that most works pertaining to the sources of international law 'start with Article 38 of the Statute of the ICJ as the fountainhead of their discussion'. Kammerhofer submits that few works go beyond article 38 and, even if they do, 'most of those only present supplemental, additional sources, but do not question or do away with Article 38 as the basis'. Kammerhofer, *ibid* at 541-542, then distinguishes between two approaches. Accordingly, some scholars deem article 38 to be an *authoritative statement* (hence, a formal source) of international law's sources. In this view, 'formal source' connotes that this norm is responsible for the validity and origin of subsequent rules, which are dependent upon this norm. In this view, article 38 (1)(b) of the *Statute itself* is held to be the norm which confers validity to all (post-1920) customs, establishes them as part of international law and constitutes their 'pedigree'. Kammerhofer, *ibid*, continues that it seems unusual to find such an important fundamental source of international law in a treaty (albeit an important one) which postulates the law for a specific tribunal (albeit an important one). Furthermore, how is it possible for a specific treaty to contain the formal source of treaties in general (article 38(1)(a))? On the contrary, other scholars deem article 38 to embody the *correct* statement as to what constitutes the formal sources of international law. This position effectively recognises non-Charter norms while the first approach entails that the Charter provision is the norm-conferring binding force. However, this seems unlikely as there could foreseeably exist sources of international law not reflected in article 38. In the latter regard, see Pellet 2006:700 and 705. It must be noted, as Ochoa 2007:122 finds, that although various considerations of CIL begin, conceptually or chronologically, with article 38 of the *Statute of the ICJ*, custom was naturally part of international law before the *Statute's* existence. Further, this provision has been criticised and Gamble 1981:306, for example, describes the list of sources in article 38 as a 'shopping list'. He accredits the false simplicity of article 38 with many of the misconceptions about the sources of international law. See also Cheng 1982:250-251 and 1983:513-514, Pearce 2003:129, Pellet, *ibid* at 679-680 and 749, as well as Trimble 1986:709. See, however, Pellet, *ibid* at 702, who indicates that many of these criticisms against article 38 are misplaced when considering the article in its own context rather than as a doctrinal analysis of international law sources.

¹³ 2001:119. See Pellet 2006:749 who indicates that although this distinction is accepted today, it was clearly not the intention of the Committee of Jurists of 1920 (who drafted the provision) to break up CIL in this fashion. See Cassese 1986:180-181 and 2001:120 who states that practice comes about due to economic, political or military demands, but that, with increasing acceptance and acquiescence rather than opposition, this practice is understood as a command of international law and it is due to the latter belief that the practice is believed to be obligatory and, hence, the economic, political or military considerations which initially played a role are not the source of the practice's obligatory nature.

the present dissertation in the context of IHL and indicates the importance of natural law virtues during the establishment of article 38. However, it is submitted that since the ICJ has to address non-natural law branches of CIL, the inclusion of such a Martens clause-like phrase was bound to be rejected due to the ambit of the ICJ's operations. Furthermore, a provision which would have allowed the Court this amount of leeway to legislate, was hardly to commend itself during the 1910s. Nonetheless, the movement away from a strict empirical approach towards a normative one seems visible in this proposition and, if the particular court's jurisdiction was limited to natural law branches of CIL, like CIHL, would arguably have gained a stronger foothold.¹⁴ Still, the evident desire to alleviate the rigidity of only applying rules and principles of international law was illustrated by article 38(2) allowing the ICJ to a limited extent to decide a matter *ex aequo et bono* if the parties agree thereto.¹⁵ However, regardless of its history, evidence of state practice (*usus*) and a psychologically felt pressure to be bound (*opinio iuris*) constitute the traditional two-element theory of the existence of CIL.¹⁶

The *locus classicus* pertaining to *usus* is the *dictum* in the *North Sea Continental Shelf Cases*: 'State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform'.¹⁷

However, CIL theory omits to give guidance when evaluating the relative weight to be afforded to

¹⁴ Pellet 2006:688. [Emphasis added.]

¹⁵ Pellet 2006:700.

¹⁶ Kelly 2000:452. See also Thirlway 2006:122 as well as 1972:46-47 and 145, Nicholls 2006:237-238 and 243, Schmitt 2007:132, Cohen 2007:75, Cowling 2006:71, Mendelson 1995:177, Guzman 2005:122-123, Elias 1995:501, Bruderlein 1991:581 and 585-587, Pearce 2003:133 and Roberts 2001:757. See also Ochoa 2007:121 and, especially, 132. Also compare Brierly 1963:59-60, Byers 1995:136, Quéguiner 2008:162, Paust 2006:602, Gunning 1991:214, Bugnion 2008:66, Cheng 1982:249-250, Kopelmanas 1937:129 and Schwebel 1979:303. Kunz 1953:666-667 succinctly described the two 'conditions' of usage and *opinio iuris* as follows: 'The elements of the first condition, "usage," are the following ones: There must be a "practice," whether of positive acts or omissions, whether in time of peace or war.... This practice must have been continued and repeated without interruption of continuity. But international law contains no rules as to how many times or for how long a time this practice must have been repeated.....As to the problem of how widely this usage must have been practiced, international law demands a "general" practice, not a unanimous one. That shows the untenability of the consent theory, of the *pactum tacitum* construction. For, if it is the case of a customary rule of general international law, created by general practice, such norm is valid for new states and for pre-existing states which hitherto had no opportunity of applying it....The usage, thus determined, must be coupled with the *opinio iuris*. The practice must have been applied in the conviction that it is legally binding. When the practice even for a long time and without interruption has been applied only in the conviction that it is morally binding or conventionally binding, a norm of international morality or a norm of *courtoisie internationale* may have come into being, but not a norm of customary general international law...Protests by other states or declarations that they, even if submitting to this practice, do so only *ex gratia*; protests against the norm on which an international decision is based, even in carrying out this decision, prevent the coming into existence of a new norm of customary general international law'.

¹⁷ *North Sea Continental Shelf Cases* 1969 ICJ Rep 3:43. Or, to use another phrase, as Thirlway 2006:124 does, the practice must be 'widespread and uniform'.

different kinds of state practice and how to measure conflicting types of practice.¹⁸ Accordingly, there is much debate as to what counts as state practice and how to evaluate the relevant information for purposes of CIL.¹⁹ Thus debates rage about the respective value to be attributed to the acts and statements of state practice. Some maintain that only physical acts are relevant, thus rendering diplomatic protests and resolutions of the United Nations excluded from state practice.²⁰

Meron indicates that the recent trend has been to elaborate on what constitutes practice. Hence, actions and omissions, verbal and real acts are deemed to be relevant state actions for the establishment of CIL.²¹ Hence, some candidates for state practice to have emerged from international legal theory include policy statements, diplomatic statements, official manuals, press releases, directives to armed forces, comments made by governments regarding draft treaties, judgments of national courts,²² decisions of executive authorities, legislation, pleadings before international tribunals, resolutions and statements made in international organisations, the adoption

¹⁸ Kelly 2000:503. Also compare Roberts 2001:784 and Byers 1995:136.

¹⁹ Kelly 2000:507. See also Kelly, *ibid* at 500, and Guzman 2005:125-127. In this regard, Kammerhofer 2004:525 mentions the ambiguity inherent in the notion of state practice as '[i]n a sense, all that states can do or omit to do can be classified as "state practice", because their behaviour is what they do (the "objective element") and it is also our only guide as to what they want, or "believe", to be the law'. Kammerhofer, *ibid* at 528, identifies two meanings which may be attached to the concept of state practice: 'There are two different concepts of state practice: the first option is a narrow and purposeless concept of state practice. A state acts in its international relations. All these actions and omissions are neutral – they are no indication that the state wishes this behaviour to be prescribed. The passage of ships through a strait is a behavioural regularity, nothing more. These regularities of behaviour constitute the material element and can only be employed for customary law-making if the will or belief on the part of the subjects of law – the subjective element – is added. Only the subjective element lets us know which of these become customary law. In essence this means that state practice is merely a regularity of fact, not a norm...The second option is a wide and purposive concept. "State practice means any act or statement by a State from which views about customary law can be inferred [refers to Akehurst 1977:53]"

²⁰ Kelly 2000:504 refers, *inter alia*, to the views of Anthony D'Amato *Concept of Custom in International Law* 1971:87-90. Regarding the concerns pertaining to potential new sources of state practice, see Cohen 2007:77. Regarding the question of what counts as state practice, Akehurst 1977:1-4 and 7 refers to D'Amato's view that only physical acts are relevant (see also Kammerhofer 2004:525-526 regarding the Akehurst-D'Amato debate). The argument raised by D'Amato, according to Akehurst, is that claims and statements of states are highly likely to be in conflict with each other whereas physical acts will not similarly conflict with each other. Akehurst counters this contention by indicating that physical acts of states *inter se* may be conflicting as well as within one state since a state may act differently during different times or different departments can act differently at the same time. Accordingly, physical acts are not necessarily more consistent than claims or statements. Furthermore, it is difficult to separate what a state does and says.

²¹ 2006:361. Regarding omissions, see also Akehurst 1977:10, Mendelson 1995:199, Tunkin 1961:421 and the *SS Lotus Case* P.C.I.J. Series A No.10 1927 at 28. For the view that state practice does not have to be a state's own practice, since it can acquiescence to the practice of other states, see Akehurst, *ibid* at 23-24, Ragazzi 2002:60, Trimble 1986:679 and Cassese 2001:123.

²² For the rejection of domestic judicial decisions as reflective of state practice, see Kelly 2000:505-506. For the contrary, see Pellet 2006:788. Akehurst 1977:9 deems national legislation and court decisions to be potentially relevant sources of state practice, maintaining that the ILC accepts domestic legislation, judicial decisions and national regulations as important evidence of state practice. Kelly, *ibid* at 526-528, admits that what is known as CIL is largely judge-made or judge-confirmed. Thus, scholars place emphasis on *dicta*, concurring opinions and dissenting opinions as having value in the determination of CIL norms. See also Bodansky 1995:209-210 and Hall 1924:15-16.

of resolutions referring to CIL in international organisations,²³ treaties,²⁴ judgments of international courts and tribunals,²⁵ opinions of national law advisors, reports produced by the ILC and state commentary thereto,²⁶ official instructions to diplomats, consuls, military and naval commanders²⁷

²³ Meron 2006:361 thus lists the findings of the ILA's Committee on Formation of Customary Law, relying on Ian Brownlie, regarding relevant practice. For a further list of state practice see Meron, *ibid* at 362. See also the lists of Akehurst 1977:53, Pellet 2006:751 as well as Rogers 2008:195 and 202. See also the comparable list of Kunz 1953:667-668 who adds that extreme caution is called for in that each element should still be considered on its own merits. Regarding the relevance of resolutions made at conferences of international organisations, see Akehurst, *ibid* at 5-7. However, Kelly 2000:454-455, 486, 489 and 492 indicates that relying on these non-binding resolutions as practice for determining CIL is controversial. At this point the difference between traditional and new CIL theories might be illustrated by the fact that 'New CIL theorists expand the list [of state practice] to include drafts of the International Law Commission, resolutions of the United Nations General Assembly, and recitals in international instruments. The International Law Commission includes the cumulative practices of international organizations and the common application of national legislation in different states as evidence of CIL'. See Kelly, *ibid* at 500-501, in this regard. Kelly, *ibid* at 484-485, discusses the 'new CIL' theorists, thus: 'The premise of "new CIL" methodology is that unanimous and near-unanimous resolutions and declarations of the U.N. General Assembly and other international fora constitute a consensus on legal norms providing clear evidence of the *opinio iuris* of nations. "New CIL" theorists assert such norms quickly become CIL based on little or no practice. This position finds some support in recent judgments of the I.C.J., but it is contrary to past understandings of CIL as based upon the actual practices of states. A few theorists even believe that enacting a resolution alone is sufficient to create custom. This "new CIL" approach is the preferred methodology of human rights activists and environmental advocates, and is the primary basis of the human rights and environmental norms...'. On this view, UN Resolutions, although they are only recommendations to members, would become evidence of *opinio iuris* and *usus*. States widely reject the view that an accumulation of non-binding instruments creates legal obligations. There is no method to determine when enough non-binding instruments change into binding legal obligations. Hence, Kelly, *ibid* at 506, finds: 'U.N. General Assembly resolutions, resolutions of international conferences and U.N. organs, and drafts of the I.L.C. are similarly problematic as state practice. Resolutions are not concrete state behavior, nor even statements that imply acceptance of norms or *opinio iuris*. While they do provide some evidence of aspirational goals, it occurs in a form that is impossible to objectively evaluate. Abstract and non-binding, these resolutions neither tell us what states consider as legally binding norms, nor what they would be willing to accept'. Likewise, the ICJ itself (in the *Advisory Opinion on Nuclear Weapons of 1996*, ICJ Reports 1996:254-255 par. 70) has held that although the resolutions of the United Nations are not *ipso facto* binding, they can have normative value. Therefore, these resolutions may provide evidence for the determination of a rule or the existence of *opinio iuris*. However, before being accepted as such, these resolutions must be considered in light of their content and adoption, cognisant also of any *opinio iuris* which may pertain to its normative nature. For further discussion on resolutions see Gunning 1991:222-223, Byers 1995:117-118, Thirlway 1972:61-79 and Ochoa 2007:177. For the opinion that these resolutions do not establish state practice (or do not do so when considered in isolation), see Schwebel 1979:302, Ochoa, *ibid* at 178, and Bugnion 2008:68. For the view that a rule of CIL may arise at an international conference even before the signing of the convention if it is generally accepted through, for example, consensus see Sohn 1986:1077-1078. For the view that these resolutions should be taken into account with the totality of the evidence, see Cheng 1982:257, Charney 1986:993-994 and Schwebel, *ibid* at 304. The latter approach may also be inferred from the *Case concerning Military and Paramilitary activities in and against Nicaragua*, Judgment of 27 June 1986 (merits) par. 188. However, see the criticism of D'Amato 1987:101-102.

²⁴ Regarding treaties as possible state practice, see D'Amato 1987:103, Akehurst 1977:43, Pellet 2006:751, Baxter 1965-1966:278, 286 and 299-300. It is observed by Baxter, *ibid* at 286, that IHL treaties, aimed at protecting individuals' human rights, have a broader claim to application as compared to treaties only concerned with the economic or political interests of states. Humanitarian treaties build on the provisions of prior humanitarian treaties; accordingly, acceptance of the older, more general standard embodied in the earlier convention as representative of CIL seems highly likely. See generally Guzman 2005:162 and Roberts 2001:766.

²⁵ Akehurst 1977:11. However, see Kelly 2000:505-506 who accepts judgments of international courts as opinions *about* CIL rather than state practice itself and, hence, are merely supportive in establishing CIL. See also Cryer 2006:245-247 and Jennings 1996:3.

²⁶ Dugard 2005:29. However, Bugnion 2008:68 rejects the notion that the decisions of international tribunals are constitutive of state practice since these tribunals are international.

²⁷ Brierly 1963:61.

and the conduct of international organisations.²⁸

Regarding IHL, Quéguiner submits that two types of practice may be distinguished, namely *behavioural* practice and *diplomatic* or *verbal* practice. It is only when one evaluates all of these types of practice that a conclusion may be reached whether the necessary *usus* has been established.²⁹ Bugnion identifies the military manuals of states, national legislation aimed at prohibiting war crimes, official statements, diplomatic correspondence, opinions of states voiced at international conferences, protests, reports of actions in the theatre of war and decisions of national courts as relevant to establish whether a rule of CIHL has materialised.³⁰ Some of the problems which occur when trying to determine the extent of the behavioural practice include that the intensity of the animosity between combatants often causes violations of CIHL, information of conduct on the battlefield is difficult to obtain and relatively unreliable and the psychological element is difficult to determine when the act is committed rather than when retrospective comments are made after the armed hostilities.³¹ Also, the traditional approach to CIL would limit practice to the actions of the combatants which would hardly constitute 'general' or even 'accepted as law' behaviour. Furthermore, actual combatant behaviour might frequently be difficult to ascertain as it may often entail omissions.³² Hence, in the *Tadic* case the International Criminal Tribunal for the Former Yugoslavia (ICTY) conceded that, in the case of ascertaining custom in IHL, it is extremely difficult to identify the actual behaviour of troops on the field for determining whether they complied with or disregarded certain standards of conduct. This problem is compounded when independent observers are barred from the theatre of military operations and the relevant information on the actual conduct of hostilities is often either withheld or manipulated. Due to these factors, the ICTY emphasised that reliance, for the ascertainment of CIHL, should

²⁸ Akehurst 1977:11.

²⁹ 2008:162. Kelly 2000:478 submits that a *non liquet* (refusal to decide) should be announced when state practice is insufficient, thus stating that no relevant CIL norms exist. This idea is inherent to CIL, which entails rules, not an entire legal system.

³⁰ 2008:67-68. See also Bruderlein 1991:587. In regard to international conferences, see Cassesse 1986:183-184 who identifies four processes through which general international law may arise. With regard to national legal sources contributing to CIL formation, see Charlesworth 1998:46. Sassòli and Bouvier 2006:134 state that: 'Other factors must therefore also be considered when assessing whether a rule belongs to customary law: whether qualified as practice *lato sensu* or as evidence for *opinio iuris*, statements of belligerents, including accusations against the enemy of violations of IHL and justifications for their own behaviour. To identify "general" practice, statements of third States on the behaviour of belligerents and on a claimed norm in diplomatic *fora* have to be considered similarly. Military manuals are even more important, because they contain instructions by States restraining their soldiers' actions, which are somehow "statements against interest".'

³¹ Quéguiner 2008:162-163. See Sassòli and Bouvier 2006:134 who also indicate that secrecy and propaganda manipulates the truth regarding state behaviour during wartime.

³² Sassòli and Bouvier 2006:134. A further problem might occur when it has to be established whether a soldier's actions are constitutive of state practice or not.

essentially be placed on military manuals, official pronouncements of states and judicial decisions.³³

Regarding state actions, it seems as though, because states are simultaneously subjects and legislators in the international arena, a state might act contrary to CIL and hence illegally, but that the action, in itself, might lead to the creation of a new customary norm. The effectiveness of the breach will be determined by the reaction of other states thereto. However, '[m]oral customs, and in particular *ius cogens* norms, are unlikely to be undermined by contrary practice. Furthermore, well-established customs will demonstrate relative resistance to change because new state practice or *opinio iuris* must be weighed against a wealth of previous contrary practice'.³⁴ The amount of state practice needed to form a rule of CIL will evidently, then, also depend on whether a prior rule needs to be supplanted or not.³⁵ The practice needs to be general, but not universal. This is especially relevant to armed conflicts where battlefield practice might be rather sporadic and dependent on the circumstances of the particular case.³⁶ Traditionally the repetition of acts is necessary for the creation of a new rule of CIL, with rare exceptions conceivable. Discontinuity may impede the formation of a new rule of customary law depending on the nature and circumstances thereof.³⁷ Nonetheless, a small number of inconsistencies in practice, unlike major inconsistencies, will not bar the creation of a customary rule as practice must be *virtually* – not absolutely – uniform.³⁸ However, as Ochoa states, the time needed for the creation of a CIL rule and the degree of consistency and widespread acceptance thereto is problematic as these factors are to be determined

³³ ICTY, Appeals Chamber, *Tadic*, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, October 2, 1995, par. 99. Meron 1987:361 concurs that it is very difficult to determine state practice during hostilities and, subsequently, he submits that manuals of military law and domestic legislation concerning the implementation of IHL in the domestic system should be deemed good evidence of said state practice and possibly even illustrative of *opinio iuris*.

³⁴ Roberts 2001:784-785. For the alteration of a rule through the disregarding thereof, see Akehurst 1977:8 and 20-21 as well as Meron 2006:371-372. Meron, *ibid*, opines that the ICRC Study neglected to properly consider these violations which do not outright challenge established rules and, subsequently, that the rules proposed may distort the real picture as some of the norms might have been undermined. For the possibility that protests could be evidence of *opinio iuris* and/or state practice, see also Akehurst, *ibid* at 38-41.

³⁵ Akehurst 1977:13 and 18-19. At this stage it is important to note that Byers 1995:177 indicates that the threshold for a new rule of CIL to form is higher when there is an old rule in existence regarding the issue in question in comparison with the situation where no such previous rule existed.

³⁶ Cowling 2006:72 and Tunkin 1961:425. Regarding general rather than universal state practice, see also Trimble 1986:679 and Cassese 2001:123.

³⁷ Tunkin 1961:419-421.

³⁸ Akehurst 1977:20 and 53. In the *North Sea Continental Shelf Cases* 1969 ICJ Rep 3:42-43 the Court states that: '74...State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform'. This requirement, according to Henckaerts and Doswald-Beck 2005:xxxvi, entails that '[d]ifferent States must not have engaged in substantially different conduct, some doing one thing and some another'. Henckaerts and Doswald-Beck, *ibid* at xxxvii, continue that sufficiently similar practice suffices to establish a rule of CIL. The notion that state practice should, in general, be in conformity with a customary rule but not necessarily absolutely was also stated in the *Case concerning Military and Paramilitary activities in and against Nicaragua*, Judgment of 27 June 1986 (merits) par. 186. See likewise Meron 2006:371 and Pellet 2006:753.

on a case by case basis.³⁹ Akehurst further acknowledges that determining the precise number of states needed for customary rule creation is difficult since both actions of states and reactions of specially affected states have to be taken into consideration.⁴⁰ Naturally, 'specially affected' states will differ depending on the interest engaged.⁴¹

These considerations have to be established on a case by case basis, which, therefore, forces one to prove a CIL rule in a *relative* – as opposed to an absolute – manner. '[O]ne can only prove that the majority of the evidence *available* supports the alleged rule'. Also, the entire process of proving a rule of CIL is relative rather than absolute.⁴²

It is submitted that being mindful of this relative nature of CIL determination is of the utmost importance when considering the ICRC Study on IHL – absolute certainty is highly unlikely in CIL, but it remains an important source for international law. Nonetheless when it comes to IHL it will be indicated that the determination thereof should be easier since the proposed approach thereto will further its inherent natural law, normative basis.

Akehurst submits that practice, taken alone, does not suffice to create a rule of CIL – it must also be accompanied by evidence of *opinio iuris* – the belief that the particular practice is required by law.⁴³

³⁹ 2007:132. See also Guzman 2005:124-125 and 157-158. Although some time will inevitably be necessary to develop a rule of CIL, according to Henckaerts and Doswald-Beck 2005:xxxix, there exists no particular time requirement to ensure the relevant density from an accumulation of uniformity, extent and representativeness. See also Kammerhofer 2004:530 and Pellet 2006:752. Also in the *North Sea Continental Shelf Cases* 1969 ICJ Rep 3:43 par. 74 the Court stated that a short period of time would not *ipso facto* prevent a new CIL rule from emerging, provided that 'within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked..'

⁴⁰ 1977:16-17. See also the *North Sea Continental Shelf Cases* 1969 ICJ Rep 3:42-43 paras 73-74. The approach of the ICRC Study, as per Henckaerts and Doswald-Beck 2005:xxxviii and Henckaerts 2005b:180-180 might also be noted, namely that: '...the State practice concerned must be both *extensive and representative*. It does not, however, need to be universal; a "general" practice suffices. No precise number or percentage of States is required. One reason it is impossible to put an exact figure on the extent of participation required is that the criterion is in a sense *qualitative* rather than quantitative. That is to say, it is not simply a question of how many States participate in the practice, but also which States. In the words of the International Court of Justice in the *North Sea Continental Shelf cases* [par. 74], the practice must "include that of States whose interests are specially affected"'. See Hall 1924:13 who accepted that, regarding certain matters, the practice of specific states might have 'preponderant weight'.

⁴¹ Henckaerts and Doswald-Beck 2005:xxxviii gives those states developing laser weapons as an example of a 'specially affected' state in the context of the question pertaining to the legitimacy of blinding laser weapons.

⁴² Akehurst 1977:13.

⁴³ 1977:31. The *North Sea Continental Shelf Cases* 1969 ICJ Rep 3:44 – also addresses *opinio iuris*: 'Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio iuris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough'. Examples of *opinio iuris* included by Byers 1995:139 are 'context, physical acts, omissions, claims, denials, concealments and the submission

Accordingly, Akehurst understands the *North Sea Continental Shelf Cases* to illustrate that *opinio iuris* ought not to be derived from state practice, but is an additional, separate requirement since '[s]tate practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; – and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved'.⁴⁴ *Opinio iuris*, therefore, has various functions in international law, including distinguishing *permissive* rules from their *obligatory* counterparts as well as differentiating between legal and non-legal obligations.⁴⁵ Thus, without the requirement of *opinio iuris* the practice of states will automatically be transformed into CIL. Needless to say, such a course of events would leave the concept of 'law' lacking objective meaning.⁴⁶ In turn, Norman and Trachtman define *opinio iuris* as '...a way of referring to the intent of states to propose or accept a rule of law that will serve as the focal point of behavior, implicate an important set of default rules applicable to law but not to other types of social order, and bring into play an important set of linkages among legal rules'.⁴⁷ *Opinio iuris* has also been held to include common understandings of what counts as the state practice which will be relevant for customary law formation.⁴⁸

of disputes to courts or tribunals all may indicate that a state views a particular issue, or behavior linked to that issue, as having legal relevance'. For the relevance of treaties and *travaux préparatoires* as sources of *opinio iuris* see Akehurst 1977:45-47 and 51-53 as well as Baxter 1965-1966:275 and 298-299. For declarations see Roberts 2001:758 and for the reliance of the ICJ on UN General Assembly resolutions to establish *opinio iuris*, see Pellet 2006:755. Cohen 2007:75 finds that *opinio iuris* 'has been commonly found in the statements of state officials'. Determining *opinio iuris* according to Akehurst 1977:37-38 may be influenced by whether a *permissive* or *obligatory* rule is engaged. Thus, in determining a permissive rule conduct alone may suffice to indicate that states can act in a certain manner provided that the express or inferred claims that such action is allowable are supported by the acquiescence of other states whose interests may be affected. Regarding obligatory rules, inference of a rule from state conduct and acquiescence are insufficient – states must make statements that they deem the act in question to be obligatory and not merely permissible.

⁴⁴ See Akehurst 1977:50 and the *North Sea Continental Shelf Cases* 1969 ICJ Rep 3 par. 74. Regarding the need for *opinio iuris* in custom formation, see Akehurst, *ibid* at 53.

⁴⁵ Akehurst 1977:33. Examples of non-legal obligations include duties emanating from morality, comity or courtesy. For the role of *opinio iuris* in distinguishing legal from non-legal practice, see also Elias 1995:502, Thirlway 1972:53, Byers 1995:139, Kammerhofer 2004:530 and Bruderlein 1991:587.

⁴⁶ Magenis 2002:429, Kunz 1953:665 and Bugnion 2008:66. Norman and Trachtman 2005:542 and 571 state that in terms of CIL doctrine, in the absence of states being motivated by *opinio iuris* – CIL cannot exist. See also D'Amato 1987:102 and 104. Kelly 2000:462 also indicates that without a normative belief that a certain action is legally obligatory it remains habit or convenience, not law. See also Ochoa 2007:125-127 and Oppenheim 1937:24-25. Brierly 1963:59, moreover, finds that a customary law is a usage felt to be obligatory. Ochoa, *ibid* at 127-128, states that some accept custom to comprise a category of usage and practice which an authoritative body would consider to pertain to customary law and would enforce if the matter were to be referred to it. Accordingly, custom is 'that body of practice that has become expected by a people to such a degree that it has become law'. Therefore, norms referred to as custom include usage and law – these norms are accepted, widespread and, often, longstanding. Hence, these norms become law due to widespread acceptance or practice even prior to a statement to that effect by an authoritative body. If an authoritative body, like a court, would find the common practice to be enforceable then this practice is deemed to be law – customary law. Naturally this argument may be extrapolated to international custom and CIL.

⁴⁷ 2005:542.

⁴⁸ Meron 2006:373.

Akehurst observes that D'Amato holds that an articulation of a rule as part of customary law should be made before or simultaneously to its being performed. This articulation may be performed by a state, international organisation, scholar or a court as long as the articulation is publicised widely enough for other states to know – or have constructive knowledge – about it. However, this necessity of articulation becomes troublesome in light of the view that 'the instances of such conduct infinitely outnumber statements that it is obligatory'. Akehurst acknowledges that *statements* and not *beliefs* are what matter for the establishment of *opinio iuris*. Hence, practice 'creates a rule of customary law that particular conduct is obligatory, if it is accompanied by statements on the part of States that such conduct is obligatory'. Not much different from the traditional approach which seeks 'evidence of what States believe,' Akehurst prefers 'to look for statements of belief by States'. On this view, it has been submitted that the traditional approach implies that *opinio iuris* entails the '*genuine* beliefs of States'. However, Akehurst submits that a state's statements on the substantive content of a rule of CIL ought to be accepted as *opinio iuris* regardless of whether the state *believes* the statements to be true or not. Accordingly, a new rule of CIL may arise when states submit that a particular conduct is part of CIL and this assertion is acquiesced to by other states – all regardless of whether the assertion made was knowingly or unknowingly falsely made. Furthermore, Akehurst submits that *opinio iuris* must be derived from statements that something is already law, not from assertions that something is required by morality, comity, courtesy, social needs or that it ought to be law. Something stated to be morally obligatory, in this view, creates rules of international morality and not of international law.⁴⁹ It must be questioned whether this approach makes sense in an CIHL context.

Not only did IHL originate from *moral concerns* and social needs, as was indicated in Chapter 2, but very many of its rules were inspired and informed by these elements. It may be countered that prior to establishing legal rules, these moral elements were observed for a period of time and states eventually held them to have become legal obligations. However, it seems as though this ignores the entirety of the law-forming process. Hence, in a morally based branch of law (like IHL) a moral need may very frequently arise *before* a legal rule can be created (although this is not absolutely true – legal rules might emerge due to expediency – it would be true of the most important rules like humane treatment, protection of human dignity and the like), by arguing that the moral desire gave rise to a legal obligation and that, hence, only a legal obligation exists, seems to ignore the truth of the matter that the moral concern still exists as the motivating reason for the legal obligation and

⁴⁹ Akehurst 1977:35-37. See also generally Pearce 2003:136 as well as Elias 1995:507-509 and 514-516.

thus constitutes an elision in the reasoning process. Therefore, in a morally based branch of law (especially IHL and human rights law) it must be submitted that morality becomes so closely linked with legal obligations that it could (and should) be taken into account directly to derive CIHL.

Thus, unsurprisingly in light of its controversial nature, some writers have rejected *opinio iuris* as an unnecessary element for the creation of custom.⁵⁰ Accordingly, if it should be argued that *opinio iuris* must be abandoned, then another criterion which would be able to serve these goals will have to take its place. Thus, another approach has been to infer an obligatory CIL rule from consistent practice where there exists no evidence to show that such practice was not meant to be legally obligatory – thus looking for a *opinio non-iuris* rather than an *opinio iuris*.⁵¹ Thirlway submits that rather than entailing a belief on the part of states that they are following existing law, *opinio iuris* could be understood as being 'equivalent merely to the need for the practice in question to have been accompanied by either a sense of conforming with the law, or the view that the practice was potentially law, as suited to the needs of the international community, and not a mere matter of convenience or courtesy'. This view would thus broaden *opinio iuris* to also provide for the notion that 'if the practice in question was not required by the law, it was in the process of becoming so'.⁵² Charlesworth points out that, from a positivist approach, the normative force of CIL emanates from the voluntarism from which it sprang. Thus, this view maintains that custom binds subjects because they have agreed to being bound by it – compliance becomes a precondition for a customary rule's coming into being.⁵³ This theory removes the notion of believing in a law, as is the case with *opinio iuris*, and advocates *consent that something is law*.⁵⁴ Furthermore, the opinion has been

⁵⁰ Kopelmanas 1937:151. Kunz 1953:665 refers to Kopelmanas' rejection of the necessity of *opinio iuris* in the formation of CIL. See also Mendelson 1995:204-208.

⁵¹ Akehurst 1977:33-34. See also Kelly 2000:452-453 and Elias 1995:503-504.

⁵² 1972:53-55. Thirlway, *ibid* at 55-56, continues that the traditional elements should be inverted so that a state initially acts in a particular way under the influence of an *opinio iuris* that the particular conduct is necessary as *law* and not comity or courtesy and, hence, that as a result of such practice a legal rule emerges. Nonetheless, Thirlway, *ibid* at 73, still demands some actual usage of an alleged abstract rule *de lege ferenda* to concrete facts or the clear intention to make the rule law by states in order to ensure that the rule becomes binding.

⁵³ 1998:44. See also Kammerhofer 2004:533 and Schwebel 1979:309. Coleman 2004:1520-1521 also deems states to tacitly consent to be bound by CIL through their participation in custom formation and world affairs in general. For the view that CIL is dependent on the recognition and acceptance of states (and criticisms thereof) see Tunkin 1961:422-426. For the functional equation of *opinio iuris* and consent/will regarding the process of permitting a new CIL rule, see Elias 1995:501, 509-513 and 520.

⁵⁴ Kammerhofer 2004:533. See Thirlway 2006:121-122 who also refers to the approach of deeming all custom to be a type of tacit consent. Also compare Kelly 2000:509. It seems that Kammerhofer, *ibid* at 535, claims that the boundaries between consent and belief are being smudged by modern theories as theories all include will in some form or another in their view of CIL. For the debate between the voluntarist approach (based on the *positivist* emphasis on state will) which accepts custom as a tacit agreement and the approach of viewing the subjective element as a belief in some conduct as legally required or compelled (the *opinio iuris* approach), see respectively Mendelson 1995:180-194 and 194-202. See also Mendelson, *ibid* at 183-184, 204 and 207-208, for the submission that the subjective element of CIL is not an invariable requirement of CIL and, hence, frequently superfluous in the

maintained that customary law applies to states irrespective of whether they would have wished to accede to it or not, had the choice been given to them.⁵⁵ However, it is submitted that tacit acceptance of a rule of CIL by the international community seems to be an unstable fiction with which to determine the subjective element of CIL. In this regard, the tacit agreement can be critiqued *à la* Mendelson because it seems to assume that a state had time to learn about the rule, consider it and then decide to abide by it. Naturally, this could not be a true reflection of reality in all circumstances. Consent, the approach of the positivists, therefore, proves problematic.⁵⁶

Consequently, it is necessary to indicate some of the concerns that have emerged from this traditional approach to ascertain CIL. Indeed, Cowling states that the existence or not of one or both of the elements of CIL is probably the most contested area of international litigation.⁵⁷

At the outset it must be noted that due to the large amount and variety of actions performed in the international legal order it might become difficult to establish whether the normativity threshold has been crossed between a legal and a non-legal rule.⁵⁸ Furthermore, evidence of state practice is often unavailable and it is uncertain whether states themselves view it as important since they frequently neglect to collect evidence of it.⁵⁹ Moreover, the application of the traditional approach to IHL is also not straightforward at all: 'Indeed, in a domain in which violations are as frequent as they are flagrant, is there any hope that the conditions of repetition, widespread practice and consistency –

'case, where there is a constant, uniform and unambiguous practice of sufficient generality, clearly taking place in a legal context and unaccompanied by disclaimers, with no evidence of opposition at the time of the rule's formation by the State which it is sought to burden with the customary obligation, or by another State or group of States sufficiently important to have prevented a general rule coming into existence at all'. See also Guzman 2005:143-144.

⁵⁵ Best 1997:370 and Meron 2006:357.

⁵⁶ Mendelson 1995:185-186 and 193-194 and see also Kelly 2000:473-474.

⁵⁷ 2006:71. Cohen 2007:76-77 indicates that it is frequently difficult to ascertain CIL and the process of sifting through, sometimes conflicting and sometimes abundant or limited amounts of, state practice and *opinio iuris* is time-consuming. Disagreements about these rules are abundant and criticisms are bound to follow when these rules are determined. Cohen continues that criticisms that a rule was wrongly identified, state practice incorrectly evaluated or *opinio iuris* over-emphasised, frequently occur. Kelly 2000:499 (and similarly, *ibid* at 450, 453, 465, 516-517, 534 and 536) also criticises the modern paradigm of CIL theory as controversial and susceptible to debate as: 'There is no common understanding of how to determine CIL beyond the ritualistic words of "general state practice accepted as law." There is no agreed means to determine the *opinio iuris* element that states have accepted a norm as law...There is no common understanding on what constitutes state practice that provides the material evidence of custom...There is no common understanding whether CIL is based on consent or the *general* consensus of states'. This causes Kelly, *ibid* at 475, 500 and 503, to argue that CIL ascertainment is susceptible to manipulation seeing that CIL legal theory relies on concepts that are 'empty vessels in which to pour one's own normative theory of international law'. See also Charlesworth 1998:44 and Kammerhofer 2004:551-552. Dunbar 1978-1980:18 also questions the existence of CIL: 'In any event, there is little evidence to support the view that it is "objectively definite, uniform and, above all, compulsory". It seems almost impossible to hazard a realistic and satisfactory definition of customary international law. What, for example, is the meaning of a "general practice" and how is one to know if it is "accepted as law"?'

⁵⁸ Weil 1983:415.

⁵⁹ Kelly 2000:472 and 475.

all *sine qua non* conditions for the consolidation of a customary norm – can be fulfilled?⁶⁰

Kammerhofer states that the traditional requirement of *opinio iuris*, which is deemed the orthodox method to determine the subjective element in CIL, is the most controversial and least understood element of CIL formation. Essentially the debate entails a paradox since creating rules of CIL seems naturally unintentional and indirect; but, on the other hand, law-formation usually entails an intentional, willed action.⁶¹ Byers refers to so-called epistemological problem since *opinio iuris* can only be known through the available evidence, namely state practice.⁶² Akehurst alludes to another concern since *opinio iuris* seems to indicate that 'states must believe that something is *already* law before it can *become* law'.⁶³ This problem entails the assertion that practice plus *opinio iuris* constitute rules of CIL, i.e. in order to create the norm there must exist a belief that the state is acting in conformity with a juridical duty, but – since a rule of CIL has not yet formed – the belief is not based on a judicial foundation. Thus, the emergence of a rule of CIL would presuppose that the state initially acted in legal error.⁶⁴ Naturally, it seems highly unlikely that all rules of CIL extant today emanated from such mistaken beliefs. This belief of acting in conformity with a judicial duty would also seem to indicate that the norm does indeed already exist and, accordingly, could not have emanated from state practice but ought to exist separately. Construed thus the norm is not one of custom through state practice but a norm preceding such practice.⁶⁵ Cheng submits that this circularity problem entails a misconception of *opinio iuris*. Hence, he believes that *opinio iuris*

⁶⁰ Quéguiner 2008:162. To these concerns, those of Byers 1995:136 might be added, namely that state equality and the alleged objectivity of the customary law creating procedures are not as straightforward in practice.

⁶¹ 2004:532. Furthermore, for the cognitive problem of whether a state can believe, see Byers 1995:136, Cohen 2007:119, Mendelson 1995:195, Cheng 1983:530 and Thirlway 2006:123. For the controversial nature of *opinio iuris*, see Mendelson, *ibid* at 177, Thirlway 1972:47 and Cheng, *ibid* at 530. See also Kelly 2000:498 for the argument that it is impossible to determine the *opinio iuris* of states objectively in a world with so many diverse interests and cultures. Subsequently, all theories that aim to establish *opinio iuris* reduce the needed communal acceptance of a norm to a fiction.

⁶² 1995:136. Hence, in the case of IHL, where many rules require abstention from action, *opinio iuris* might be problematic to determine, as was apparent in the ICRC Study, according to Henckaerts and Doswald-Beck 2005:xli. For the view that *opinio iuris* is frequently inferred from the consistency and generality of state practice itself see Meron 2006:366 and Kelly 2000:470 and 475. In this regard Dugard 2005:34 submits that: 'Proof of *opinio iuris* is difficult to produce. Consequently, it is argued by some jurists that *opinio iuris* will be presumed when there is evidence of a general practice in support of a particular rule. The judgments of the International Court of Justice in the *North Sea Continental Shelf Cases* and the *Nicaragua Case*, however, do not endorse such a presumption'.

⁶³ 1977:32. See also Kammerhofer 2004:534 who indicates that if *opinio iuris* is understood to indicate a belief in something as law, then it would only refer to existing law.

⁶⁴ Tunkin 1961:424, Kunz 1953:667, Thirlway 1972:47 as well as Norman and Trachtman 2005:544 and 570. See also Ochoa 2007:132, Elias 1995:502-503 and 507 as well as Guzman 2005:124. Byers 1995:136 calls this the chronological problem, '...requiring states creating new law to believe that they are behaving in accordance with existing law'. Thirlway 2006:122 puts it succinctly: 'how can a practice ever develop into a customary rule if States have to believe the rule already exists before their acts of practice can be significant for the creation of the rule? Or is it sufficient if initially States act in the mistaken belief that a rule already exists, a case of *communis error facit ius* (a shared mistake produces law)?'

⁶⁵ Tunkin 1961:424.

merely entails what a state perceives the law to be at any given moment. It simply means that the state accepts that a particular norm has a legal (rather than a moral or social) character and, thus, embodies legal rights and duties.⁶⁶ Akehurst advances another possible answer to this problem, namely that *opinio iuris* is 'a belief that conduct is required by some *extra-legal norm*; such a belief, coupled with practice, creates a rule of customary law'. Nonetheless, although there exists a significant overlap between rules of CIL and prevailing notions of justice and social needs, Akehurst submits that this overlap is not very extensive. Thus, even though a sense of moral or social obligation accompanies state practice it does not necessarily follow that a rule of CIL will emerge.⁶⁷ In this regard the ICJ in the *South West Africa Case* observed:

Throughout this case it has been suggested, directly or indirectly, that humanitarian considerations are sufficient in themselves to generate legal rights and obligations, and that the Court can and should proceed accordingly. The Court does not think so. It is a court of law, and can take account of moral principles only in so far as these are given a sufficient expression in legal form. Law exists, it is said, to serve a social need; but precisely for that reason it can do so only through and within the limits of its own discipline. Otherwise, it is not a legal service that would be rendered.⁶⁸

It is submitted that this reflects an extreme legal positivist approach. Non-legal phenomena are dismissed out of hand. It is submitted that this type of approach may lead to the exact same arbitrary decisions which would follow when a natural law adherent exceeds the bounds of reason to further his own interests. This is because the approach of the court tends to the other extreme and manipulation of sources becomes a real possibility. How, for instance, will it be determined whether the moral principles were given 'sufficient expression in legal form'? This again returns to a subjective value judgment. It is also submitted that, as was established in Chapter 2, the contemporary international legal order has seen enormous strides in the furtherance of humanitarian ideals. Morality indeed forms the *basis* of disciplines such as IHL and human rights. It seems, therefore, that we might be approaching an epoch where humanitarian concerns might (and should) inform the legal process. To deny this would entail a failure of driving the modern inclinations to focus on human rights and natural law ideals (as furthered through treaties, international organisations, activist groups, states and so on) to its logical conclusion. The substantive body of law would be established on and informed by, but not developed from natural law concerns. This would be a *non sequitur*. It must also be emphasised that the debate does not centre around invoking morality in a national court of law. The debate pertains to invoking these aspects in an

⁶⁶ 1983:531 and 548. See also Thirlway 1972:53-55.

⁶⁷ Akehurst 1977:34-35. [Emphasis added.] An example of such moral considerations not leading to a rule of CIL is aggressive wars which were deemed to be immoral long before they were held to be illegal.

⁶⁸ *South West Africa Case* ICJ Reports (1966) 3 at 34 par. 49.

international court or tribunal, which were themselves established on such concerns, which themselves purport to dispense law influenced and based on these concerns. How could morality not play a part in such deliberations?

CIL has also been criticised for being doctrinally incoherent and behaviourally epiphenomenal. The basis of CIL has been described as a 'fabric of rational acts, woven through a multiplicity of relations over time' rather than a stable and solid natural law foundation of divine principles. However, at the same time, certain components of CIL are held to comprise the foundation of the entire international legal order.⁶⁹ It has been argued that it is extremely difficult, if not impossible, to derive state practice from the actions of a state party to a treaty of parallel application, since all relevant practice is actually in exercise of the treaty rule and not the customary rule.⁷⁰ Where the focus is on treaties to which many states are not party, initiatives to derive customary rules from those treaties may be viewed as an attempt to circumvent the requirement of consent needed for a state to be bound to a treaty; also, why should a state not party to the *Additional Protocols* of 1977 ratify them if the state will be bound by them in any case through CIL? Interpretation and application of CIL is problematic when the wording thereof differs from treaty rules, and CIL may be unsuitable due to its imprecise, vague nature for implementation and interpretation in municipal courts for individual criminal responsibility.⁷¹

Weil indicates the trend over the last few years that the amount of generality needed for a particular practice to be subsumed as a rule of CIL has diminished while the binding nature of that rule, when it has formed, has become increasingly more general. However, arguing from a positivist will-oriented premise, Weil finds this development disconcerting since more and more CIL rules will now be imposed on a larger number of states even contrary to their unambiguously formulated will.⁷²

⁶⁹ Norman and Trachtman 2005:541 and 573. See also Guzman 2005:116-117.

⁷⁰ Bethlehem 2007:8 gives the view of Judge Jennings who dissented in the *Case concerning Military and Paramilitary activities in and against Nicaragua*, Judgment of 27 June 1986 (merits) 14. See also Bethlehem in Chatham House 2005:12 and Guzman 2005:161-162. Meron 1987:370 finds that observance of treaty rules may lead to a blurring of the distinction within the treaty between rules that are also customary in nature and those that are not. See also the *North Sea Continental Shelf Cases* 1969 ICJ Rep 3:43-44. Dinstein 2006:10-11 believes the *North Sea case* to imply that the practice of non-contracting parties (as opposed to contracting parties or soon to be contracting parties) to have the most weight in determining whether a customary rule has emerged after a treaty has been created. This leads Dinstein to state that the ICRC Study deliberately refrained from limiting the Study to the practice of non-contracting parties. See also Cheng 1983:532-533. However, Thirlway 1972:90-91 indicates that this view curiously excludes those states party to the treaty from contributing acts to cause its crystallisation into CIL. Indeed, he opines that the ratification of treaties counts as acts of state practice for CIL purposes.

⁷¹ Bethlehem 2007:8-9.

⁷² 1983:434.

Furthermore, the argument has been advanced that the normative force of CIL has been viewed as illusory seeing that power and national interests are what really drive state actions.⁷³ In this regard it has been argued that:

Rules of customary international law are not strictly the result of short-term, self-interested applications of state power, but are instead the result of a complex interaction of shared understandings, different forms of state behavior, and rules and principles of international law. Power is an important, but not an exclusive, determining factor in the maintenance, development, and change of customary rules.⁷⁴

CIL can only have authority as source of law if it is possible to determine whether states have accepted CIL norms as being legally binding. The so-called lack of procedural legitimacy also detracts from custom's worth as source of law in the international arena. This argument maintains that too few states participate in the creation of these norms, and that the views of less powerful states are often ignored in favour of those held by powerful states. The process is thus not deliberative and the integrity of the international order is undermined when it seems as though the values of one or a few cultures are emphasised as constitutive of obligations for all.⁷⁵ However, is this true in the context of IHL? Is suffering not universal? Is the unnecessary death of an innocent child not something to guard against at all costs? Do nations have diverse interests when it comes to the suffering emanating from armed conflict? Is the universal ratification of the *Geneva Conventions* not precisely reflective of a universal commitment towards the victims of armed hostilities? It is submitted that the vicious, atrocious situation of war furnishes the exception where the sentiment that one culture's values are furthered to bind another gives way to the idea of *tutti fratelli*.⁷⁶ Meron states that: 'After all, customary humanitarian law for the most part prohibits acts that everyone would assume to be criminal anyway: rape, murder, torture, deportations, pillage, attacking civilians'.⁷⁷ Does this not confirm some sort of correlation between CIL, natural law and IHL?

Cassese deems custom to be an unsuitable instrument for effecting legal change. This is due to custom's inherent uncertainty as it is unwritten and its development is often slow (to the

⁷³ MacLaren and Schwendimann 2005:1219 refer to the views of Goldsmith and Posner into whose views this dissertation does not intend to go in any detail as Vagts 2004:1031-1040, Golove 2006:335-339 as well as Norman and Trachtman 2005:541-580 elaborately do this.

⁷⁴ Byers 1995:179.

⁷⁵ Kelly 2000:453, 457-458 and 465. See also Kelly, *ibid* at 531-532, and Roberts 2001:762.

⁷⁶ Dunant 1986:72 – *Tutti fratelli* – 'all are brothers!' was the sentiment of the women of Castiglione, who helped Henry Dunant take care of the wounded after the Battle of Solferino in 1859.

⁷⁷ Meron 2005:821.

disadvantage of especially Third World states). Also, the international community of states is much larger than when custom was a prominent source of law decreasing the likelihood of majority support *vis-à-vis* a particular rule.⁷⁸ However, the role of NGOs in this regard is important as they could speed up and facilitate the custom-creating process to the advantage of the international community.⁷⁹ Doubts have been expressed as to whether custom can address the needs of 20th century civilization. However, custom is deemed to be a source from which one can get the international law he desires without having to give anything up as one would do in the 'give-and-take' process inherent to the legislative process.⁸⁰

The criticisms thus raised against CIL as source of law are significant, but do they necessarily outweigh the advantages thereof? Furthermore, do all of them hold sway over CIHL? It is submitted that many of these criticisms emanate from a legal positivist view, which takes unwritten, non-consensual legal sources to task merely because of the so-called inherent uncertainty and manipulable nature thereof. It is acknowledged that these are extremely important criticisms and attention must be given to avoid and, where necessary, alleviate them. However, especially regarding customary norms applicable to IHL (with respect it is not the attention of this dissertation to enter the shark-infested water of attempting to defend CIL in the broader branch of international law), it is submitted that there are guidelines and standards to aid in the process of establishing rules of CIHL. Free reign is definitely not allowed for subjective, arbitrary determinations in this regard as IHL has a very long tradition and, as such, has clear objectives and the support of many, visible rules of CIHL and treaty law which serve as limitations against *mala fide* determinations. Furthermore, as was advocated in Chapter 2, higher, natural law principles gave rise to CIHL and informed these rules; therefore, these rules are further aligned with the essential objectives of IHL and, as such, they serve as valuable proof thereof.

Although debates rage over the method of ascertaining CIL, the *advantages* of this source of international (humanitarian) law are significant and a consideration thereof also increases the value of the ICRC Study's renewed scrutiny into this source. Accordingly, CIL's importance is very evident as it applies to all states irrespective of ratification. Also, unlike treaties, CIL is more adaptable to changing circumstances due to its fluid nature.⁸¹ Furthermore, although CIL is

⁷⁸ 2001:124 and 1986:181.

⁷⁹ Cassese 2001:125 mentions the UN as such an example, but the ICRC would arguably also fall in this category.

⁸⁰ Reisman 1987:134.

⁸¹ Cohen 2007:76 and 89-92 as well as Roberts 2001:784. See also Golove 2006:375. In this regard Cohen, *ibid* at 77, finds that 'custom does have the advantage of allowing for change, although some argue that custom changes too

uncertain and vague when compared with treaty law, this may be an asset to alleviate the rigidity of treaty law.⁸² In countries subscribing to the notion that customary law is part of the law of the land, while treaty law should be made law of the land through the regular promulgation of an act, custom becomes very important in the absence of the necessary enactment.⁸³ Custom is less exact, but when it is established after a time from the actions of states, it binds all nations.⁸⁴ Therefore, although treaties are used more often, their more limited applicability leaves treaties less suited (compared to CIL) to the creation of a *universally* binding international law. This dichotomy with treaty, being more restricted, and CIL, being more universal, motivates a convergence of the two regimes so that there is an equivalence of treaty provisions with customary – thus, universal – rules. From this it is clear that the difference between a rule of treaty law as opposed to a customary rule is important since the regime directly influences the scope of its applicability.⁸⁵ It is submitted that these differences pertaining to the scope of applicability indeed provided the significant impetus for the ICRC Study on CIHL, which substantially focused on determining which treaty rules (of those treaties not widely ratified) were also binding as a matter of CIHL in order to ensure extended and enhanced protection to the victims of armed conflicts.

Cassese submits, and it is felt that both the present dissertation and the ICRC Study confirm his submission, that custom still has an important role to play in *areas of international law deemed to*

quickly (arguing that courts cherry-pick evidence of practice and *opinio iuris* to reach desired results) and others argue that it changes too slowly (because of the requirement of changed general practice). One ever-present problem is that the same behavior can constitute either a violation of the customary rule or evidence of a new rule'.

⁸² Meron 2006:360, Guzman 2005:124, Cohen 2007:76, Charlesworth 1998:44 and Pearce 2003:140. Kalshoven and Zegveld 2001:15 state that CIL rules are 'elusive and uncertain'. However, this problem is overcome through including those rules in a treaty as the substantive content of these rules can then be discussed and commented on. However, as Cohen, *ibid* at 119 n. 259, notes, the uncertainty (which CIL certainly contains) should not be over-estimated: 'States have followed (and courts have identified) customary international law for centuries. Even today, when many areas of international law have been reduced to treaty, courts continue to find new rules of customary international law'.

⁸³ Meron 2006:358 and Meron in Chatham House 2005:48. South Africa may be seen as such a country – see 231 and 232 of the *Constitution of the Republic of South Africa*. See Paust 2006:605 who also shows that the possible effects which CIL can have domestically are important consequences of this source. See also Bethlehem 2007:7-8 and Bethlehem in Chatham House 2005:12.

⁸⁴ Gunning 1991:213, Ragazzi 2002:59 and Chodosh 1995:977. See also Thirlway 2006:122 and 1972:133 who indicates that CIL binds the states irrespective of whether they participated in the customary rule's formation.

⁸⁵ Chodosh 1995:977-980. The effect on especially the non-treaty party is important, because an equation of treaty and CIL would bind the non-party state to the treaty. See also the comments of Paust 2006:601 in a CIHL context: 'Customary international law is universal in its reach. It is not subject to control by a few actors in the international legal process, and it binds all participants in international and non-international armed conflicts to the extent that it is applicable to such conflicts'. Hence Cassese 2001:119 states that the importance of custom lies in the wide application it finds as compared to other conventional instruments since it binds all members of the international community, while treaties bind only those states which ratify them. See also Thirlway 2006:125, 1972:144-145 and Guzman 2005:119. For the view that CIL has come closest to representing a source of universal international law, since it is held to apply to states irrespective of their culture or political system, see Kelly 2000:451.

be in need of updating and elaboration like the laws of war and treaties.⁸⁶ Thus, for IHL, custom's universality is also important in that it extends the influence of CIHL to non-state insurgents. Evidently, then, the protections afforded by CIHL fill the gaps left by treaty law and, in the process, increases protection of those suffering as a result of the armed conflict.⁸⁷ The importance of custom as source of law in IHL escalates due to the scant possibility of developing IHL through regular treaties. In IHL, CIL is relevant for adjusting, aligning and even reforming the law. In other branches of international law treaty law might be faster, but in IHL change through custom-creation may be faster (albeit less precise and detailed in content).⁸⁸

Thus, despite the abundance of treaty law, it has been submitted that CIL should be remembered for establishing the basis of the international humanitarian legal order and still exists side by side with these treaties. To prove that a 'rule' in the international humanitarian legal order is customary in nature can be quite difficult, but this in no way detracts from the importance of CIL's importance for this branch of law.⁸⁹ Indeed, it has been submitted that a finding of customary status of a specific rule might ensure increased *moral weight* of the particular rule and, hence, encourage compliance thereto.⁹⁰ This succinctly emphasises the importance of custom for IHL – CIHL was historically formed and influenced by morality and, conversely, postulating a rule of CIHL furnishes that rule with moral weight and, therefore, with improved normativity.

It has been stated that regardless of the development of the law of war the parameters of its application are still set by CIL. Treaties are only able to give a piecemeal definition of when this corpus of law should apply.⁹¹ CIL in the field of IHL has been described as usually being absolutely binding.⁹² Furthermore, CIL is essential for comprehending treaty law which is based on a notion like *pacta sunt servanda*.⁹³ Accordingly, although IHL is thoroughly codified, custom is still of great importance.⁹⁴ Still, the codification of unwritten principles aid in their

⁸⁶ 2001:126 and the same thoughts are almost found verbatim in Cassesse 1986:181-182.

⁸⁷ Balgamwalla 2006:16.

⁸⁸ Meron 1996:247. See also Sassòli and Bouvier 2006:135.

⁸⁹ Henckaerts 2008:118. Byers 1995:127 finds that the basic principles which are responsible for the structure of the international legal order, including treaty-making, are customary in origin. See MacLaren and Schwendimann 2005:1223 who state that ascertaining *usus* and *opinio iuris* for rules of CIHL is especially difficult.

⁹⁰ Nicholls 2006:233.

⁹¹ Hoffman 2004:233.

⁹² Gasser 1993:26.

⁹³ Guzman 2005:119 and 121. Here the argument of the present dissertation must be kept in mind that CIHL influenced, permeated and provided the impetus for treaty law. See also the comments of Oppenheim 1937:24 that CIL is the older, original source of international law. See footnote 145 on page 47 regarding *pacta sunt servanda*.

⁹⁴ Bugnion 2008:64.

comprehensibility, detail and ease of applicability in particular cases.⁹⁵ Accordingly, it is unsurprising that the ICRC produced a written Study on CIHL. It is clear that although CIHL formed the basis of treaty law, the positivist underpinning of treaty law has permeated the ascertainment of CIHL.

CIL is especially important in armed conflicts because it furnishes the participants in both international and non-international armed conflicts with rights and competencies regardless of whether they are nationals of a state party to the relevant treaty in which similar rights are contained. CIL may also incorporate customary human rights, for example pertaining to due process, into IHL treaties, for example to common article 3 of the *Geneva Conventions*.⁹⁶ Evidently, CIHL is a dynamic aspect of international law – how it develops is determined in the soundness of decision-making relating to humanitarian needs and operational challenges.⁹⁷ It is submitted that the *moral objectives* of IHL indicated in Chapter 2,⁹⁸ should inform and direct decision-making and, thus, the development of CIHL. Moreover, certain factors cause conventional (treaty) law to be less effective in the international humanitarian legal order than might be desired. These factors include the fact that *treaties have to be ratified* by a party, which many parties neglect to do, in order to bind that party; the fact that a particular *armed conflict has to be categorised* in order to determine which treaty applies to it (and this may be very difficult to ascertain as armed conflicts might have overlapping characteristics); and the *insufficient, primitive nature of conventional law* applicable to non-international armed conflicts might undermine their protection during these conflicts.⁹⁹

The first factor, that of ratification, does not apply to the four *Geneva Conventions* of 1949 as their ratification is universal. Nonetheless, if the *Geneva Conventions* are shown to be reflective of CIL, it would enhance the *moral* claim for observance thereof as humanitarian foundations and a basis in

⁹⁵ Gasser 1993:26. See also Bruderlein 1991:589 who indicates that the renewed scrutiny into CIL seems to reflect a dissatisfaction with treaty law while a desire to focus on a more flexible legal source which could strengthen the international legal system is also evident.

⁹⁶ Paust 2006:602-604. Sassòli and Bouvier 2006:135 likewise submit that: 'Although IHL is a branch widely codified in widely accepted multilateral conventions, customary rules remain important to protect victims on issues not covered by treaties, when non-parties to a treaty are involved in a conflict, where reservations have been made against the treaty rules, because international criminal tribunals prefer – rightly or wrongly – to apply customary rules, and because in some legal systems only customary rules are directly applicable in domestic law'.

⁹⁷ Hoffman 2004:249.

⁹⁸ See section 2.1 in Chapter 2, pages 26-30, above.

⁹⁹ Henckaerts 2008:118. See also the statements of Dr Kellenberger in his foreword to the ICRC Study on page x where he acknowledges the first and third points, namely the problem with ratification and insufficient regime for non-international armed conflicts. See also Weeramantry's *The Revival of Customary International Humanitarian Law* in Maybee and Chakka 2006:32, Henckaerts' *The ICRC Study on Customary CIHL – An Assessment* in Maybee and Chakka, *ibid* at 44-46, and Bugnion in Chatham House 2005:1-2.

tradition and community values would be reflected. The process might also lead to a norm that is first contractual, to become customary and then to be elevated to *ius cogens*. Naturally, a norm deriving its force from both custom and convention enjoys additional strength in its moral claim for observance and this affects its interpretation.¹⁰⁰ However, the factor of ratification is very relevant for treaties such as the *Additional Protocols* of 1977 as they have not been ratified by all parties and particular important states have failed to ratify them.¹⁰¹ This leads to the result that different armed conflicts might fall under different treaties and, accordingly, different treatment of combatants and victims will be the unfortunate result. *It is only CIHL which furnishes a common system of rules applicable to all types of armed conflict, irrespective of whether the relevant states have ratified different treaties.*¹⁰² Thus, customary rules may develop outside the treaty regime to cover those rules not explicitly stated and could, for example, serve to clarify the vague rules in *Additional Protocol I*. Also, naturally, any rules of the *Protocol* that have hardened into customary rules will command greater respect.¹⁰³ This leads Bethlehem to state that *CIL might serve as the instrument through which to ensure the universal application of the principles of IHL.*¹⁰⁴ It is submitted that this process is evident from the number of CIHL rules identified in the ICRC Study which largely correspond to the Pictet principles mentioned in Chapter 3.

¹⁰⁰ Meron 1987:349-350.

¹⁰¹ As of 11 November 2010 states party to *neither* the *Additional Protocol I* nor *Additional Protocol II* include the United States, Turkey, Tuvalu, Thailand, Sri Lanka, Somalia, Singapore, Papua New Guinea, Pakistan, Nepal, Myanmar, Morocco, Malaysia, Kiribati, Israel, India, Indonesia, Iran, Eritrea, Bhutan, Azerbaijan and Andorra. States party to *Additional Protocol I*, but not party to *Additional Protocol II*, include: Angola, Democratic People's Republic of Korea, Iraq, Mexico, Syrian Arab Republic and Vietnam. States party to *Additional Protocol II*, but not party to *Additional Protocol I*, include: Philippines. See <http://www.icrc.org/ihl> accessed on 19 November 2010. See also Meron 1996:247.

¹⁰² Henckaerts 2008:119-120, Pearce 2003:137 and Weil 1983:440. For CIHL's role *vis-à-vis* other IHL treaties, see Bugnion 2008:64-65. See also MacLaren and Schwendimann 2005:1220, Guzman 2005:119, Trimble 1986:669, Bruderlein 1991:579-581, Cheng 1983:529, Hampson 2007:52 and Chodosh 1995:991-992. However, see the criticism of Tunkin 1961:428-429 who deems the acceptance of CIL as binding on all states to reflect the desire of some states to impose their will on others. *However, it is argued by the present dissertation that with regard to IHL and CIHL these abuses do not arise because of the inherent morality of IHL.* Furthermore, Gamble 1981:314-315 opines that newly independent states may prefer custom as source of international law since their participation therein is more pronounced than with treaties already in existence. In this regard Bugnion, *ibid* at 86-87, states that the claim that the ICRC Study was intended to circumvent the refusal of certain states to ratify *Additional Protocols I* and *II* is unfounded. Furthermore, the ICRC did not intend to force states to accept norms which they rejected, but rather to take stock of which rules the states did accept due to their customary nature. Thus, the intention was not to act against the states, but rather to use their practice as basis. However, it could be asked whether it is necessarily wrong to circumvent the refusal of states to accept treaties when the provisions in question pertain to fundamental norms. Here reference might also be made to the fact that, besides unilateral reservations, a *si omnes* clause in a treaty – limiting the treaty's applicability to those conflicts where *both* parties are signatories – becomes irrelevant when the particular treaty's rules harden into CIL which then becomes binding universally. In this regard, see Paust 2006:602.

¹⁰³ Meron 1996:245. Thus, for example, Meron, at 246, indicates that CIL may also be important regarding weapons not regulated by treaties.

¹⁰⁴ Bethlehem 2007:6.

The second concern, that of identifying the nature of the armed conflict, will determine, for example, whether common article 3 of the *Geneva Conventions* will be solely applicable, or whether the *Geneva Conventions* will apply in their totality, or whether *Additional Protocol I* or *II* of 1977 applies or not. However, the classification of armed conflict can be difficult if elements of non-international armed conflict overlap with hostilities of an international nature.¹⁰⁵ Nonetheless, many rules of CIHL applicable in international and non-international armed conflict overlap (as was also determined by the ICRC Study) due, it is submitted, to *similar motivating concerns regarding the protection of humanity* in these atrocious conditions. Thus it is felt that in order to apply many of the CIHL rules during hostilities, the categorisation of the specific armed hostilities is not as important.¹⁰⁶ Furthermore, Bethlehem submits that CIL may be 'opposable beyond States, not only to armed opposition groups but also to other non-State actors and individuals'.¹⁰⁷ Therefore, CIHL remains important even in recent and current hostilities as both state forces and, where they are engaged, non-state forces must respect CIHL.

The third drawback from the application of conventional law to armed conflicts, that of the insufficient nature of treaties pertaining to hostilities of a non-international nature, is very important. Accordingly, while common article 3 of the *Geneva Conventions* omits dealing with the conduct of the hostilities as such, *Additional Protocol II* only applies if it has been ratified by the parties in question and, even then, its provisions are not very comprehensive.¹⁰⁸ CIL, however, has furnished the paradigm through which state practice could extend the law of war to non-international armed conflicts.¹⁰⁹ Finally, it must be submitted that, because treaties may be insufficient as in the case of non-international conflicts, CIL may be relevant in the interpretation of

¹⁰⁵ Henckaerts 2008:120.

¹⁰⁶ See also the statements of Dr Kellenberger in his foreword to the ICRC Study, Henckaerts and Doswald-Beck 2005:x, that state practice surpasses what those states agreed to at diplomatic conferences, 'since most of them agree that the *essence* of customary rules on the conduct of hostilities applies to *all* armed conflicts, international and non-international'. [First emphasis added.]

¹⁰⁷ 2007:7-8. See also Bethlehem in Chatham House 2005:12.

¹⁰⁸ Henckaerts 2008:120-121. For example, *Additional Protocol II* provides no provision to distinguish between military objectives and civilian objects, it fails to prohibit indiscriminate attacks and neglects to ensure that precautions are taken during hostilities and against the consequences of attack.

¹⁰⁹ Hoffman 2004:238. See Schindler 2003:178, Meron 1996:246 and ICTY, Appeals Chamber, *Tadic*, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, October 2, 1995 par. 117. See also paras 80, 82 and 84 of the *Advisory Opinion on Nuclear Weapons of 1996*, ICJ Reports 1996 which indicates the customary nature of many IHL treaty rules. Henckaerts 2008:122 opines that although the adoption of the *Statute of the International Criminal Court* in 1998 improved the recognition of crimes committed by individuals in a non-international armed conflict, it still failed to really further the substantive law applicable to those conflicts, as can be inferred from the shorter list of crimes punishable in a non-international context as compared to those punishable in hostilities of an international character. Henckaerts continues, *ibid* at 128, that with regard to war crimes, CIL has played a significant role. Thus, for example, states, under CIL, may establish universal jurisdiction in their national courts to try war crimes.

treaty law.¹¹⁰ Through its use as an interpretive aid, CIL can clarify ambiguities and fill *lacunae*.¹¹¹

Accordingly, due to the problems pertaining to conventional treaty law's applicability in IHL, customary law is still very important.

The importance of CIL as source of international law is further confirmed by the view that by violating a customary legal rule, a state may undermine the entire international legal order since that rule may be a link with the broader international legal order, thus, a stronger incentive for adherence and compliance may emerge from the interconnectedness of the rules.¹¹² It has been submitted that regardless of (or maybe due to) the informal origins of CIL rules, they provide the substantive content for many branches of international law, including the procedural framework through which most of the rules of international law develop and change.¹¹³ It is submitted, that on this view, precisely because of its unwritten, flexible nature, CIL seems to function as the foundation which holds the entire international order together.¹¹⁴ This, of course, is especially relevant for IHL since CIHL was the initial conventional source of substance thereof. *Therefore, as was also indicated in Chapter 2, custom is a significantly important source of international law since it is underpinned by certain general or fundamental principles like, for example, 'elementary considerations of humanity'. Some of the principles deemed to be most fundamental are hailed as norms of ius cogens from which no derogation is permitted.*¹¹⁵

Evidently, CIL is a very important source of international law. This naturally also applies to IHL's customary source – CIHL. CIL (and CIHL) is a flexible source which may provide solutions to problems on which agreement (and hence treaty law) was impossible. This use of custom is already sufficient for incontrovertible evidence of its importance and relevance for international law. However, CIL (and CIHL) sometimes furnishes the only answer to a situation, which might not

¹¹⁰ Aldrich 2005:505, Bethlehem 2007:6-7, Guzman 2005:120, Pellet 2006:779 and Scobbie 2007:23. See also Gamble 1981:314-315, Weeramantry's *The Revival of Customary International Humanitarian Law* in Maybee and Chakka 2006:32, Meron in Chatham House 2005:48 and the foreword of Kellenberger in Henckaerts and Doswald-Beck 2005:x. Oppenheim 1937:24 also notes the possible use of CIL when interpreting vague and uncertain treaties.

¹¹¹ Paust 2006:603. Article 31 of the *Vienna Convention on the Law of Treaties* also enables interpretation through the paradigm of CIL. Regarding custom's ability to fill *lacunae* in treaties or provide a rule when states cannot reach agreement thereon, see Gasser 1993:15 and Weeramantry's *The Revival of Customary International Humanitarian Law* in Maybee and Chakka 2006:32. See also Weston, Falk, Charlesworth and Strauss 2006:107.

¹¹² Norman and Trachtman 2005:543.

¹¹³ Reus-Smit 2004:38 quotes Byers M. 1999. *Custom, Power and the Power of Rules: International Relations and Customary International Law*. Cambridge: Cambridge University Press: 3.

¹¹⁴ Pearce 2003:125.

¹¹⁵ Best 1997:8. The reference to 'elementary considerations of humanity' was made by the ICJ in the *Corfu Channel Case*, Judgment on merits, 9 April 1949, p. 22. For the view that CIHL is a useful source of *ius cogens* norms like the prohibition against cruel, inhuman and degrading treatment, see Balgamwalla 2006:16.

have been addressed before. Hence, it might be the *only* legal regime applicable to a particular dispute. In the light of this, it seems folly to argue for the rejection of CIL (and CIHL) as source of international law. Nonetheless, the most important function of CIL (and here especially also CIHL) is that it is the only legal source which might apply *universally* in the international community. The importance of a universal source of law for the international community with its many states, organisations and various behaviours is self-evident. Establishing universal law during times of armed conflict is clearly essential as well. It is for this reason that the present dissertation argued, in Chapter 2, for the inherent principles of natural law which initially led to the first tentative (customary) rules applicable to armed conflicts. The (universal) principles and objectives of IHL have therefore been immersed in its customary rules. It is the customary rules which contain the spirit and tenor of these principles which, it is argued in Chapter 2, are so essential to IHL. Also, CIL (and CIHL) has influenced the most relied upon source of contemporary international law – treaties. Accordingly, many treaties were based on pre-existing CIL or are interpreted in line with existing CIL. The importance of CIHL, then, in providing the foundational source of IHL, and which itself was permeated and shaped by the underlying IHL natural law principle of humanity, seems evident.

It is submitted that the so-called traditional approach to determine CIL has served a function in determining the customary rules applicable in the *ius in bello*. However, and it needs to be re-emphasised that the present dissertation is commenting on CIHL and not any other branch of CIL, the rigid reliance on *usus* and *opinio iuris*, as basis, to establish CIHL seems to reflect an empirical positivist approach. IHL has been argued in the present dissertation to be based upon natural law. Accordingly, it is submitted that the empirical positivist approach, as basis towards the ascertainment of CIHL, must be rejected in favour of a *transcendental natural law approach* to ensure the coherent and harmonious development of the customary rules applicable during periods of armed conflict.

3. The proposed natural law approach to CIHL determination

This section will consider the basic approaches to CIL determination (which, of course, also apply to CIHL), namely induction and deduction. Thereafter the modern approach towards the ascertainment of morally influenced CIL rules, like those applicable to armed conflicts, will be investigated, before proposing a fundamental, natural law based approach to establish rules of

CIHL. In this regard those theories of Roberts and Kirgis which emphasise the moral nature of CIL rules will be reconsidered as they already contain significant value *vis-à-vis* the determination of CIL rules in a moral/natural law based branch of law, like IHL. Some reference will be made to the ICRC Study's method of postulating CIHL rules, since the comparison between the present dissertation's proposed approach to CIHL and the approach taken by the ICRC Study remains an essential theme for the current and next chapter. In the following section, the proposed method of ascertaining CIHL will also be applied to a selection of the ICRC's proposed rules in order to investigate whether the proposed rules might be enhanced by adopting a fundamental, natural law approach to determining CIHL.

As was seen above, the workings of CIL creation is an immensely contested aspect in modern international law although it is also one of the fundamental aspects of this legal system.¹¹⁶ In this regard, the type of approach adhered to by a scholar or court may be of decisive importance. Thus, an *inductive approach* will attempt to induce the customary law-making process from past situations where customary law was established. Thus, the customary rules are derived from the facts of international life. On the other hand, the *deductive approach* is more abstract in that it derives rules from more general, non-legal, non-factual postulates like, for instance, logic or a normative system like morality or natural law. Both approaches have advantages and disadvantages. Thus, *induction* provides provable empirical evidence, while *deduction* is internally logically consistent. However, it has been argued that law is not the same as facts (except if everyone obeys the law) and deduction is not provable. Although natural law is popular, it has been argued that it seems as though pure reason is insufficient to derive an entire legal system from as it lacks any human interaction. The deductive method attempts to base international law on a higher instance – an authority external to the legal system considered. A problem with this approach ostensibly lies in the omission of any human act of will in the deduction of norms. The norms thus constituted are not 'positive' but 'hypothetical'.¹¹⁷ *However, it is submitted that in IHL, the nexus between the foundational natural law virtues and the implementation thereof in customary rules is intrinsic.* Also, the requirement that a norm must be willed seemingly reflects a positivist approach, which itself cannot justify all norms from within the law.

A further problem that has been identified with the deductive approach, where for instance reliance is put on natural law, is that it relies on a presumption that cannot be proved through empirical

¹¹⁶ Scobbie 2007:23.

¹¹⁷ Kammerhofer 2004:537, 542 submits that these norms could be termed 'imagined'.

evidence. The inductive method leaves the positive element of law – the factual nexus which makes a norm positive – discoverable.¹¹⁸ However, emphasis on empirical evidence seems reflective of a legal positivist approach towards the ascertainment of CIL. It must be indicated that it seems inappropriate to insist on a legal positivist approach, as basis, while attempting to determine the rules of a natural law based branch of law like IHL. Therefore, the current section will argue for the rejection of the empirical inductive (positivist) approach, as basis, in favour of a transcendental normative deductive (natural law) approach *vis-à-vis* the ascertainment of customary rules in the natural law based IHL.

Meron submits that the traditional approach to establish CIL entailed that state practice was transformed into customary law when *opinio iuris* was added, but that this process is now beginning to be reversed so that after the articulation of *opinio iuris*, practice is added to confirm *opinio iuris*.¹¹⁹ Hence, a distinction has been made between traditional custom – which emphasises *usus* – and modern custom – which emphasises *opinio iuris*. The former, *inductively* determined, focuses on state practice with *opinio iuris* a supplementary consideration to differentiate between legal and non-legal duties. The latter, *deductively* determined, approach attributes greater emphasis to *opinio iuris* since it looks to statements rather than actions. Furthermore, traditional custom develops slowly through state practice, whereas modern custom's development is faster due to its reliance on *opinio iuris*.¹²⁰ Meron indicates that 'the movement from the inductive to the deductive method of ascertaining custom is a result of the expansion in what counts as practice of States and the enhanced significance of *opinio iuris*'.¹²¹ It has been opined that the requirement of *usus* in the determination of CIL has become solely evidentiary as it furnishes evidence of the content of the particular rule and of the *opinio iuris* of the relevant states. On this view, neither lengthy state practice nor repeated practice will be necessary to establish CIL provided that the *opinio iuris* of the relevant states can be unambiguously determined. *Opinio iuris*, on this view is therefore the only

¹¹⁸ Kammerhofer 2004:543. The tension in this source of law escalates dramatically in light of sentiments like those held by Meron 1987:363: 'The lawmaking process does not merely 'photograph' or declare the current state of international practice. Far from it. Rather, the lawmaking process attempts to articulate and emphasize norms and values that, in the judgment of some states, deserve promotion and acceptance by all states, so as to establish a code for the better conduct of nations'. This comment indicates the tension between a descriptive approach (like induction) to CIL and a normative one (like deduction).

¹¹⁹ 2006:366.

¹²⁰ Roberts 2001:758-759 and 788. Compare Simma and Alston 1988-1989:88-90. See also Guzman 2005:149, 153-154 and 174 for an acceptance of *opinio iuris* as essential for CIL with *usus* merely evidential thereto. Thus, Cheng 1982:250 indicated that both the Permanent Court of International Justice (PCIJ) and the ICJ have emphasised the subjective component of *opinio iuris*. Accordingly, see *The Lotus* (1927) A 10, p.28 (PCIJ) and the *Asylum Case* (1950) ICJ Rep 266 at 277. See also the *Right of Passage Case* (1960) ICJ Rep 6 at 42-43.

¹²¹ 2006:361.

element needed to establish CIL – if it is present then a rule of CIL exists.¹²²

Roberts also confirms that descriptive accuracy is closely linked to traditional custom seeing that state practice is the main source from which these norms are derived – thus transferring norms from practice to theory. This approach of relying on state practice ensures continuity with past behaviour and trustworthy predictions of future conduct. On the contrary, modern custom prefers substantive normativity in lieu of descriptive accuracy and, therefore, derives its norms essentially from abstract assertions of *opinio iuris* – hence transferring norms from theory to practice. Importantly, state practice is evidently descriptive, whereas *opinio iuris* is ambiguous because assertions can entail either *lex lata* (what the law is concretely, a descriptive element) or *lex ferenda* (what the law ought to be, a normative component). The ICJ, however, has held that only assertions of *lex lata* can contribute to custom creation. Hence, state practice is descriptive, whereas *opinio iuris* may be descriptive or normative. Due to traditional custom's reliance on the former it is chiefly justified by descriptive accuracy, while modern custom, relying on the latter, is justified by normative appeal.¹²³ However, it will be argued that *lex ferenda* is particularly important for IHL – hence, modern custom with its focus on *opinio iuris* which embodies this component is important for determining CIHL.

Unsurprisingly, these divergent views on custom have led to the criticism that custom is indeterminable and manipulable.¹²⁴ If traditional custom is based solely on state practice it will become an apology for power, while establishing modern custom only on *opinio iuris* will create utopian norms that will not be able to regulate reality.¹²⁵ However, does this matter regarding fundamental IHL norms? These norms, by their very nature, are idealistic. Furthermore, in order to provide for future conflicts, it seems evident that CIHL might rely on normative approaches – thus

¹²² Cheng 1982:251 and, similarly, 1983:531 and 548. Later Cheng 1982:260 and 1983:532 concludes that *opinio iuris* may grow overnight, bringing a new rule of customary international law into existence instantly. Accordingly, the notion of 'instant custom' was born. See also the discussion of Guzman 2005:122 and 157. Regarding this approach Thirlway 2006:123 acknowledges that the psychological component has become essential for some, with state practice merely necessary to prove that component. As Thirlway, *ibid* at 124, finds, this approach accepts that General Assembly resolutions, for example, may lead to custom since such resolutions comprise both practice and *opinio iuris*. However, this theory was rejected through the limited view of the ICJ in *Case concerning Military and Paramilitary activities in and against Nicaragua*, Judgment of 27 June 1986 (merits) paras 184 and 188 and *Advisory Opinion on Nuclear Weapons of 1996*, ICJ Reports 1996 par. 73 on resolutions as entailing nothing more than *opinio iuris*.

¹²³ 2001:762-764. See *North Sea Continental Shelf* 1969 ICJ Rep. 3 at 38. See also Pearce 2003:133-134 and Nicholls 2006:232.

¹²⁴ Kelly 2000:451 and 459. See also Roberts 2001:770.

¹²⁵ Roberts 2001:773 and 790. See also Roberts, *ibid* at 767-769, who continues that traditional custom is arguably ideologically biased, hegemonic and a legitimating force for perpetuating the existing political and economic status. Modern custom seems to reflect ideal (and not actual) standards of conduct. Thus, norms of *ius cogens* are often ignored. States rarely internalise these norms.

engaging *lex ferenda* – to anticipate possible future infringements. Indeed, if considerations of *lex ferenda* are ignored in favour of *lex lata* during the ascertainment of CIHL, then it seems evident that rigid positivist doctrine has been emphasised at the expense of the natural law foundation of IHL. Due to such strict adherence to theoretical doctrine, many (unnecessary) casualties will occur during armed conflicts because the law will only be *reactive*. It is admitted that arguing for *proactive* law-making might invite stringent criticism, but the present argument is limited to those customary rules applicable *during the most tumultuous circumstances known to humankind, namely armed conflict*. If the international community is indeed committed to protecting and improving the plight of those suffering due to armed hostilities, then the normative approach for the ascertainment of CIHL, argued for in the present dissertation, will receive its approval. It seems evident that if this approach is criticised then the true reason for such criticism will not be found in a *bona fide* rejection of the merits of either IHL or its central principle of humanity. Accordingly, it is submitted that a strong case must be made to rely on *lex ferenda* in the case of CIHL.

It needs re-emphasis that these rules of CIHL attempt to regulate the most extreme circumstances and, thus, are doomed to only partial fulfilment. However, despite this knowledge, these rules are not discarded or neglected. Since every attempt to lessen suffering should be welcomed, these rules are supported and extended in order to ensure the maximum possible protection. Furthermore, as this dissertation argues for the inherent morality of IHL, note must be taken of the approach espoused by Roberts, namely that *a lower threshold of practice may be acceptable for strong moral customs as contraventions of ideal standards should be expected*.¹²⁶

The workings of CIL and its interaction with morals have been described by Roberts through the illustration of international laws as placed on a spectrum between *moral* and *facilitative* rules. Thus, at one end, there exist absolute facilitative rules which, though necessary for harmony and cooperation, are unconcerned with substantive moral problems (a rule of this type might be that ships must pass on the left). Then there are rules that are mainly facilitative, but now also entail some moral concerns (a fair division of resources in a continental shelf might be such a rule). In the middle of the spectrum, rules exist which entail significant facilitative and moral concerns (like environmental rules). Towards the other extreme of the spectrum, rules exist which are more moral than facilitative (like, for example, human rights and, it is submitted, rules of IHL). Peremptory rules (like a norm of *ius cogens* prohibiting genocide) also now emerge, which prohibit certain

¹²⁶ 2001:790.

conduct irrespective of their influence on cooperation and harmonious coexistence between states. Rules usually tend to one or the other extreme of the spectrum, although it is foreseeable that a law might facilitate affairs between states and simultaneously have a strong moral content (for example the prohibition on the use of force). Although traditional CIL was mainly occupied with facilitating cooperation and harmony between states, international law (since 1945) has come to include various moral issues such as human rights, the use of force and, of course, humanitarian concerns. This movement could be deemed as being one from state values to human values. Roberts confirms that state practice has been viewed to be less important for modern CIL seeing that these customs *have come to entail ideal standards of behaviour* rather than merely furnish evidence of existing practice. Thus, for example, the CIL rule prohibiting torture rather entails an extreme moral distaste of torture than a genuine reflection of state practice. (It is submitted that this eschewing of *usus* is extremely relevant for IHL.) This emphasis on the moral content of modern custom also indicates why contrary practice has been discounted in the modern approach to elucidating CIL. Thus, importantly, while a descriptive law might be impeded by irregularities in description, *normative laws remain law even though they are broken as they do not rely on descriptive accuracy*. (Thus, norms of *ius cogens* prohibit essentially immoral behaviour and, thus, cannot be undermined by subsequent treaty negotiation or inconsistent state practice.)¹²⁷

It must be remembered that IHL is engaged during times of armed conflict and that the perfect attainment of its objectives is strictly impossible. Hence, due to the very nature of IHL, violations thereof are inevitable. Concurrently, the most comprehensive rules (which, it is argued, will inevitably be idealistic and aspirational) must be sought to ensure that at least a significant amount of protection is realised in practice. Thus, 'since the subject matter of modern customs is not morally neutral, the international community is not willing to accept any norm established by state practice. Modern custom involves an almost *teleological* approach, whereby some examples of state practice are used to justify a chosen norm, rather than deriving norms from state practice'.¹²⁸ This succinctly reflects the argument of the present dissertation regarding IHL – to maximise the protection of *humanity* and *human dignity*, lack of state practice must not impede the establishment of a rule. These insights on the moral view of CIL are naturally most important for CIHL, which, it must be submitted, tend toward the moral extreme of the sketched spectrum.

¹²⁷ Roberts 2001:764-765. For a confirmation that serious violations of human dignity, like torture, should not be construed as state practice, see Simma and Alston 1988-1989:92-93.

¹²⁸ Roberts 2001:765. [Emphasis added.]

Unsurprisingly, then, due to the teleological considerations, the co-editors of the ICRC Study, Henckaerts and Doswald-Beck, assert that due to *practical* considerations international courts and tribunals sometimes infer a CIL rule if the said rule furthers international peace and security or protects the human being and no significant opposing *opinio iuris* exists.¹²⁹ It is submitted that: 'This aspect of the assessment of customary law is particularly relevant for international humanitarian law, given that most of this law seeks to regulate behaviour for humanitarian reasons. In some instances, it is not yet possible to find a rule of customary international law even though there is a clear majority practice in favour of the rule and such a rule is very desirable'.¹³⁰

This modern differentiation in regard to the weight afforded to the traditional elements of CIL was also considered by Kirgis. It is imperative to consider Kirgis' sliding scale theory in order to enhance the proposed theory to CIHL determination made by the current dissertation. Hence, Kirgis states that the ICJ in the *Nicaragua case*¹³¹ questioned 'whether – or at least to what extent – each of these two elements (of state practice and *opinio iuris*) must be established so as to demonstrate that a restrictive rule of customary international law exists'.¹³² Kirgis questions, in the light of the emphasis placed by the ICJ on *opinio iuris* at state practice's expense in the *Nicaragua case*, whether the opposite might be possible – focus on state practice in lieu of those statements of governments that would constitute *opinio iuris*. Writing in 1987, Kirgis indicated that various scholars accepted that the belief in an action as required or allowed by law might be inferred from widespread, consistent state practice provided that there is little or no contrary evidence of such beliefs. This view has been attributed to the ICJ as well, because legal significance has been ascribed to consistent state practice at times without considering *opinio iuris*.¹³³ Apparently, such

¹²⁹ 2005:xlii. Hence, the International Military Tribunal [*Trial of the Major War Criminals Before the International Military Tribunal*, Nuremberg, Vol. XXII:497] held the *Hague Conventions* of 1907 to be part of customary law and the ICJ (*Case concerning Military and Paramilitary activities in and against Nicaragua*, Judgment of 27 June 1986 (merits) paras 202-209) held the rule of non-intervention in the internal and external affairs of another state to be part of CIL. However, where significant contrary *opinio iuris* existed, as in the *Nuclear Weapons case*, no rule of CIL was found.

¹³⁰ Henckaerts and Doswald-Beck 2005:xlii.

¹³¹ *Case concerning Military and Paramilitary activities in and against Nicaragua*, Judgment of 27 June 1986 (merits) 14.

¹³² 1987:146-147. Kirgis 1987:148 continues that: 'When the stakes are not high, international decision makers have not been so quick to find restrictive customary rules. The classic example is found in the North Sea Continental Shelf Cases [1969 ICJ Rep 3], where the Court found neither adequate state practice nor the necessary *opinio iuris* to establish the equidistance principle as customary international law for continental shelf delimitation between adjacent states'.

¹³³ Kirgis 1987:148-149 refers to *The SS Wimbledon* 1923 PCIJ ser A No 1 at 25 and *Nottebohm Case Second Phase* 1955 ICJ Rep 4, 22 (Judgment of 6 April). Likewise Byers 1995:140 notes that the ICJ has supported *opinio iuris* in principle, but has often neglected it in practice. Instead: '...the Court has followed the same approach to determining legal relevancy...: examining what states have openly done or admitted to doing, what in some cases they have not done, what states representatives have said, and the context in which that behaviour has taken place'. See also Mendelson 1995:180 who indicates that although the ICJ pays lip service to the traditional two requirements of CIL,

an approach would contradict the approach in the *Nicaragua case* where *opinio iuris* was emphasised, however, Kirgis submits that '[t]he cases can be reconciled, however, if one views the elements of custom not as fixed and mutually exclusive, but as interchangeable along a sliding scale'.¹³⁴ Accordingly, Kirgis goes on to formulate his influential sliding scale theory of customary law creation, which has also influenced the ICRC Study on CIHL as will become apparent in Chapter 4 below, thus:

On the sliding scale, very frequent, consistent state practice establishes a customary rule without much (or any) affirmative showing of an *opinio iuris*, so long as it is not negated by evidence of non-normative intent. As the frequency and consistency of the practice decline in any series of cases, a stronger showing of an *opinio iuris* is required. At the other end of the scale, a clearly demonstrated *opinio iuris* establishes a customary rule without much (or any) affirmative showing that governments are consistently behaving in accordance with the asserted rule.¹³⁵

The *particular action* and the *reasonableness* of the proposed customary rule will influence the precise amount of state practice needed to override *opinio iuris* and *vice versa*. Thus, the more an action destabilises or is *morally distasteful* and the proposed rule seems reasonable, the greater the possibility of one element being substituted for another by the international decision makers. If the action is not very destructive and the asserted rule seems unreasonable in the situation, the decision makers might place greater emphasis on both elements. The more reasonable an asserted rule the more likely it is to be found reflective of state practice and/or *opinio iuris*.¹³⁶ Also, when there are opposing interests (regardless of whether the interests are political, social or economic in nature) *ab initio*, then the *usus* element may increase in importance. In different circumstances *opinio iuris* may be more important as it is, *inter alia*, based on clear and inherently rational grounds.¹³⁷

It is submitted that the rules of CIHL, with their focus on *humanity*, as was stated above in Chapter 2, are pertinent examples of where the rules will aim to protect moral principles and embody immanently reasonable aims thereby (correctly, it is submitted) increasing the likelihood, according to Kirgis' theory, of their being accepted and of one element of CIL being substituted for another in

it frequently establishes CIL rules on the strength of only one of those requirements.

¹³⁴ 1987:149.

¹³⁵ 1987:149. See Roberts 2001:760 who summarises Kirgis' sliding scale thus: 'Frederic Kirgis rationalizes the divergence in custom by analyzing the requirements of state practice and *opinio iuris* on a sliding scale. At one end, highly consistent state practice can establish a customary rule without requiring *opinio iuris*. However, as the frequency and consistency of state practice decline, a stronger showing of *opinio iuris* will be required. Kirgis argues that the exact trade-off between state practice and *opinio iuris* will depend on the importance of the activity in question and the reasonableness of the rule involved'. For concerns regarding this loosening of CIL so that rules may be established when needed, see Simma and Alston 1988-1989:96 and 107.

¹³⁶ Kirgis 1987:149.

¹³⁷ Cassese 2001:120 gives the customary rules prohibiting genocide, slavery and racial discrimination as examples.

order to increase the possibility of the rule being confirmed.

Roberts deems the sliding scale to accept *usus* and *opinio iuris* as two irreconcilable quantities to be measured against each other. The approach proposed by Roberts should rather entail a determination of a coherent explanation of *state practice* and *opinio iuris*, rather than giving preference of one above the other. Thus, through this reflective interpretive method, the dual approaches of traditional and modern custom are brought closer together.¹³⁸ However, it must be indicated that Kirgis accepts that both elements might be important if the proposed custom is not destructive or morally distasteful.¹³⁹ Nonetheless, despite these criticisms, it seems as though both theories might have a role to play in accentuating the *moral underpinnings* of certain branches of law, like IHL and, as such, could be used jointly to enhance the method invoked to postulate rules of CIHL.

The ICRC Study, itself, seemed willing to eschew one or the other element of traditional CIL seeing that Henckaerts and Doswald-Beck found that it was in the case of ambiguous state practice that the ICJ (and the PCIJ) sought to determine the separate, independent existence of an *opinio iuris* in order to indicate that the ambiguous practice contributed towards the formation of CIL. From this, Henckaerts and Doswald-Beck formulate the ICRC Study's approach to pursue state practice which is sufficiently dense:

When there is sufficiently dense practice, an *opinio iuris* is generally contained within that practice and, as a result, it is not usually necessary to demonstrate separately the existence of an *opinio iuris*. *Opinio iuris* plays an important role, however, in certain situations where the practice is ambiguous, in order to decide whether or not that practice counts towards the formation of custom. This is often the case with omissions, when States omit to act or react but it is not clear why.¹⁴⁰

From the aforementioned it is apparent that *usus* and *opinio iuris* are inevitably intertwined.¹⁴¹ The ICRC's approach to the determination of CIHL in its study, discussed in Chapter 4, also indicates how entangled *usus* and *opinio iuris* can be in practice when it found that it was problematic and essentially theoretical to rigidly separate *usus* and *opinio iuris*, as the same act frequently embodied both components.¹⁴² Unsurprisingly, then, a further possible solution to the problematic norm-

¹³⁸ 2001:791.

¹³⁹ Kirgis 1987:149.

¹⁴⁰ 2005:xl-xli.

¹⁴¹ Thirlway 2006:123.

¹⁴² Henckaerts and Doswald-Beck 2005:xl refer to ILA, Final Report of the Committee on the Formation of Customary (General) International Law, Statement of Principles Applicable to the Formation of General Customary International Law, Report of the Sixty-Ninth Conference, London 2000, §10(c), p. 718 who pointed out that the ICJ

creating process in CIL has been postulated, namely to consolidate all the relevant factors for custom-creation into one holistic approach. Thus, *inter alia*, both the material and psychological elements, repetitions, participation level, time durations and persistent objectors¹⁴³ could be taken into account to ensure a single, coherent process to elucidate CIL (it is submitted that the moral desirability of the proposed rule could also be included in this approach and that it would then closely resemble the approaches mentioned above).¹⁴⁴

The present dissertation's proposed normative approach towards the determination of CIHL, cognisant of the natural law foundation thereof, may thus be derived from the approaches of Roberts, Kirgis, the ICJ and Hayashi. From Roberts' theory it must be highlighted that a lower threshold of practice may be acceptable for strong *moral* customs, like IHL, as contraventions of ideal standards should be expected. Also, bearing in mind that IHL tends towards the moral end of the spectrum of CIL rules, state practice has decreased in significance as these customs *have come to entail ideal standards of behaviour* rather than merely furnish evidence of existing practice. The importance of *lex ferenda* is again to be noted when considering CIHL rules. Furthermore, normative laws, like IHL, remain law even though they are broken as they do not rely on descriptive accuracy. Therefore, CIHL rules are evidently subsumed by the modern, normative approach to CIL determination and, as such, *opinio iuris* is emphasised.¹⁴⁵ Kirgis' theory ensures that the traditional element of state practice may yet have a role to play in CIHL determination since the *particular action* and the *reasonableness* of the proposed customary rule will influence the possibility of one element being substituted for another by the international decision makers. Thus, the more an action destabilises or is *morally distasteful* and the proposed rule seems reasonable, which it is argued seem pertinent considerations to CIHL, the greater the chances of one element being eschewed and, thus, the proposed rule being confirmed and protection being improved.¹⁴⁶

'has not in fact said in so many words that just because there are (allegedly) distinct elements in customary law the same conduct cannot manifest both. It is in fact often difficult or even impossible to disentangle the two elements'. See Mendelson 1995:180, Thirlway 1972:68 and Pellet 2006:761. See section 3.2.2 in Chapter 4, pages 235-237.

¹⁴³ For this doctrine entailing that a state which objects to a rule, from its initial emerging, clearly and consistently will not be held bound by that rule after it has crystallised into a rule of CIL, mindful of the fact that many of those who accept this doctrine deem rules of *ius cogens* unobjectionable, see Meron 2006:374-375. See also Byers 1995:163, 165, Guzman 2005:142-143 and 164-171, Pearce 2003:137-138 and Akehurst 1977:24-27 and 53. Compare also Thirlway 2006:125 and 1972:110. See Ragazzi 2002:60 who opines that states may evade being bound by a rule of CIL through the conclusion of a treaty to such effect (although not when a norm of *ius cogens* is engaged); through the acquisition of a prescriptive right and possibly through the persistent objector doctrine. See also Weston, Falk, Charlesworth and Strauss 2006:124 regarding the existence of such fundamental rules of CIL that even the persistent objector will be bound. Regarding the requirements for a state to qualify as persistent objector see also Ragazzi, *ibid* at 63.

¹⁴⁴ Kammerhofer 2004:550.

¹⁴⁵ Roberts 2001:764-765 and 790.

¹⁴⁶ Kirgis 1987:149.

Two further aspects need to be re-emphasised, as was indicated in Chapter 2, namely that the ICJ has, at times, eschewed the traditional approach towards the ascertainment of CIHL by rather invoking 'elementary considerations of humanity' (which, it has been indicated, reflects the use of equity).¹⁴⁷ This is, of course, the *raison d'être* of IHL as has been argued throughout the current dissertation and direct reliance thereupon seems inevitable and necessary in order to enhance CIHL. Also, it was indicated in Chapter 2 that recourse has been had by the ICTY to the Martens clause in order to vary the weight which is attached to *usus* in the two-pronged theory of CIL. The Martens clause is used in this instance to attenuate the requirement of *usus*, thus increasing the possibility of identifying a rule of CIL even when evidence of *usus* is difficult to produce.¹⁴⁸ This proposed approach takes morality and natural law into account, thereby providing a normative approach to the ascertainment of CIHL which is in conformity with the essential underlying source thereof since natural law informed and influenced CIHL. This approach is also in harmony with the natural law basis of the broader discipline of IHL in which this specific source has to operate. It is further argued that this normative theory is essential for the committed, principled endeavour to attain justice when considering CIHL. This proposed approach, which is in harmony with the branch of law it is intended to further, will improve the alleviation of those suffering as a result of armed conflict and, in the process, contribute towards the improvement of IHL's essential principle – humanity.

It is therefore submitted that the determination of CIL in the contemporary international community has changed from the strict traditional separation of *usus* and *opinio iuris*, to a more flexible approach where all the relevant factors are considered and that *in the final instance the moral desirability of the proposed rule of CIL has become an important factor in this process*. Such an approach of postulating rules of customary law cognisant of the moral standards involved, especially in the light of the arguments raised in Chapter 2 regarding IHL's natural law foundations, would be particularly appropriate in determining rules of CIHL. Furthermore, the fear can be allayed that this proposition would lead to the arbitrary determination of CIHL rules as various aspects of IHL serve as intrinsic limitations in this process. Therefore, with the vast body of

¹⁴⁷ See *Corfu Channel (merits) ICJ Reports*, 1949, p. 22, *Case concerning Military and Paramilitary activities in and against Nicaragua*, Judgment of 27 June 1986 (merits) par. 218, the *Advisory Opinion on Nuclear Weapons of 1996*, ICJ Reports 1996 paras 78-79 and the *Advisory opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Advisory Opinion of 9 July 2004 [2004] ICJ Rep. par. 157. See also Pellet 2006:725 regarding the nexus between 'elementary considerations of humanity' and equity. For the criticism of the ICJ's equation of general principles with CIL and their neglect to establish the material content of 'elementary considerations' from CIL, see Bruderlein 1991:584-585. See section 2.4.1.1 in Chapter 2, pages 116-117, above.

¹⁴⁸ Hayashi 2008:146-148 and Meron 2000b:88. See, for example, *Prosecutor v Kupreškić* ICTY Judgment 14 January 2000 Case IT-95-16-T paras 525, 526, 527 and 531. See section 2.4.1.1 in Chapter 2, pages 115-116, above.

judicial decisions, the number of humanitarian/humane treaties in force today, the workings of international organisations like the United Nations for alleviating suffering and publications emanating from publicists of IHL (including both classical authorities and modern authorities) the international legal order has a strong base from which to determine whether particular conduct should be prohibited through CIHL on the grounds that it is *morally unacceptable*.

This proposed normative approach to elucidate CIHL rules will now be applied to a selection of the ICRC Study's proposed rules in order to indicate how the Study's findings may be enhanced when a natural law approach is applied to a natural law based branch of law.

4. Applying the proposed natural law approach of CIHL determination to a selection of the ICRC Study's proposed rules

This section will briefly apply the present dissertation's proposed approach for the ascertainment of CIHL to the six sections of the Study as well as to some of the ICRC Study's proposed black-letter rules. In passing it must be stated that the proposed normative approach to CIHL determination ensures that the rules postulated apply to both international and non-international armed conflicts. Some of the proposed rules (like rules 3-4 and 106-108) deemed to be solely applicable to international armed conflicts, seem merely to clear up technical distinctions between international and non-international armed conflicts. These technical rules, however, do not alter the ethical considerations argued for in the present dissertation. Furthermore, nothing turns on whether the present dissertation omits to indicate the ethical, normative basis of a particular rule as the following section merely provides a selection of the ICRC's proposed rules to illustrate the postulated natural law approach in relation to the determination of CIHL and, thereby, also aims to enhance the ICRC Study's findings.

The principle of distinction between civilians and combatants (proposed rules 1-6) and civilian objects and military objectives (proposed rules 7-10) essentially postulates the necessary ethical standard of conduct during armed conflicts. These proposed rules of the ICRC Study are evidently moral in nature as their objective is to protect humanity (both in the sense of humankind in its totality and in those aspects which contribute towards being human like dignity, personality and the like). Directing attacks against those who do not engage in hostilities or against those objects which do not contribute to the war effort seems malicious since those persons and objects do not embody a

threat and, accordingly, their destruction will not lessen the enemy's capability to conduct its military operations. It seems evident that the principle of distinction embodies the essential normative consideration for enemy combatants as it reflects what their conduct towards each other ought to be like in order to protect the foundational virtue of IHL, namely humanity. Evidently, these proposed rules and parts of the section on distinction of the ICRC Study embody the central examples where the morally abhorrent conduct aimed to be prevented, normativity considerations, together with the principle of humanity, enhance and strengthen their inclusion as rules of CIHL irrespective of contrary state practice and/or *opinio iuris*. Consequently, the prohibition on indiscriminate attacks (proposed rules 11-13) can also be understood as a morally imperative, normative consideration intended to further and enhance humanity by attempting to limit the violence and destruction which accompanies armed conflicts.

The first 14 rules of the ICRC Study therefore postulate what Roberts labels the ideal standards of behaviour.¹⁴⁹ However, it is well known that civilians and their objects sometimes do end up in the line of fire and thus proposed rules 14-24 provide important ethical considerations for a branch of law where destruction inevitably occurs and, hence, where the effects need to be controlled as much as possible in order to ensure that the central IHL virtue of humanity is afforded the maximum possible protection in case things go wrong. Naturally these rules prescribe normative conduct on the part of combatants in order to prevent moral horrors which are limitable. The moral imperatives and normative necessities inherent in these rules would also justify the eschewing of one of the traditional requirements of CIL determination in order to ensure that the maximum amount of protection may be afforded to humankind against the consequences of armed hostilities.

Evidently, the ICRC Study's proposed rules on the protection of certain persons (proposed rules 25-34) and the prescription of methods of warfare (proposed rules 46-48 and 53-69) are intended to further humanity, in other words furthering the dignity, liberties, rights and personality which being human constitutes. The ethical, moral foundation of rules protecting persons rendered *hors de combat* (proposed rule 47), prohibiting the use of starvation as method of warfare (proposed rule 53) and prohibiting the killing of an enemy by recourse to perfidy (proposed rule 65) is evident and, hence, eschewing the traditional requirements of *usus* or *opinio iuris* in determining their CIHL status seems not only inevitable but indeed imperative to ensure the maximum possible protections for those suffering as a result of war. These observations apply *a fortiori* to those proposed rules

¹⁴⁹ 2001:764-765.

which directly aim to promote the human person – humanity – by extending certain guarantees to civilians and persons *hors de combat* (rules 87-105, 109-113, 115-129 and 134-138).

Subsequently, the Study's rules regarding weapons (proposed rules 70-86) must be considered in light of the normative approach espoused by the current dissertation. Hence, causing civilians and/or combatants unnecessary suffering while conducting military operations is not only unnecessary to obtain the objective of warfare, namely to subdue your enemy, but it is moreover cruel and therefore ethically unacceptable. The proposed approach to the ascertainment of CIHL in the previous section entails a normative approach mindful of the moral repugnance of the particular action. Clearly, the infliction of unnecessary suffering on human beings during a period of armed conflict is abhorrent being mindful that gratuitous violence is not to be condoned in any circumstance much less in wartime. Concurrently, the foundational principle of IHL, as was identified in Chapter 2, namely humanity, must also be taken into consideration when determining whether a rule of CIHL has, in fact, developed or not. It is submitted that the infliction of unnecessary suffering does not reflect the value of treating persons in a humane fashion. By disregarding those elements which make a civilian and/or combatant human, namely his/her dignity, personality and the like, the principle of humanity is undermined. Furthermore, as has been argued in the previous section, *lex ferenda* considerations are important for a morally contingent source of law like CIHL. In the present dissertation's approach to CIHL, it seems evident that mere aspirational rules might nonetheless be validly accepted as CIHL. Thus, the ICRC Study proposed the prohibition of blinding laser weapons (proposed rule 86) as part of CIHL. However, these weapons have not yet been developed and/or used. Nonetheless, treaties (which do count as *usus*) have been established in this regard (although many states have yet to ratify them) and this rule is directly aimed at furthering humanity and protecting human dignity – the essential natural law virtues underpinning the whole IHL system. It has also been argued in the current dissertation that rejecting *lex ferenda* merely due to strict legal positivist doctrine in the branch of IHL will cause increased suffering for the victims of war who will, at very best, be protected one war too late. Thus *opinio iuris* – mindful of the aims and essential natural law basis of IHL – dictates that a weapon designed merely to increase suffering must be prohibited by CIHL even before significant *usus*, in this regard, has been established. Allowing the disfigurement of combatants or civilians is morally abhorrent and should not be allowed. The customary status of proposed rule 86 regarding blinding laser weapons is therefore confirmed.

It is further submitted that this argument also extends to any other new weapon that may be

designed in the future which fails these criteria. Hence, for example, some weapon intended to merely paralyse or deafen another person for life should be prohibited by CIHL as a matter of course since such weapons inherently contravene the natural law basis of IHL and merely perpetuate the evils of warfare indeterminately. Therefore, eschewing *state practice* becomes very important when considering these proposed rules. This finding is confirmed in that these rules address important moral standards of conduct and, as such, enjoy strong normative support. Accordingly, in the proposed approach of the present dissertation, the CIHL status of these proposed rules, prohibiting unnecessary suffering through various weapons, should be confirmed and justified by a normative, *opinio iuris* based approach, bearing in mind that 'elementary considerations of humanity' and/or the Martens clause may further be used to enhance its normativity.

Regarding the proposed rules on implementation of IHL, various rules (including proposed rules 139-144) indicate important ethical considerations as to how states should comply with and enforce IHL. The normative imperative of implementing the substantive rules of IHL speaks for itself and, hence, the absence or not of one of the traditional elements of CIL should not prevent these proposed rules from existing to ensure the workability of the whole superstructure of IHL rules intended to protect and enhance humanity.

It is submitted that the proposed normative approach towards the formulation of CIHL rules enhances the protection of IHL's central natural law virtue – humanity. In the process, the rigid doctrinal approach in relation to CIL as embodied in article 38(1)(b) of the *ICJ Statute* is appropriately demoted so that a transcendental natural law based approach *vis-à-vis* the determination of CIHL may be used in the natural law branch of international law engaged – IHL. The proposed approach to ascertain a particular source of IHL therefore conforms to the inherent nature of this specific branch of law itself. This is important since it illustrates that CIL is not the same for all branches of international law. The hope may be expressed that this finding could lead to increased investigations regarding the differences of the various branches of CIL. Nonetheless, the hope is expressed that the proposed approach to CIHL determination of the present dissertation will be considered, criticised and elaborated upon since this will inevitably strengthen the IHL endeavour, enhance the ICRC Study on CIHL and, indeed, increase the protection afforded to those suffering as a result of armed conflicts. Having lifted the legal positivist veil of rote recitation of article 38(1)(b) of the *ICJ Statute* as the beginning and end of discussions on CIHL, improved responses will now be called for to explain a failure to comply with any important normative, moral

aspect of IHL.

5. The departure from the traditional approach to CIHL determination in practice

Having postulated the theoretical shift which has occurred from the traditional, *usus*-centred approach to the determination of CIHL to the modern, *opinio iuris*-centred approach thereto, the present dissertation also proposes a normative, transcendental approach regarding CIHL establishment. Hereafter the proposed approach was applied to the proposed rules of the ICRC Study on CIHL. Subsequently, it is necessary to indicate that this theoretical movement away from a rigid empirical (positivist) approach, as basis, to CIHL has also begun a practical shift which is occurring in IHL jurisprudence.

Accordingly, Cryer indicates that it seems as though the standards of proof of CIL have been relaxed somewhat in relation to IHL by, especially, tribunals. Nonetheless, he continues that this is not a call to accept IHL as customary without adequate evidence as the result would not be above criticism. In his opinion, 'there is no rule of international law that provides for a special status for humanitarian law in relation to the formation of customary law, and it is a matter of evidence in any individual case whether or not a treaty rule represents the custom one'.¹⁵⁰ Clearly, each case must be considered on its own merits, but it is submitted that the preceding sections and international practice could very well be indicating the emergence of a unique approach to the ascertainment of CIHL. Meron states that although courts and tribunals have not formally abandoned the dual requirements of *usus* and *opinio iuris* for the creation of CIL, they have nonetheless often ignored battlefield or operational practice and held statements as constitutive of both practice and *opinio iuris*. It is on this *opinio iuris* or the general principles of IHL derived partly from the Hague, Geneva and other humanitarian treaties that these courts and tribunals have relied in making their judgments. Nonetheless, formally, the courts and tribunals have used the language of practice and custom even though they stretched the traditional meaning of CIL.¹⁵¹ Thus, in summary, Meron states that:

Only a few international judicial decisions discuss the customary law nature of international humanitarian law instruments. These decisions nevertheless point to certain trends in this area, including a tendency to ignore, for the most part, the availability of evidence of state practice (scant as it may have been)

¹⁵⁰ 2006:243.

¹⁵¹ 2000a:244.

and to assume that noble humanitarian principles that deserve recognition as the positive law of the international community have in fact been recognized as such by states. The “ought” merges with the “is,” the *lex ferenda* with the *lex lata*...Given the scarcity of actual practice, it may well be that, in reality, tribunals have been guided, and are likely to continue to be guided, by the *degree of offensiveness of certain acts to human dignity*; the more heinous the act, the more the *tribunal will assume that it violates not only a moral principle of humanity but also a positive norm of customary law*.¹⁵²

This quote illustrates the *de facto* blurring of morality and conventional law which is occurring in practice. It has also been confirmed that the two traditional elements needed to establish a rule of CIL, *usus* and *opinio iuris*, play a different role in the context of IHL due to the Martens clause.¹⁵³ Meron states that *opinio iuris* is essential for hardening treaty rules into custom, otherwise one cannot be sure whether a treaty rule was followed from a contractual obligation or from a legal obligation – the former does not establish a customary rule whereas the latter does.¹⁵⁴

Meron believes that the *Tadic* decision of the ICTY and the ICRC Study on CIHL illustrate the 'renewed vitality of customary law in the development of the law of war'.¹⁵⁵ The importance of the *Tadic* decision lies in its position in the line of cases (notably the *Trial of Major War Criminals*,¹⁵⁶ *United States v Leeb*,¹⁵⁷ and the *Nicaragua case*¹⁵⁸) which – while considering articles 1 and 3 of the *Geneva Conventions* – emphasise *opinio iuris* more than state practice.¹⁵⁹ Meron continues that the ICTY, just like the Nuremberg courts, considered verbal aspects like statements, declarations and resolutions in lieu of battlefield practice. This happened despite the Tribunal's formal adherence to the traditional two-element theory of CIL formation, namely *opinio iuris* and *usus*. What in effect occurred was that statements served as evidence of both *opinio iuris* and *usus*. In passing, it may be

¹⁵² 1987:361. [Emphasis added.] See also Nicholls 2006:247.

¹⁵³ Cassese 2001:121. See also section 2.4.1.1 in Chapter 2, pages 115-117, above.

¹⁵⁴ Meron 2006:382.

¹⁵⁵ 1996:238.

¹⁵⁶ 1946 CMD 6964 Misc No 12 at 65.

¹⁵⁷ 1948 No 10 at 462 and 533-535.

¹⁵⁸ *Case concerning Military and Paramilitary activities in and against Nicaragua*, Judgment of 27 June 1986 (merits) paras 218-220. Par. 184 states: 'The Court must satisfy itself that the existence of the rule in the *opinio iuris* of States is confirmed by practice'. Meron 2005:820 submits that the Court strengthened CIL through its downplaying of contradictory practice. See also the *Nicaragua*, case, *ibid* par. 186. This approach was commended by Meron, *ibid* at 820, since there is no norm which every state consistently obeys and to illustrate customary law as a description of completely universal practices would relieve it of its power as law. Although it should be borne in mind that contradictory practice may reach a stage where the relevant norm's customary status will fail.

¹⁵⁹ 1996:239 and 2006:367. See also Guzman 2005:154 as well as Meron 1987:357 and 362. Meron 2005:819 states that the ICJ has tended to treat the provisions of a treaty as a distillation of the CIL rule thus eschewing examination of evidence for establishing state practice and *opinio iuris*. He deems the *Nicaragua* case to be an example of this recent approach. By holding that articles 1 and 3 of the *Geneva Conventions* comprise general principles of international law the Court made a significant contribution to the 'vitality of humanitarian law'. What Meron finds remarkable about this case is the total failure to scrutinise whether *opinio iuris* and practice confirm the customary status of articles 1 and 3. However, the *Nicaragua* decision has had the effect of allowing articles 1 and 3, and basically the entirety of the *Geneva Conventions*, to be accepted as CIL. This also applies to the Nuremberg Trials' comments in relation to the *Hague Convention IV* of 1907. With regard to the latter see also Paust 2006:601-602.

remarked that this approach seems to foreshadow that of the ICRC Study on CIHL. The emphasis on *opinio iuris* might compensate for an absence of relevant practice according to Meron.¹⁶⁰ Regarding the ICJ's *Nicaragua* decision, Simma and Alston indicate that by invoking the 'fundamental general principles of humanitarian law' one may deduce that the ICJ also seems willing to accept the binding nature of fundamental human rights (and humanitarian) prescriptions 'without going into the details about their formal source, but rather stressing their *inherent authority and universal recognition*'.¹⁶¹ In this regard, Kelly submits that '[t]he International Court of Justice, when basing a decision on CIL, is careful to mention the formal requirements of both state practice and *opinio iuris*, but it frequently avoids a detailed empirical inquiry into either element. Instead, the Court deduces norms that it terms customary from treaties, general principles of law, U. N. resolutions, analogous legal issues, and other non-inductive sources'.¹⁶² However, as Pellet indicates, the traditional, two-element theory of custom is a doctrinal reconstruction which it was evidently not the intention of the founding fathers of the *ICJ Statute* to compel the ICJ to rigidly follow (although at times the ICJ has paid it lip service) and, hence, at times in practice the Court has moved away from this construction.¹⁶³

It is argued that this survey points to an emphasis of *opinio iuris* as reflective of normative considerations in tribunal jurisprudence. Evidently then, the need for a more flexible, transcendental approach to CIHL determination in international legal practice has already led to international institutions beginning to accept the theoretical kind of approach argued for in the present dissertation.

¹⁶⁰ 1996:239-240 and 2006:367. However, Meron 1996:240-244 continues that the ICTY could have made a greater effort to establish state practice, which would have strengthened the substantive arguments of the Tribunal regarding the principles and rules of CIL. Furthermore, the importance of the *Tadic* decision for CIL lies in its illustration of CIL's vitality and potential in adapting IHL for non-international armed conflicts. Accordingly, rules (like common article 3 and *Additional Protocol II*) which were originally posited in treaty form to regulate non-international armed conflicts may crystallise into CIHL. CIHL has also established the paradigm through which the violation of certain norms has led to individual criminal responsibility. Various general principles that were initially conceived for international armed conflicts (like proportionality and necessity) may be made applicable to non-international armed conflicts through CIL. The prohibition of certain weapons in international conflicts is being extended through CIL (and treaty law) to non-international armed conflicts. See also Fenrick 1998:197 and 228 as well as Meron 2006:363.

¹⁶¹ 1988-1989:106. *Case concerning Military and Paramilitary activities in and against Nicaragua*, Judgment of 27 June 1986 (merits) par. 218.

¹⁶² Kelly 2000:476 and 477 states that the ICJ can only apply customary law, not create it. Compare Pellet 2006:759-760.

¹⁶³ 2006:761. In this regard the comment of Higgins *Problems and Process: International Law and how we use it* in Weston, Falk, Charlesworth and Strauss 2006:27 is apposite, namely that international law embodies a process of authoritative decision-making as well as a system of rules. Therefore, those who make decisions based on international law do not merely find and apply rules mechanically, but rather make choices to determine what the relevant legal rules are.

6. Conclusion

Many international academics begin debates regarding CIL (and CIHL) by relying on article 38(1)(b) of the *ICJ Statute*. However, this article has been criticised for various reasons. Furthermore, it is submitted that this article was intended to furnish the method to ascertain CIL (and CIHL) for a particular judicial body, namely the ICJ. Moreover, it needs to be indicated that the *Statute of the ICJ* reflects the formal sources of international law as opposed to its material sources. Hence, the focus of article 38 is on the processes which accord legal relevance to international rules and not the religious, moral, social, political and other origins of legal rules.¹⁶⁴ It is postulated that this focus on the formal validity of legal rules indicates a positivist approach towards law ascertainment (which is not *per se* incorrect, but due to the *overemphasis* of this positivist approach, as basis of CIHL determination, problems occur). The present dissertation intends to re-emphasise the material source of international (humanitarian) rules, hence, transcending a mere consideration of a rule's form and thus engaging with the necessary normative considerations to ensure that the rules relied upon in IHL further justice by conforming with the essential natural law nature of the branch of law in which they function.

Consequently, the argument that article 38(1)(b) *ipso facto* establishes the *only* or the *most* authoritative statement on the method to ascertain CIL (and CIHL) seems to be a *non sequitur*. Furthermore, it is proposed that, as was indicated above, not all custom is created equal. Different branches of CIL must have particular rules relevant for their authoritative determination. It is submitted that CIHL, with its unique natural law foundation, is a prime example of such a branch. Furthermore, in light of the theories of both Roberts and Kirgis above, it is evident that other, more flexible methods to ascertain CIHL do exist. These methods address IHL on its own terrain, namely morality. Hence, it was indicated that the modern approach to establish CIL and CIHL has evolved in a more holistic fashion where both *usus* and *opinio iuris* are considered, but the weight accorded to any one of them could be shifted *in accordance with the moral desirability* of establishing the proposed rule. This approach, with its inclusion of morality, seems to be an ideal one for IHL and the determination of CIHL seeing that it was argued in Chapter 2 that IHL was originally based upon natural law and that its first source, custom, was permeated thereby. Such an approach to CIHL would also ensure flexibility regarding the distinction between *usus* and *opinio iuris*. The

¹⁶⁴ Pellet 2006:714-715.

need for a rigid theoretical distinction between them would subside. Strict formalistic arguments would not prevent a much needed rule of CIHL to emerge and its ascertainment might, arguably, be easier. Hence, the proposal is for the rejection of a rigid empirical approach, as basis, for the determination of CIHL in favour of a normative approach. Succinctly put, it is the proposition of the present dissertation that a teleological, normative approach is essential for the proper ascertainment of custom in IHL, mindful of the fact that the essential principle of IHL, humanity, must be furthered by the particular approach adopted.

It is submitted that this proposed approach is much more appropriate than a rigid, dogmatic enforcement of the traditional components of *usus* and *opinio iuris* as basis of CIHL. In the process, the ascertainment of CIHL could become easier and more harmonious. As long as proposed IHL rules strive to further humanity and human dignity they will be held as reasonable and preventative of morally distasteful actions. Furthermore, if these proposed rules are also considered with their objectives in mind – thus, teleologically – then, it is submitted, their establishment would be ensured. This approach is further compounded by the attenuating and dislocating functions of the Martens clause which were identified in the previous chapter. The use of the Martens clause thus clearly indicates the desire and need of the international community to loosen the straightjacket imposed upon it by *usus* and *opinio iuris*. Accordingly, it is submitted that the ascertainment of CIHL should include moral concerns in order to ensure that the rules of CIHL are derived logically and coherently, cognisant of the overarching natural law foundation of IHL.

Nevertheless, the distinction between *lex lata* and *lex ferenda* might become blurred, which is bound to draw criticism. However, it is submitted that IHL, due to its nature, is not to be compared with national legal systems (as was indicated in Chapter 2¹⁶⁵) or with other branches of international law and thus acknowledging that aspirational rules might be a necessity. Accordingly, unless law should remain one war behind, or in other words, unless the law is appropriately considered to have to react after atrocities have been committed, it would be advisable to prevent the atrocities from occurring, thereby furthering the *lex ferenda*. This will be seen as controversial since the argument advocates for the ascertainment of some realistic aspirational rules of CIHL (as was done by the ICRC Study). However, if the global community's desire to furnish aid to victims of conflicts and to prevent suffering is *bona fide*, then it would seem nonsensical to prevent such important rules from being formed because of the rigid adherence to (positivist) doctrine. The view is therefore

¹⁶⁵ See section 2.3 in Chapter 2, pages 69-75, above.

supported that in order to ensure the relevance and importance of custom, the custom must embody the genuine interests of the international community and, to a certain degree, reflect the community's normative aspirations. However (and with this the present author concurs as well) CIL must not be so different from *de facto* state practice and interests that it becomes unrealistic.¹⁶⁶

Having re-evaluated CIHL in line with its natural law basis, it remains to consider the most significant modern restatement of CIHL, namely the ICRC Study on CIHL *through the natural law paradigm* argued for in Chapters 2 and 3.

¹⁶⁶ Charney 1986:992.

CHAPTER 4

THE POTENTIAL INFLUENCE OF THE INTERNATIONAL COMMITTEE OF THE RED CROSS AND ITS STUDY ON CIHL TO PROMOTE AND STRENGTHEN HUMANITY AND CIHL IN THE INTERNATIONAL (HUMANITARIAN) LEGAL ORDER

'...academics are in the best position to generate public opinion in favour of the expanded protective value of IHL and its usefulness in protecting and assisting victims of armed conflicts'.¹

1. Introduction

Chapter 2 illustrates the natural law foundation of the initial laws of war. *Humanity* was identified as the central virtue of natural law to provide the impetus for this branch of law, which was destined to become international humanitarian law (IHL). It was indicated that these natural law standards, and particularly humanity, were initially furthered through the primitive customary rules of the ancient societies. Subsequently, it was clearly evident that natural law virtues informed the customary rules that emerged. Also, it was to these standards (especially humanity) and customary rules that eminent publicists of international (humanitarian) law turned to substantiate their proposed rules of law. With the emergence of treaty law, it is submitted, reliance was also placed on CIHL and indirectly, as custom was itself based thereon, on natural law principles. Accordingly, the importance of humanity, as the central natural tenet of IHL, and customary international humanitarian law (CIHL), as the first formal source of IHL, was established.

It was further indicated that although natural law constituted the foundation of the laws of war, the rise of legal positivism saw natural law relegated to a passive role in the onslaught of codifications and consensual sources of (international) law. Nonetheless, it was also indicated that after World War II natural law again gained support, which was seen in the adoption of human rights law and IHL instruments. However, it was argued that although natural law has become important for the substantive content of IHL again, the modern international community remained loyal to the positivist consensual and mostly codified sources of international law. In passing, it must be

¹ Kadam in Barnaby, Yang, Faite and Henckaerts 2006:32.

emphasised that the argument advanced in this dissertation is not against the value of codifications *per se* but rather against the misuse which has emanated from the contemporary jurisprudential conception that codifications supersede customary international law (CIL), *lex ferenda*, morality, natural law and principles like humanity. This reliance on rigid formal sources of international law to subsume flexible natural law standards seems problematic. This was shown in Chapter 3 to be the case, especially regarding CIL. The international community, in an attempt to reintroduce the higher normative standards which exist in CIHL, moved for the reinvestigation of custom as a source of IHL. The result was the ICRC Study on CIHL. Unfortunately, it may be argued that the monumental ICRC Study is merely a continuation of the legal positivist endeavour to reduce all legal rules to certain, codified texts, which becomes problematic when it is done at the expense of norms beyond codifications. However, this would not detract from the importance of the ICRC Study to re-emphasise the value of CIHL as source of IHL. Furthermore, endeavours like the ICRC Study ensure renewed debate and analysis into a very problematic branch of law 'at the vanishing point of international law'.²

This chapter will briefly consider the ICRC as a significant role player in IHL since this is important for the proper consideration of the merit of the ICRC Study on CIHL. Subsequently, the Study itself will be considered both with reference to comments emerging thereto from the international community and through the natural law paradigm established in the present dissertation. By doing this, the main thread of contention in the present dissertation is enhanced in that the foundational natural law element of IHL is deliberately and carefully reintroduced into the discussion on IHL, CIHL and the ICRC Study itself.

2. The ICRC as international (humanitarian) law role player

The previous chapters indicated the natural law origin of IHL. Principles and virtues were held to be included in IHL not merely as the *raison d'être* of this branch of law, but also as an independent source thereof which might be invoked directly. However, from Chapter 2, it became apparent that there exists no overarching sovereign or compelling court structure in international (humanitarian) law. The rise of conceptions like state sovereignty in the international sphere also impeded the

² See Lauterpacht 1952:381-382. Chapter 2 reflected that IHL not only functions during the most tumultuous times known to man, but, by arguing that it is based upon morality and taking the absence of a central legislator, judiciary and policing system into account, it is evident why this corpus of law is seemingly at the 'vanishing point of international law'. This reference underscores the importance of every and any investigation into IHL.

implementation of rules deemed by a state to be contrary to its own interests. Subsequently, the fact emerged that enforcing IHL inevitably becomes problematic. This was seen to be true in the case with treaty law – arguably the most evident, uncontroversial source of IHL – which many states fail to sign and ratify. Hence, unsurprisingly, when attempting to enforce customs, the very formation of which is controversial, as was indicated in Chapter 3, the problem pertaining to the unwillingness of the international community to ensure compliance therewith is compounded. However, the objective of ensuring compliance with IHL has remained an important one and the international community has recognised this fact. Therefore, the traditional conception of the international community only comprising states as subjects has changed to include other role players as well. By broadening the participants in international law a much more inclusive approach to these most vexing concerns is ensured.³ Thus, various actors have emerged in the attempt to further the IHL endeavour and, in the process, to ensure greater compliance with these rules that purport to be applied in the situation most insusceptible to law and legal rules.⁴ The importance of the contributions emerging from these actors has been appreciable. One such contribution, of course, which has been alluded to throughout the present study, is the ICRC Study on CIHL. The present section will therefore briefly investigate the exceptionally important position of the ICRC as non-state party in the international arena before focusing on the Study conducted by the ICRC on CIHL. By considering the ICRC as a role player, it will become apparent that *humanity*, that essential principle of IHL as it has been argued in the present dissertation, underlies and informs its functioning. Thus, an important scrutiny of humanity as the central principle of an international humanitarian role player will be possible, which further enhances the normative approach

³ However, for the caution against the needless expansion of the list of role players, see Albin 1999:383-384 and Van Oppeln 2002:249.

⁴ For states as the traditional role players, see Byers 1995:155, Broms 1983:385-395 and Medinger 2006:43, 53 and 57 (regarding the Holy See); for the limited international legal personality of corporations, see Byers, *ibid* at 157, and Dugard 2005:2; for the participation of individuals in international law, see Ochoa 2007:121, 135, 152-153, 163-164, 169-170, 175-176 and 185, Akehurst 1977:11, Broms, *ibid* at 411-419, Bederman 2003:1528, Bull 1979:171, Best 1997:227, Quéniwet 2004:181-186, Sassoli and Bouvier 2006:303, Van Oppeln 2002:246, Carty 2005:535, Teitel 2004:233, Dixon 2007:2 and Byers, *ibid* at 158; for the important role of international courts and tribunals, see Sassoli and Bouvier, *ibid* at 321-325, Broms, *ibid* at 409, Meron 2000a:253 and Best 1997:180. For the role of the ICJ to 'ripen' customs into positive law, see Pellet 2006:686. Regarding the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), Pocar 2006:90 indicates the importance of these tribunals for IHL in that they were the first international judicial bodies to enforce the corpus of IHL which had 'undoubtedly' been subsumed by CIL, namely the *Geneva Conventions* of 1949; the *Hague Convention (IV) Respecting the Laws and Customs of War on Land* and the Regulations annexed thereto of 18 October 1907; the *Convention on the Prevention and Punishment of the Crime of Genocide* of 1948 and the *Charter of the International Military Tribunal* (at Nuremburg) of 1945. For the United Nations as role player, see Dixon 2007:13, Broms, *ibid* at 405-411, Best 1983:309 and 1997:55, Meurant 1987:238, Pictet 1985:82, Sassoli and Bouvier, *ibid* at 290-291; for the role of Inter-Governmental Organisations (IGOs) and Non-Governmental Organisations (NGOs) – in which the ICRC is included – see Best 1997:227, Broms, *ibid* at 402-405, Bothe 2005:148, Carty, *ibid* at 535, Albin 1999:371-383, Ochoa, *ibid* at 146 and 157, Dixon, *ibid* at 13, Gunning 1991:227-229 as well as Ku and Brun 2003:69.

propagated for in this dissertation. Also, by considering the ICRC Study, which embodies a significant effort to improve compliance with the substantive rules of CIHL, the investigation (which was initiated in the previous chapter) regarding the natural law, principle-infused CIHL might be furthered since the ICRC Study is bound to be the starting point of many discussions of CIHL to come.

The ICRC's standing and authority is of such a nature that it has become inseparably intertwined with IHL. The import of the ICRC lies in its humanitarian neutrality.⁵ Schindler states that the ICRC has acted as a guardian of IHL when states sometimes neglected these duties.⁶ However, the Swiss-ness of the ICRC has led to it being regarded as a weakness for IHL.⁷ Since this association in terms of Swiss law is not a state or, to a lesser extent, an IGO, the ICRC is not a direct participant in the making of international law.⁸ The status of the ICRC in the international legal order has been summarised as follows:

Its legal status remains very particular: although under Swiss law it is an ordinary society composed entirely of Swiss citizens, it has nonetheless been given certain tasks and therefore been granted certain powers by the international community. To this extent, the ICRC has become a subject of public international law. Its mono-national governing body coupled with its international activities give it a very special status, quite different from that of an international organization or the usual type of non-governmental organization. In one sentence one can say that the ICRC is *national* by its structure and composition and *international* by its activities and staff.⁹

Since its inception in 1863, the ICRC has initiated and created regulations with the aim of protecting both combatant and civilian victims of armed conflict, while paying due regard to the ideas of neutrality, humanity and impartiality.¹⁰ Indeed, the foundational principles of the Red Cross and Red Crescent societies are impartiality, humanity, independence and neutrality.¹¹ Accordingly, the Red Cross is not concerned with the question as to whether a war is just or not – it focuses on victims suffering as a result of the atrocities of war.¹² The draft humanitarian conventions of the

⁵ Best 1997:373.

⁶ Schindler 2003:186.

⁷ Best 1997:376.

⁸ Meron 1996:245. See also the views of Best 1997:90 pertaining to this 'anomalous and unique...Swiss-based, Swiss-run NGO'. Ku and Brun 2003:62-62 describes the ICRC's functioning: 'The ICRC's approach may be equated to the formula: neutrality = confidentiality = trust = access, implying that access to victims – the ICRC's main task – is subject to the parties' prior authorization, which requires gaining their trust based on confidentiality'.

⁹ Sassoli and Bouvier 2006:356.

¹⁰ Verri 1992:95.

¹¹ Best 1997:236-237. Ku and Brun 2003:58 submit, and this will be confirmed below when considering the principles of the ICRC, that the ICRC's fundamental principles of humanity, neutrality, impartiality and independence are the driving force behind its objectives to act as an intermediary between opposing parties to conflicts and, thereby, to furnish aid to victims of war.

¹² Pictet 1979:31, 1985:44 and at <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/fundamental-principles->

ICRC have been submitted to various diplomatic conferences. The results of the ICRC's efforts are the various IHL treaties that were adopted between 1864 and 1949 as well as the *Additional Protocols* of 1977. The ICRC has also written extensive commentaries on the *Geneva Conventions* and the *Additional Protocols*. These commentaries have been influential in the interpretation of the *Conventions* thereby also affecting the practice and *opinio iuris* of states and thus have had an indirect impact on CIL formation. Both the *Geneva Conventions* and *Additional Protocols* endow the ICRC with a status and give it certain functions.¹³

Furthermore, bearing in mind the importance of natural law for IHL as advocated in the present dissertation, NGOs frequently advocate for the inclusion of particular legal or *ethical* principles during negotiations of international agreements. Due to its unique status, mandate and expertise as a guardian of IHL, the ICRC performs these tasks constantly.¹⁴

The ICRC has been influential in the armed conflicts that have been waged since its establishment. Hence, the primary concern of the ICRC is to aid the sick, wounded and shipwrecked, prisoners of war, civilian internees and the general civilian population through furnishing these groups with food, clothing, medicine and the ability to trace missing persons.¹⁵ Furthermore, the ICRC, *inter alia*, visits persons detained due to armed conflict and registers them; conducts talks with national and local authorities,¹⁶ rebel groups and militias on behalf of potential (war) victims and disseminates IHL.¹⁷

Supervision is one of the chief problems in international law and, more specifically, IHL. The

commentary-010179?OpenDocument&style=Custo_Final.3&View=defaultBody3 accessed on 22 February 2010. See also Best 1983:4-5 who indicates that it is difficult to remain completely indifferent to this ideal. Accordingly, Best, *ibid* at 5, submits that the ICRC notably never judges whether the armed conflicts in which they act are right or wrong. It is as if the ICRC realises the claims made by war (and the importance of addressing them) all too well to also attempt to placate the demands made by justice. Clearly, *humanity* – not justice – is the ICRC's chief concern. Consequently, the only judgments the ICRC will make (and then only unwillingly and if deemed helpful) are whether the laws and treaties pertaining to *humanity* in warfare are being observed or not.

¹³ Meron 1996:245. Regarding the ICRC's status in terms of the *Geneva Conventions*, see also Van Oppeln 2002:247. See also 1949 *Geneva Convention III* articles 3, 123, 125 and 126 as well as *Additional Protocol I* article 5(3).

¹⁴ Albin 1999:378 and 381 indicates that NGOs, like the ICRC, have even participated directly in these negotiations through furnishing assistance with the preparation of the official background documentation, giving oral presentations; remarking on governmental positions and formulating draft agreements and proposals. Furthermore, these NGOs, and it is submitted that this applies particularly to the ICRC, may be able to introduce *moral* considerations into deliberations. This, of course, places such NGOs ideally to further the view of IHL as argued for in the present dissertation.

¹⁵ Verri 1992:95. See also Kalshoven and Zegveld 2001:198. Blondel 1989:513 deems the alleviation of suffering to be 'the ultimate ethical motivation underlying the commitment of all Red Cross and Red Crescent volunteers'.

¹⁶ Best 1997:230-231.

¹⁷ Van Oppeln 2002:247.

ICRC has an important – and delicate – role to play in the event of violations as it may, *inter alia*, act *mero motu*, especially when its delegates are confronted by violations; receive complaints which it transmits or it could approach the relevant authorities or it may publicly give its opinion on the allegations and the ICRC may be called upon to investigate alleged breaches or to record the performance of violations. However, in acting thus, the ICRC must continuously keep the interests of the victims whom it is supposed to protect and assist in mind and to remember that its rights do not surpass those of states, the contracting parties to treaties, whose responsibility it is to ensure respect for international law.¹⁸ Indeed, MacLaren and Schwendimann submit that the ICRC's actions on ground level are a significant driving force behind the development of contemporary IHL.¹⁹

Due to its stature in armed conflicts, the ICRC also entails a significant *moral* component. It represents peace – a beacon in the midst of hostilities. Every action it performs constitutes a pacifying gesture since by acting as intermediary between opposing parties and through promoting IHL the ICRC creates a climate of appeasement and reconciliation. Through furthering solidarity between people who suffer as a result of war and by furnishing aid, the ICRC levels the inequalities between victims and thus alleviates their plight and frustrations. Briefly, the ICRC helps to bring individuals and, possibly, whole peoples together.²⁰

Evidently, then, the ICRC is a significant role-player in the protection and development of IHL and it enjoys international legal and political status and recognition due to the mandate it has been burdened with in treaties and conventions by states. The ICRC's status entails that it remain neutral, independent and objective. This is the case despite the fact that it receives public funding and works closely with governments. This situation is opposed to that of NGOs that work separately from governments and without any public funding in order to ensure their neutrality and credibility.²¹ Furthermore, it is precisely because of its neutrality, independence and impartiality, as contrasted with most humanitarian NGOs, that the ICRC enjoys a special status regarding projects

¹⁸ ICRC 1981:76-78 and 81-83.

¹⁹ 2005:1235. The ICRC's dual role, which causes criticism, is succinctly put by MacLaren and Schwendimann, *ibid*: 'A fundamental tension arises out of the fact that the one role is based on the *lege lata* and may be characterized as reactive and administrative, while the other is essentially proactive and legislative, concerned with the *lege ferenda*. The way in which the ICRC manages this challenge is always open to outside critique, but the ICRC's relationship to the Study has brought the Committee under particularly "heavy fire".'

²⁰ Pictet 1979:32-33 and at http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/fundamental-principles-commentary-010179?OpenDocument&style=Custo_Final.3&View=defaultBody3 accessed on 22 February 2010.

²¹ Albin 1999:376. See also MacLaren and Schwendimann 2005:1234. In light of its close interaction with governments, Bothe 2005:157 submits that the ICRC also frequently helps states in drafting military manuals.

pertaining to IHL.²²

The focus for the present discussion, however, is on the importance of *humanity* as motivating factor for the ICRC. Accordingly, the importance of humanity will be seen to extend beyond embodying the original foundation of IHL (as was established in Chapter 2) and being the single most important objective of IHL as a legal system (also indicated in Chapter 2) to also furnish the essential *raison d'être* for one of the most (if not *the* most) influential NGOs in IHL, namely the ICRC. The preamble to the *Statutes of the International Red Cross and Red Crescent Movement*, adopted in October 1986 at the 25th International Conference of the Red Cross in Geneva, lists the seven fundamental principles²³ of the International Red Cross and Red Crescent Movement:

'Humanity *The International Red Cross and Red Crescent Movement, born of a desire to bring assistance without discrimination to the wounded on the battlefield, endeavours, in its international and national capacity, to prevent and alleviate human suffering wherever it may be found. Its purpose is to protect life and health and to ensure respect for the human being. It promotes mutual understanding, friendship, cooperation and lasting peace amongst all peoples.*²⁴

Impartiality *It makes no discrimination as to nationality, race, religious beliefs, class or political opinions. It endeavours to relieve the suffering of individuals, being guided solely by their needs, and to give priority to the most urgent cases of distress.*²⁵

²² MacLaren and Schwendimann 2005:1235.

²³ For the fundamental principles proclaimed in 1965 by the XXth International Conference of the Red Cross, which differ slightly from the 1986 formulation, see Pictet 1979: 5-6 and Pictet at http://www.icrc.org/web/eng/siteeng0.nsf/html/EA08067453343B76C1256D2600383BC4OpenDocument&Style=Custo_Final.3&View=defaultBody accessed on 22 February 2010.

Pictet 1979:11-14 and at http://www.icrc.org/web/eng/siteeng0.nsf/html/EA08067453343B76C1256D2600383BC4?OpenDocument&Style=Custo_Final.3&View=defaultBody2 accessed on 22 February 2010 defines a principle as: 'In philosophical terms, a principle is an abstraction of a *moral* nature, derived from the ideal tendencies of society, which imposes itself upon human conscience and becomes an *absolute imperative*, above and beyond discussion. In terms of what we are now concerned with, we shall say that a principle is simply a rule, based upon judgement [sic] and experience, which is adopted by a community to guide its conduct'. [Emphasis added.]

²⁴ Also stated and accepted in the *Case concerning Military and Paramilitary activities in and against Nicaragua*, Judgment of 27 June 1986 (merits) paras 242-243. Thürer 2007:56 states that Jean Pictet deems *humanity* to be the most important principle in the Red Cross, determining ideals, motivation and objectives, and from which all other principles flow. Thus, Pictet 1979:21-22 and at http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/fundamental-principles-commentary-010179?OpenDocument&style=Custo_Final.3&View=defaultBody3 accessed on 22 February 2010 states: 'In the doctrine of the Red Cross, the principle of humanity, from which all the other principles flow, obviously has to stand in first place. As the basis of the institution, *it provides at the same time its ideal, its motivation and its objective*. It is indeed the prime mover for the whole movement, the spark which ignites the powder, the line of force for all its action. *If the Red Cross were to have only one principle, it would be this one*'. [Emphasis added.]

²⁵ Dr Sandoz succinctly formulated this principle in his Foreword to the Study in Henckaerts and Doswald-Beck 2005:xiv: 'For the ICRC, impartiality means not only avoiding discrimination between the different victims of a given conflict, but also constantly striving to ensure that all the victims of all the conflicts on the planet are treated equitably, without regional or ethnic preference and independently of the emotions sparked by media-selected images'. Sometimes, according to Pictet 1979:42 and 46, it must be accepted that choices will have to be made in practice as to whom treatment will be given to and who not, seeing that resources are often insufficient to treat everyone in need simultaneously: 'Here we touch upon a truth referred to in the introduction, the fact that the principles have a theoretical character. In practice, we cannot always take them literally. But, although their value may be relative, it is nevertheless very great, for it shows the ideal that we must continue to approach'. Regarding

Neutrality *In order to continue to enjoy the confidence of all, the Movement may not take sides in hostilities or engage at any time in controversies of a political, racial, religious or ideological nature.*²⁶

Independence *The Movement is independent. The National Societies, while auxiliaries in the humanitarian services of their governments and subject to the laws of their respective countries, must always maintain their autonomy so that they may be able at all times to act in accordance with the principles of the Movement.*²⁷

Voluntary Service *It is a voluntary relief movement not prompted in any manner by desire for gain.*²⁸

Unity *There can be only one Red Cross or one Red Crescent Society in any one country. It must be open to all. It must carry on its humanitarian work throughout its territory.*²⁹

Universality *The International Red Cross and Red Crescent Movement, in which all Societies have equal status and share equal responsibilities and duties in helping each other, is worldwide.*³⁰

These principles of the ICRC are deemed by Pictet to be hierarchical. Consequently he identifies substantive, derived and organic principles. The *substantive principles* embody the aspirations of the organisation and determine its conduct. These principles 'stand above all contingencies and particular cases'. They provide goals and objectives rather than ways and means. Pictet accords a special place to *humanity* in these substantive principles since 'it is the expression of the profound motivation of the Red Cross, from which all the other principles are derived'. Unsurprisingly, he labels humanity the *essential principle*. Non-discrimination and proportionality, subsumed under impartiality, constitute the other substantive principles. Non-discrimination is viewed as closely

the interaction between humanity and impartiality, Pictet, *ibid* at 48-49, states that impartiality reveals itself through applying established rules, which for the ICRC essentially entails *humanity*, non-discrimination and proportionality, without taking sides. See also Wortel 2009:787, Thürer 2007:57, Pictet, *ibid* at 39-41, and at http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/fundamental-principles-commentary-010179?OpenDocument&style=Custo_Final.3&View=defaultBody4 accessed on 22 February 2010.

²⁶ Pictet 1979:52-56 and at http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/fundamental-principles-commentary-010179?OpenDocument&style=Custo_Final.3&View=defaultBody5 accessed on 22 February 2010 indicates that neutrality – essentially a negative concept – entails not taking sides in armed hostilities and, likewise, to refrain from accepting any religious, ideological or political doctrine. See also Wortel 2009:788; Thürer 2007:58; Ku and Brun 2003:56 and see also Kalshoven and Zegveld 2001:198.

²⁷ Pictet 1979:61-63 and at http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/fundamental-principles-commentary-010179?OpenDocument&style=Custo_Final.3&View=defaultBody6 accessed on 22 February 2010 summarises this principle by indicating that the ICRC must be sovereign in its own actions and decisions, thus, it must be at liberty to pursue the ideal objectives of *humanity* and justice without being influenced by politics, social or economic factors, pressure groups, public opinion or financial pressure. See also Thürer 2007:58.

²⁸ Pictet 1979:70-78 and at http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/fundamental-principles-commentary-010179?OpenDocument&style=Custo_Final.3&View=defaultBody7 accessed on 22 February 2010 finds this principle to entail someone working on his own volition and not as a result of compulsion from someone/something else and who might also be paid. This principle of voluntary service is the means to ensure that *humanity* is given effect. The notion of selfless action constitutes one of the main pillars of Red Cross actions – assistance should further the interests of victims. Naturally, material gain is not an aim of the Red Cross, only the alleviating of suffering is.

²⁹ Pictet 1979:82 and at http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/fundamental-principles-commentary-010179?OpenDocument&style=Custo_Final.3&View=defaultBody8 accessed on 22 February 2010 states that to ensure the efficacy of its work, the Red Cross Society must be the only one of its nature in the territory of a state. More than one of these types of organisations, professing similar ideals, are bound to cause confusion. Such confusion would, of course, be detrimental to the pursuance of the Movement's objectives of *humanity* and justice.

³⁰ Pictet 1979:87-88 and at http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/fundamental-principles-commentary-010179?OpenDocument&style=Custo_Final.3&View=defaultBody9 accessed on 22 February 2010 states that the Red Cross should serve everyone in every country. Protecting mankind against suffering and ensuring humane standards are worldwide concerns. However, it must be noted that it is not the National Societies, but rather the international organs of the Red Cross that extend their services universally.

linked to the principle of humanity whereas proportionality emerges from the notions of humanity and non-discrimination. The second type of principle identified is the *derived principles*, which include neutrality and independence. These principles, firstly, ensure that the essential principle of humanity can be put into practice and, secondly, that the substantive principles can be introduced into factual reality. These principles entail means rather than ends and are closely related to non-discrimination. The third kind of principle is the *organic principles* which are institutional in nature. Included under this category are unselfishness and voluntary action (which are subsumed by voluntary service), unity and universality. These principles provide standards for the operation of the organisation. They are held to be less encompassing than the previous principles. Nonetheless, the principle of universality uniquely embodies both an ideal and a practicality as it is derived from the dictates of humanity and non-discrimination. Unselfishness and voluntary action are closely linked to humanity, whereas unity is connected to non-discrimination. These, then, embody the essential principles of the ICRC and, *although it is difficult to realise these principles in every circumstance, they still embody important ideals to aspire and strive towards.*³¹

Accordingly, the importance of these principles as well as their links to *humanity* is apparent. In sum, therefore, the ICRC *principle of humanity* has been succinctly described in that it constitutes the exclusive objective of the ICRC and determines its range of competence. In fact, humanity furnishes the foundation for the ICRC's values and even constitutes the reason for the ICRC's existence.³² It needs to be emphasised, then, that humanity evidently not only serves as the essential theoretical principle of IHL, but also embodies the central practical principle of the ICRC.

The precedence accorded to *humanity* as the essential principle of the ICRC is evident when the ICRC is called upon to implement IHL because in performing this 'watchdog function' it may call on the participants of armed hostilities to observe IHL and the fundamental principles thereof. However, if the ICRC adheres to the principle of neutrality, how can it make public statements preferring a particular type of conduct?³³ Ku and Brun state that neutrality is merely a means to an

³¹ Pictet 1979:11-14 and at http://www.icrc.org/web/eng/siteeng0.nsf/html/EA08067453343B76C1256D2600383BC4?OpenDocument&Style=Custo_Final.3&View=defaultBody2 accessed on 22 February 2010. Haug 1986:136 submits that: 'Humanity, impartiality and neutrality are the guarantees of the Movement's unity and universality, and the Red Cross can only find the strength to fulfil its humanitarian tasks if it continues to be a united, worldwide organization'.

³² Thürer 2007:57. See also MacLaren and Schwendimann 2005:1234. See also Wortel 2009:791 for the submission that this essential moral value, which had been stated by Dunant, became a norm that may be construed as an obligation or absolute duty.

³³ Ku and Brun 2003:66. See also Kalshoven and Zegveld 2001:198-199 who refer to the ICRC's function as promoter and guardian of IHL. Three aspects must be noted under these functions, namely 'monitoring compliance with humanitarian law; promotion and dissemination of the law; and contribution to its development'.

end and not the end itself and, accordingly, considerations of *humanity* overrule it when the welfare of victims is in jeopardy.³⁴

Since the Red Cross has extended its grasp all over the world and with numerous National Societies also coming into being, there is no central distinctive character permeating all the spheres, except for these principles which serve as the glue to hold the whole together. As the universality of these principles have been described: 'When we bring together and compare different moral systems and dispose of the non-essentials, that is to say their special peculiarities, we find in the crucible a pure metal, the universal heritage of mankind'.³⁵ It is submitted that this is also true with regard to IHL as a branch of law and, accordingly, the 'pure metal' for both IHL and the ICRC, as indicated in this dissertation, is *humanity*. As it has been emphasised throughout the present dissertation, IHL is the one branch of (international) law where a core of universal values and principles may be identified. Hence, the principles of humanity and dignity were examined in Chapter 2. In the situation of war, it must be submitted that culture, race, religious conviction, gender and any other distinction which may be fathomed to differentiate between humans inevitably must give way to the universal solidarity inherent in the very notion of humanity.

It has been indicated that care ought to be taken to distinguish between these *principles* of the Red Cross and the *rules* of IHL – the former apply always and are directed at regulating the conduct of the Red Cross as a private body, while the latter has an official character and is engaged in times of armed hostilities in order to regulate the conduct of states and their enemies. Nevertheless, Pictet proposes that the link between these branches is evident seeing that much of contemporary IHL developed from the ideals of the Red Cross which further remain the driving force behind future developments. Accordingly, he submits that it is unsurprising that common values such as humanity and non-discrimination exist between the two branches.³⁶ However, it is respectfully submitted that IHL (or the laws of war) is not a recent phenomenon and, although it has changed its guise from a system based on CIHL to one based on treaty law (wherein the ICRC has had a significant role to play), there remains a substantial number of IHL rules unaccounted for if the pre-1863 rules are discarded. Furthermore, it has been argued in Chapter 2 that even the initial

³⁴ 2003:66.

³⁵ Pictet 1979:9-11 and at http://www.icrc.org/web/eng/siteeng0.nsf/html/EA08067453343B76C1256D2600383BC4?OpenDocument&Style=Custo_Final.3&View=defaultBody2 accessed on 22 February 2010.

³⁶ Pictet 1979:8 and at http://www.icrc.org/web/eng/siteeng0.nsf/html/EA08067453343B76C1256D2600383BC4?OpenDocument&Style=Custo_Final.3&View=defaultBody2 accessed on 22 February 2010.

societies, which applied rules in wartime, and the eminent publicists of the sixteenth and seventeenth centuries were motivated by considerations of *humanity* in the formulation of their rules applicable in wartime. Consequently, it is submitted that the principle of humanity, as motivating *raison d'être* of what was to become IHL, can only be reinforced by the ICRC since this principle *precedes* the ICRC.³⁷

Finally, the importance of the ICRC for IHL has not been ignored by international tribunals and the ICTY has also acknowledged the active role assumed by the ICRC to further the development, enforcement and dissemination of IHL. Hence, in non-international armed conflicts, the ICTY found that the ICRC has consistently appealed to the parties thereto to respect IHL. The ICTY contends further that it is evident that the ICRC has moved for the application of the *foundational principles* of IHL by parties to such non-international armed conflicts. The ICRC has also attempted to convince opposing parties to adhere to the provisions of the 1949 *Geneva Conventions*, or – at the very least – to the essential provisions of these *Conventions*. When opposing parties have still refrained from adhering to IHL, the ICRC has indicated that common article 3 should be followed as a minimum. In this manner the ICRC has furthered and facilitated the extrapolation of general IHL principles to non-international armed conflicts. The practical results which have emanated from the efforts of the ICRC to induce compliance with IHL should be considered as a component of actual state practice. This component has, furthermore, been essential in the emergence/crystallisation of CIL rules.³⁸ It is submitted that these statements of the ICTY not only reflect the indispensability of the ICRC for the strengthening and implementation of IHL but also indicate the close link between the ICRC, *foundational principles* and IHL. This approach of the ICRC to advocate for adherence to the foundational principles of IHL neatly ties in with the approach of the present dissertation to move for the acceptance of the natural law foundations of IHL and the direct reliance thereon as legal authority. In this regard, the ICRC has an important role to play since, as was alluded to above, the ICRC is intimately connected with the development and practice of IHL.³⁹ In this regard, the ICRC also *spreads knowledge* of IHL, especially to countries caught in the grip of armed hostilities.⁴⁰ The ICRC, then, engages with humanity as both a practical aspiration for its conduct and as a crucial theoretical virtue underpinning the legal system

³⁷ See also Nicod's *Foreword* to Maybee and Chakka 2006:vii and his *Welcome Address*, *ibid* at 7. See section 2.2 in Chapter 2, pages 31-69, above.

³⁸ *Prosecutor v Tadic* Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995 par. 109. In the light of the ICTY's *dicta*, it is submitted that the comment from Meron 1996:248 that CIL is influenced by the action of parties and non-parties to treaties, as well as by the ICRC and United Nations is unsurprising.

³⁹ Ku and Brun 2003:56. See also Kalshoven and Zegveld 2001:198.

⁴⁰ Kalshoven and Zegveld 2001:198.

it intends to further. The importance of this role player for IHL is therefore confirmed. It embodies and pursues the very principles upon which IHL (and the laws and customs of war) were vested. From the preceding it is also clear that the ICRC's undertaking to initiate a study into CIHL is in keeping with its mandate and objectives to strengthen the entire humanitarian endeavour.⁴¹ Accordingly, the ICRC Study on CIHL will be evaluated as a significantly important recent addition to the corpus of IHL.

3. An evaluation of the ICRC Study on CIHL

It has been evident from the present dissertation that IHL was based on and purported to further natural law principles. It was indicated that these natural law virtues found expression in rudimentary customary rules among the primitive societies and, to a large extent, the later eminent publicists on IHL. However, in Chapter 2, it was indicated that the nineteenth century saw legal positivism gain the ascendancy beyond natural law approaches. It was argued that this caused the essential natural law basis of IHL – which is accepted as historical fact rather than merely reflective of a theoretical approach – to be obscured. Subsequently, it was indicated that the emphasis fell on state sovereignty, consensual legal sources and written materials.⁴² It is submitted that although natural law thought in international law re-emerged after the atrocities of World War II, the international community's focus on consensual, written legal materials endured. Hence, codifications increased even when that meant reducing the re-emergent natural law virtues to inflexible, written rules. Of course, CIHL – which was the original source of IHL, easier to ascertain than natural virtues and, in any case, reflective of natural law principles – provided an important reservoir of rules to be subsumed under treaty law. Therefore, although treaty law developed some unique and original rules, treaty law largely represented a continuation of the rules accepted as customary, *which, in turn, embodied the universal, immutable, objective natural law principles*. It must be noted though that this indirect subsuming by treaty law of the natural law principles occurred mechanically and, therefore, these natural law virtues were largely overlooked.

⁴¹ Meron 1996:245. Thus, Pictet 1979:24 and at http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/fundamental-principles-commentary-010179?OpenDocument&style=Custo_Final.3&View=defaultBody3 accessed on 22 February 2010 states: 'In the legal field, prevention calls for the work of developing international humanitarian law. As we know, the ICRC has been concerned since the beginning with promoting and perfecting the rules protecting the victims of conflicts and it was the architect of the Geneva Conventions. Lastly, it is prevention which determines the role of the Red Cross in favour of peace. There are those who are not satisfied to see it confine itself to attenuating the effects of war, but insist that it attack the evil of war at its root and participate directly in the fight against this scourge'.

⁴² See section 2.2 in Chapter 2, pages 31-69, above.

However, with the continued emphasis on written, positivist codifications, treaties came to be accepted as *the* legal source in the international order. This positivist emphasis has now also eventually led to the attempt by the ICRC to codify customary rules. *However, in an apparently ironic volte-face this codification of CIHL seemingly relies on treaty provisions! Hence, where historically CIHL was subsumed into treaty provisions, the current trend is to attempt to derive CIHL rules from treaty provisions. In the process the emphasis on natural law virtues has been lost. Treaty provisions subsumed CIHL without due concern of natural law virtues thus, by reversing this process an incomplete version of CIHL will emerge since treaty provisions cannot actively provide the natural law virtues. It is argued in this dissertation that the natural law virtues must also be pertinently reintroduced into the IHL debate to enhance it.*

Nonetheless, the renewed scrutiny into CIHL, which is probably the closest to a universal and conventionally accepted legal source, seemingly reflects the desire of the international community to re-emphasise the universally binding source of law in the IHL debate. However, it is submitted that unless this reconsideration of CIHL is accompanied by a due consideration of the immutable, foundational principles of IHL, the lofty edifice of the ICRC Study might indeed be undermined.⁴³

Accordingly, the following section intends to investigate the monumental Study of the ICRC pertaining to CIHL. First, the history of the Study will be briefly considered, before summarising its essential findings and insights. Thereafter, the scrutiny will turn to the substantive aspects of the Study. Subsequently, the Study's methodological approach will be considered as well as the black-letter rules postulated as part of CIHL. In this regard, some of the criticisms to emerge from international literature will be considered. The present dissertation will then consider the Study's methodology and black-letter rules against the unique paradigms, pertaining to the natural law foundation of IHL and the approach to ascertaining CIL (and CIHL), identified from the preceding chapters. (Indeed, the proposed approach to CIHL determination of Chapter 3 and the application thereof to a selection of the Study's proposed rules should be kept in mind for the present section as the present section's comments on the Study's methodological approach will be supplementary to Chapter 3 rather than a mere restatement thereof.⁴⁴) It will also be insightful to subject the criticisms, levelled against the ICRC Study in international literature, to the natural law paradigm established by the present dissertation. It will be indicated that the natural law/legal positivism

⁴³ Of course, reducing the rules of CIHL to a written form (albeit a non binding form as that of the ICRC Study) impedes this branch of international law from developing and changing as it usually does in its customary form. See in this regard Pearce 2003:138.

⁴⁴ Hence, sections 3 and 4 of Chapter 3, pages 186-201, must be kept in mind.

debate is still very alive in the international legal order and, it will be indicated, that this might prevent *bona fide* advances in IHL.

3.1 An overview of the history and findings of the ICRC Study on CIHL

The atrocities committed in the 1990s in the former Yugoslavia and Rwanda caused the entire global community to witness the blatant disregard for the most fundamental principles of IHL – the distinction between civilians and combatants and between civilian and military objects.⁴⁵ Furthermore, it seemed as though inadequacy of rules were not to blame for these violations of IHL. Violations occurred – and still do – due to an unwillingness of the states to respect the rules, from the lack of an international law-enforcement institution, from uncertainty regarding their application in particular situations and from the fact that few political leaders, commanders, belligerents and general populace have knowledge thereof.⁴⁶ Something had to be done. Accordingly, in 1993, the International Conference for the Protection of War Victims discussed methods to deal with violations of IHL, but they refrained from proposing the adoption of new treaty law to this effect. Accordingly, the Conference reasserted 'the necessity to make the implementation of humanitarian law more effective' in its Final Declaration, and also requested the Swiss government 'to convene an open-ended intergovernmental group of experts to study practical means of promoting full respect for and compliance with that law, and to prepare a report for submission to the States and to the next session of the International Conference of the Red Cross and Red Crescent'. Subsequently, various recommendations that purported to increase respect for IHL through, especially, 'means of preventive measures that would ensure better knowledge and more effective implementation of the law' were adopted by the Intergovernmental Group of Experts for the Protection of War Victims that convened in 1995. It was from Recommendation II of this Group that the suggestion emerged to invite the ICRC to prepare a report on CIHL rules, which apply in international and non-international armed conflicts, and which was then to be circulated to states and other important international entities. This report was further to be prepared with the aid of IHL experts from various geographical regions and diverse legal systems, and with the assistance of experts from international organisations and governments. This recommendation was endorsed in 1995 by the 26th International Conference of the Red Cross and Red Crescent and the ICRC was officially mandated to prepare the report pertaining to CIHL rules relevant in international and non-

⁴⁵ Henckaerts 2008:124.

⁴⁶ Henckaerts 2005b:176. See also Henckaerts and Doswald-Beck 2005:xxvii.

international armed conflicts.⁴⁷

The ICRC formulated a Study containing 161 rules of CIHL in 2005 as the culmination of the mammoth task given to it in 1995. The Study comprises two volumes: volume one contains the black-letter rules, considered to be customary, with commentaries explaining the content thereof, while volume two (bound in two books due to sheer size) contains the material relied on to determine the customary nature of the rules formulated in volume one.⁴⁸ Each black-letter rule postulated in volume one cross-refers to a chapter and section in volume two where the practice on which that rule was established can be found.⁴⁹ The Study is divided into six sections: Distinction, Specifically Protected Persons and Objects, Specific Methods of Warfare, Weapons, Treatment of Civilians and Persons *hors de combat* and Implementation. Thus, clearly, rather than focus on treaty law and determining whether each provision is part of customary law, the Study approached the work from a broad perspective considering *state practice* generally and not limiting itself to IHL as it is reflected in treaty law.⁵⁰ Henckaerts states that by conducting research on the three levels of national, international and ICRC sources, practice from all parts of the world is reflected.

⁴⁷ Henckaerts 2005b:176. See also International Conference for the Protection of War Victims, Geneva, 30 August–1 September 1993, Final Declaration, *International Review of the Red Cross* 1993 33(296):381, Meeting of the Intergovernmental Group of Experts for the Protection of War Victims, Geneva, 23–27 January 1995, Recommendation II, *International Review of the Red Cross* 1996 36(310):84, 26th International Conference of the Red Cross and Red Crescent, Geneva, 3–7 December 1995, Resolution 1, International humanitarian law: From law to action; Report on the follow-up to the International Conference for the Protection of War Victims, *International Review of the Red Cross* 1996 36(310):59. See also MacLaren and Schwendimann 2005:1217, Henckaerts 2007a:260, 2005b:473 and 1999 Study on customary rules of international humanitarian law: Purpose, coverage and methodology (<http://www.icrc.org/web/eng/siteeng0.nsf/html/57JQ3K> accessed on 3 September 2010), Cowling 2006:66, Nicholls 2006:232–233, Balamwalla 2006:13 and UN Doc. E/CN.4/1999/92 par. 21. Of course, also see Dr Kellenberger's Foreword in the Study, Henckaerts and Doswald-Beck 2005:x and the editors' introduction at xxvii.

⁴⁸ Bugnion 2008:75. Henckaerts 2005a:527 emphasises that it is only the black-letter rules which are proposed rules of CIHL and not the commentaries pertaining to those rules as well. Nonetheless, the commentaries could provide useful clarifications on the black-letter rules thereby postulating the relevant context against which to consider certain rules.

⁴⁹ Henckaerts and Doswald-Beck 2005:xlvi.

⁵⁰ Cowling 2006:66–67 and Henckaerts 2005b:184: 'It should be stressed that the study did not seek to determine the customary nature of each treaty rule of international humanitarian law and, as a result, did not necessarily follow the structure of existing treaties. Rather, it sought to analyse issues in order to establish what rules of customary international law can be found inductively on the basis of State practice in relation to these issues. As the approach chosen does not analyse each treaty provision with a view to establishing whether or not it is customary, it cannot be concluded that any particular treaty rule is not customary merely because it does not appear as such in the study'. See also Henckaerts, *ibid* at 197. The Study states this sentiment in Henckaerts and Doswald-Beck 2005:xxx. Bugnion 2008:74–75 states that the Study had two methods it could follow – a *deductive* approach, taking treaties of IHL and illustrating the customary status of their provisions (which could lead to criticisms that the Study was merely attempting to show the customary status of treaties not universally ratified in order to circumvent non-ratification of non-parties) or an *inductive* approach, taking the essential elements of IHL and state practice and determining which rules are customary – stating that the Study ascribes to the second approach. See section 3 in Chapter 3, pages 187–189, regarding deduction and induction. See also MacLaren and Schwendimann 2005:1224 who also deem it possible that the derivation of CIHL rules from treaties might be seen as an attempt to circumvent the requirement of consent needed to make a treaty applicable to a state. However, see Bugnion, *ibid* at 86–87.

Nonetheless, the research cannot claim to be complete. The focus of the study was especially on the practice emanating from the last thirty years in order to ensure a formulation of contemporary CIL, but older practice was also taken into account when it was deemed to be relevant.⁵¹

Henckaerts states that the Study was carried out at the behest of states – it was intended to help states compile and assess practice in order to determine the content of CIHL.⁵² In this regard the aim of the ICRC Study was to circumvent various problems that occurred in relation to IHL treaty law.⁵³ Regarding the interaction of treaty and custom, as was indicated in Chapter 3, it is clear that a treaty may codify existing custom and a new treaty rule may eventually harden into custom, but evidently these sources remain separate.⁵⁴ Accordingly, then, states can be bound by certain rules of IHL (which have been subsumed by CIHL) irrespective of whether they ratified the treaty containing the relevant rule or not. This was what the Study aimed to determine – which rules applied to states as CIHL and, hence, regardless of treaty ratification.⁵⁵ Also, custom might be the instrument through which states may be obligated where conventional law is allegedly ambiguous. In sum, then, although treaty law may be used to fill the *lacunae* in IHL, such a process would be drawn out and difficult as it would entail obtaining the needed state support for the acceptance and ratification of the proposed provisions. Accordingly, the Study aimed to determine which rules already bind every state in an armed conflict as a matter of CIHL.⁵⁶ Furthermore, since the vast majority of armed conflicts are non-international in nature, and the treaty regime applicable to those conflicts is insufficient, the second main aim of the ICRC Study was to determine whether

⁵¹ 2005b:186. Regarding the various levels on which research was conducted, see Henckaerts and Doswald-Beck 2005:xliv-xlvii, Henckaerts 2005b:184-185, MacLaren and Schwendimann 2005:1235, Dinstein 2006:1 and Bugnion 2008:73. See Henckaerts and Doswald-Beck, *ibid* at xlv-xlvi, for practice collected by *national* researchers and, *ibid* at xlvii, for practice from *international* sources. Note may also be taken that Jenks 1954:21 had already indicated that there was a crucial desire to collect evidence of CIL from a broader geographical spectrum and, in the process, to progressively establish a wider based and more complete acceptance of established and developing CIL. This, it was argued, would protect existing CIL against the threat of disintegration. It seems as though this call was heeded roughly 50 years later! (See also Jenks, *ibid*, for an acknowledgment that collective state practice emanating from IGOs may contribute to CIL.)

⁵² 2005a:525 and 2007b:473.

⁵³ Henckaerts 2005b:177 and 2005c:423. See also Maybee *Introduction* in Maybee and Chakka 2006:1 and Henckaerts in Chatham House 2005:4. For completeness Henckaerts, *ibid*, cites various treaties applicable to IHL, including the *Geneva Conventions* of 1949, *Additional Protocols* of 1977, the 1868 *St. Petersburg Declaration*, the 1899 and 1907 *Hague Regulations*, the 1925 *Geneva Gas Protocol*, the 1972 *Biological Weapons Convention*, the 1980 *Convention on Certain Conventional Weapons* and its five *Protocols*, the 1993 *Chemical Weapons Convention*, the 1997 *Ottawa Convention on the Prohibition of Antipersonnel Mines*, the 1954 *Hague Convention* and its two *Protocols* and the 1998 *Statute of the International Criminal Court* which contains, *inter alia*, a list of war crimes upon which the ICC can adjudicate.

⁵⁴ See footnote 6 on page 162 above.

⁵⁵ Henckaerts 2005a:526, 2005b:177, 2005c:423 and 428, Henckaerts and Doswald-Beck 2005:xxviii, Henckaerts in Barnaby, Yang, Faite and Henckaerts 2006:16 and 44, Meron 2005:833, Nicholls 2006:233, Henckaerts in Chatham House 2005:4 and Cowling 2006:69. See also Nicod's *Foreword* to Maybee and Chakka 2006:vii and his *Welcome Address*, *ibid* at 9. See also section 2 in Chapter 3, pages 179-183.

⁵⁶ MacLaren and Schwendimann 2005:1221-1222.

customary law furnishes a more detailed framework for the regulation of non-international armed conflicts than treaty law and, if indeed so, to what extent.⁵⁷ Although not explicitly stated as one of the ICRC Study's objectives, it has been submitted that a finding of customary status of a specific rule might ensure increased *moral weight* of the particular rule and, hence, encourage compliance thereof.⁵⁸ It is submitted that this proposal conforms to the argument of the present dissertation that morality underpins CIHL more directly and visibly than might be the case with a treaty rule, for example.

It is necessary to consider which treaties were considered by the Study in its endeavour to ascertain CIHL rules. Due to the universal ratification of the *Geneva Conventions*, they have been accepted as comprising CIL due to the formal crystallisation thereof. The ICRC deems customary law to have little practical value on matters governed by them, except regarding questions of direct applicability of the *Conventions* in domestic jurisprudence where the customary nature of these rules may be very important.⁵⁹ Nonetheless, the international duty of these states to implement the *Geneva Conventions* will not be influenced if they omit to enact the needed legislation. In such situations, however, it may become essential to invoke a specific norm as customary (and not conventional) in order to ensure that the needed protection be afforded to the relevant individuals.⁶⁰ The ICRC Study confirms the International Military Tribunal at Nuremberg's finding that the 1907 *Hague Regulations* were customary; the submission of the ICJ in the *Nicaragua case* that common article 3 of the *Geneva Conventions* were applicable to all armed conflicts since they embodied 'elementary considerations of humanity;' and the finding of the ICJ in the *Nuclear Weapons Advisory Opinion* that most of the *Geneva Conventions* were part of CIL.⁶¹ Scobbie, however,

⁵⁷ Henckaerts 2005a:525, 2005b:178, 2005c:423-424 and 1999 Study on customary rules of international humanitarian law: Purpose, coverage and methodology (<http://www.icrc.org/web/eng/siteeng0.nsf/html/57JQ3K> accessed on 3 September 2010), Henckaerts in Chatham House 2005:4-5, Nicholls 2006:233, MacLaren and Schwendimann 2005:1221, Meron 2005:833 and Balgamwalla 2006:15. See also section 2 in Chapter 3, pages 182-185. Henckaerts 2005b:178 cites as treaties applicable to non-international armed conflicts the *Convention on Certain Conventional Weapons* as amended, the *Statute of the International Criminal Court*, the *Ottawa Convention on the Prohibition of Anti-personnel Mines*, the *Chemical Weapons Convention*, the *Hague Convention for the Protection of Cultural Property* and its *Second Protocol* and, of course, *Additional Protocol II* and article 3 common to the four *Geneva Conventions*. See also Henckaerts and Doswald-Beck 2005:xxviii-xxix regarding the insufficient treaty regime of non-international armed conflicts.

⁵⁸ Nicholls 2006:233.

⁵⁹ Meron 1996:246 and 1987:348. See also Cowling 2006:70.

⁶⁰ Meron 1987:348-349.

⁶¹ Scobbie 2007:26-27. See also Henckaerts and Doswald-Beck 2005:xliv. See the *Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg*, Vol. XXII:497, regarding the *Hague Regulations* and the ICJ see the *Advisory opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Advisory Opinion of 9 July 2004 [2004] ICJ Rep. par. 89, *Case concerning Military and Paramilitary activities in and against Nicaragua*, Judgment of 27 June 1986 (merits) par. 218 and *Advisory Opinion on Nuclear Weapons of 1996*, ICJ Reports 1996 paras 79 and 81.

objects and submits that the deduction from the widespread participation in the *Geneva Conventions* and *Additional Protocols* to the normative finding of existing customary status is too easy. It should, however, not be accepted as a mere formality that when a treaty enjoys universal acceptance all its provisions are transformed into CIL.⁶² Nonetheless, in light of the universal ratification of the *Geneva Conventions*, the focus of the Study was more on the *Additional Protocols* of 1977, the *Hague Convention for the Protection of Cultural Property* and other conventions including the *Additional Protocols to the Weapons Convention* and the *Ottawa Landmines Treaty* which do not enjoy universal ratification.⁶³ Both states that the significance of the old Hague law, pertaining to means and methods of warfare, in its capacity of treaty provisions is almost nothing. The Third World is basically absent in the ratification of this law. Since these *Conventions* only apply if both parties have ratified them, this leads to few international armed conflicts being governed by this branch of treaty law. Accordingly, the customary law status of these Hague rules is important. As was alluded to above, due to the large number of states not party to these major treaties, a study into CIL seemed warranted to address these 'participation loopholes'.⁶⁴ Furthermore, with regard to weapons and means and methods of warfare, Haines indicates that treaties alone are insufficient because whereas a treaty rule may not prohibit the use of a particular weapon, a customary rule might address both the inherent lawfulness of a particular weapon and/or its use. Thus, the Study further elucidates these rules. Each of the Study's proposed rules either bans the weapon to which it refers or limits its use. Furthermore, the Study acknowledges that the rules included might not be a *numerus clausis* and that other customary rules pertaining to weapons may still exist.⁶⁵ Returning to the important *Additional Protocols* of 1977, it is evident that the states not party thereto present a concern with political considerations supplying the answer to why this should be the case.⁶⁶

Thus the cause of IHL would be greatly furthered if the Study could indicate that the political

⁶² Scobbie 2007:30-32. *North Sea Continental Shelf Cases* 1969 ICJ Rep 3 par. 76: 'To begin with, over half the States concerned, whether acting unilaterally or conjointly, were or shortly became parties to the Geneva Convention, and were therefore presumably, so far as they were concerned, acting actually or potentially in the application of the Convention. From their action no inference could legitimately be drawn as to the existence of a rule of customary international law...'. See also Kopelmanas 1937:136-137 and *North Sea Continental Shelf Cases* 1969 ICJ Rep 3 paras 60-82.

⁶³ Cowling 2006:70, Bothe 2005:146-148, Henckaerts 2005c:424, Henckaerts and Doswald-Beck 2005:xxviii, Henckaerts in Chatham House 2005:5 as well as MacLaren and Schwendimann 2005:1220-1221 and 1225.

⁶⁴ Bothe 2005:147-149.

⁶⁵ 2007:260-261.

⁶⁶ Bothe 2005:148. As of 11 November 2010 states party to *neither* the *Additional Protocol I* nor *Additional Protocol II* include the United States, Turkey, Tuvalu, Thailand, Sri Lanka, Somalia, Singapore, Papua New Guinea, Pakistan, Nepal, Myanmar, Morocco, Malaysia, Kiribati, Israel, India, Indonesia, Iran, Eritrea, Bhutan, Azerbaijan and Andorra. States party to *Additional Protocol I*, but not party to *Additional Protocol II*, include: Angola, Democratic People's Republic of Korea, Iraq, Mexico, Syrian Arab Republic and Vietnam. States party to *Additional Protocol II*, but not party to *Additional Protocol I*, include: Philippines. See <http://www.icrc.org/ihl> accessed on 19 November 2010.

motivation to ignore certain principles of IHL (that are deemed to impede short term military gains) is incorrect as a matter of law since these rules constitute not only treaty law (which can be circumvented through non-ratification) but also CIHL. However, because of these far-reaching consequences, the proof adduced as evidence of CIHL cannot be accepted lightly. If proof has to be adduced to counter the evident resistance of certain significant states to rules embodied in a *Protocol* as being customary, then it must be solid.⁶⁷

Moreover, Dr Sandoz raises an important question in his Foreword to the Study, namely why should such large scale resources be invoked to elucidate rules of CIL in a branch of law that is so extensively codified and through whose treaties the majority of states are bound? He suggests two answers. Firstly, such research casts light upon those vast yet little known recesses of IHL which are important to consider in greater detail. Secondly, by conducting research throughout the world to determine how these rules are adhered to, translated, taught and enforced, then consolidating the information to establish both the successes and the lingering *lacunae* leads to more effective implementation of these rules, increased interest, research, new ideas and, most importantly, it encourages dialogue between different cultures.⁶⁸ (Obviously, the present dissertation embodies an attempt to further this whole process as well.) It has further been stated that the significant importance of this Study lies in the fact that treaties cannot comprise direct sources of law. This is held to be the case irrespective of whether certain treaties have been described as law-making treaties comparable to legislation from a domestic system or the notion of treaties' supremacy evident from listing it as the first source mentioned in article 38 of the *Statute of the ICJ*. The rationale behind this is that treaties must have a contractual basis seeing that the international community lacks a central legislator and, accordingly, each state is free to choose which treaties it will accede to. Treaties cannot enjoy automatic general application among states of the international community, but the condition of general application is essential for any rule of law.⁶⁹

It is consequently necessary to consider briefly the *substantive findings* of the ICRC Study. The Study confirmed that the majority of provisions of *Additional Protocol I* (not all the provisions, though) relating to the conduct of armed hostilities (articles 35-42 and 48-58), were now reflective of customary law either due to those provisions codifying already existing customary rules or because the provisions, adopted in the treaty, have crystallised into customary law through

⁶⁷ Bothe 2005:148.

⁶⁸ Henckaerts and Doswald-Beck 2005:xvi-xvii.

⁶⁹ Cowling 2006:68. Compare Cheng 1983:526-528 and 548 as well as Thirlway 1972:25-26. See Pellet 2006:703 in the context of article 38 of the *ICJ Statute*.

subsequent state practice.⁷⁰ Thus, the consequences of confirming the customary status of the main provisions relating to the conduct of armed hostilities and protecting of civilians from the effects of armed conflicts are significant as these provisions now, by implication, bind the entire international community irrespective of whether a country has acceded to the *Additional Protocol I* or not.⁷¹ The second essential finding entails that many rules of the *Geneva Conventions* and *Additional Protocols* have become binding as CIL in non-international armed conflict.⁷² In this regard, Henckaerts states that *usus* and CIHL have come to fill significant *lacunae* in treaty law pertaining to non-international armed conflicts. The gap between international and non-international armed conflicts relating especially to the conduct of hostilities, conduct towards individuals in the power of a party to the conflict and the resort to means and methods of warfare has been closed to a large extent.⁷³

Nonetheless, it does not follow that the law regulating international and non-international armed conflicts is now the same. Inevitably the ICRC Study contains rules which only apply in international armed conflicts and rules which have different formulations for international and non-international armed conflicts.⁷⁴ In this regard, the ICRC Study has been lauded for meticulously differentiating between international and non-international armed conflicts when presenting each of its 161 proposed rules.⁷⁵ Bugnion confirms that the Study furnished 'resounding confirmation' of IHL's universality.⁷⁶

⁷⁰ Bugnion 2008:76-77 as well as Henckaerts 2005b:187 and 2007b:485. However, this finding was rejected by Bellinger and Haynes 2007:447-448 as will be seen from their critique of the Study below.

⁷¹ Bugnion 2008:77, Cowling 2006 and Balmgawalla 2006:13.

⁷² Henckaerts 2007b:485, MacLaren and Schwendimann 2005:1221 as well as Sassòli and Bouvier:135. See also Bothe 2005:152-154 and Maybee *Introduction* in Maybee and Chakka 2006:2. The approach of the Study seems to be encapsulated in: 'Common sense would suggest that such rules, and the limits they impose on the way war is waged, should be equally applicable in international and non-international conflicts' (see Henckaerts and Doswald-Beck 2005:xxix). Hence, Bothe 2005:154 states '[t]his means: the role of customary law is not to fill loopholes left by treaty law. It is, as the Study rightly formulates, a means of dynamic development of international law. In about 15 years since 1977, customary law has overcome a political resistance which seemed to be so deeply embedded in the international legal system that it was supposed to withstand any humanitarian assault for many years to come'. However, this finding was also rejected by Bellinger and Haynes 2007:447-448 as will be seen from their critique of the Study below.

⁷³ 2007b:487. See also Fleck 2005:246 and 2006:179-180. See also Henckaerts 2005b:189, 197 and 2005c:425.

⁷⁴ Henckaerts 2007b:487. See also Sassoli and Bouvier 2006:251, Quéguiner 2008:168-169, Henckaerts in Chatham House 2005:5-6, the *Foreword* of Nicod to Maybee and Chakka 2006:vii-viii and Henckaerts 2005b:189, 197, 2005c:425 and 428. See also Henckaerts and Doswald-Beck 2005:xxix. Thus, for example, see Quéguiner 2008:168 discussing the principle of distinction.

⁷⁵ Fleck 2005:246.

⁷⁶ 2008:83. Compare Dr Kellenberger reaching this very conclusion in his Foreword to the Study - Henckaerts and Doswald-Beck 2005:xi. See also Weeramantry's *The Revival of Customary International Humanitarian Law* in Maybee and Chakka 2006:27 who describes the Study as 'the fruits of a period of several years of work in the universal field of law where principles, traditions, customs and rules from across the world have been gathered together by a team of dedicated scholars'.

It is submitted that the ICRC Study reached important conclusions, *but nowhere did the Study return to a principled, axiomatic approach to IHL*, which is argued for in the present dissertation as being a necessity for the *bona fide* reinforcement of IHL. Accordingly, in 1952 Lauterpacht submitted that when the law regarding the distinction between combatants and non-combatants is developed or when new law is created it should not be done through reference to existing law, but rather through considerations of *humanity*, the continued survival of civilization and the sanctity of the individual human being.⁷⁷

This approach is indicative of the approach which this dissertation submits the Study ought to have pursued more vigorously and which by doing so, would have considered IHL, and particularly CIHL and IHL treaty law, through the proper historical, essential and aspirational natural law, principled basis thereof.

The value of the Study was stated succinctly by Dr Yves Sandoz in his foreword to the ICRC Study and is justifiably quoted at length:

...[T]his study will have achieved its goal only if it is considered not as the end of a process but as a beginning. It reveals what has been accomplished but also what remains unclear and what remains to be done. The study is a still photograph of reality, taken with great concern for absolute honesty, that is, without trying to make the law say what one wishes it would say. I am convinced that this is what lends the study international credibility. But though it represents the truest possible reflection of reality, the study makes no claim to be the final word. It is not all-encompassing – choices had to be made⁷⁸ – and no one is infallible. In the introduction to *De iure belli ac pacis*, Grotius says this to his readers: “I beg and adjure all those into whose hands this work shall come, that they assume towards me the same liberty which I have assumed in passing upon the opinions and writings of others.” What better way to express the objective of those who carried out this study? May it be read, discussed and commented upon. May it prompt renewed examination of international humanitarian law and of the means of bringing about greater compliance and of developing the law. Perhaps it could even help go beyond the subject of war and spur us to think about the value of the principles on which the law is based in order to build universal peace – the utopian imperative – in the century on which we have now embarked.⁷⁹

It is submitted that the reason and the impetus for the present dissertation can be found in the sentence, '[m]ay it be read, discussed and commented upon'. As will be evident from the following pages, a number of scholars have already given heed to this call of Dr Sandoz. Nonetheless, the present author must agree with Dr Sandoz that the debate on IHL and, especially, CIHL has only just started. Accordingly, this dissertation aims to further the debate by establishing a unique

⁷⁷ 1952:379.

⁷⁸ Scobbie 2007:17 commends this acknowledgment, namely that selections had to be made and, thus, that absolute comprehensiveness is not guaranteed. This acknowledgment makes the reader aware that not every issue is addressed or solved for that matter – customary law also exists outside the Study.

⁷⁹ 2005:xvii-xviii. However, see Aldrich 2005:505.

natural law framework through which the Study may be viewed as compared to those previously constructed. In the process, with the emphasis placed on *values* and *principles* throughout the dissertation, it seems inevitable that this dissertation might indeed constitute (as far as the author hereof could determine) one of the first attempts to '*go beyond the subject of war and spur us to think about the value of the principles on which the law is based*'.

The following section will attempt to synthesise and systematise the various (general and rule-specific, i.e. formal and substantive) criticisms which have already been levelled at the ICRC Study before adding some additional comments and considering the value of the Study. In describing some of the criticisms, selection will be necessary as various rules have been taken to task for similar reasons.

3.2 A dual consideration of the methodology invoked to establish the black-letter rules in the ICRC Study on CIHL from international literature and the natural law framework postulated in this dissertation

3.2.1 Introduction

As was indicated in Chapter 3, the determination of CIHL – that is rules potentially universally applicable to states during times of armed conflict – is controversial.⁸⁰ The ICRC therefore had to endure the inevitable onslaught on its specific methodological approach to CIHL and its black-letter formulations. Accordingly, the present section will briefly consider the approach of the Study in ascertaining CIHL rules before alluding to some of the criticisms to have emerged in this regard.

At the outset it must be indicated that the Study was not intended to be a textbook on IHL – it is a snapshot of practice without purporting to comment on it. Thus, conflicting practice is merely described and where practice is unclear the Study refrains from suggesting answers.⁸¹ The ICRC considers the Study to be a work of scholarship, conducted through scientific research and with the support and aid of many internationally renowned academics.⁸²

⁸⁰ See section 2 in Chapter 3, pages 174-179.

⁸¹ Henckaerts 2005a:526 and, likewise, *ibid* at 531.

⁸² Bugnion 2008:84. Indeed, Bugnion continues that the academic freedom of the authors was respected and in reaching their findings they described CIHL as it is and not as they, or the ICRC, wish it to be. According to MacLaren and Schwendimann 2005:1236 and Dr Kellenberger's Foreword to the Study 2005:xi the Study remains a

The approach to CIL formation taken by the Study is fairly traditional – state practice and *opinio iuris* (the conviction that the practice is legally obliged, required or prohibited) were needed for a customary rule to arise. Current critical and revisionist approaches to customary law creation were not considered.⁸³ Moreover, as was indicated in Chapter 3, the approach to ascertain modern CIL has changed. According to Meron:

...when customary law *is* applied today, the methods used to determine its content are increasingly relaxed, particularly with respect to the establishment of state practice. The modern approach to customary law, it is said, relies principally on loosely defined *opinio iuris* and/or inference from the widespread ratification of treaties or support for resolutions and other “soft law” instruments; thus, it is more flexible and open to the relatively rapid acceptance of new norms. The ICRC's approach, in contrast, takes a traditional form, while remaining open to a wide variety of manifestations in practice. In my view, the ICRC's project is highly relevant today.⁸⁴

Nonetheless, it became apparent from Chapter 3 that no consensus exists as to what precisely constitutes state practice or *opinio iuris*. Accordingly, it is important to determine what state practice really entailed for the Study. Debates (as has been seen in Chapter 3) range from conduct to statements – also referred to as claims or verbal acts. However, for purposes of the Study (and Dinstein and Bothe agree) “[b]oth physical and verbal acts of States constitute practice that contributes to the creation of customary international law”.⁸⁵ Henckaerts indicates that Dinstein is generally correct in considering state practice to be the *fons et origo* of custom, but opines that more correct would be to deem it the practice of 'subjects of international law'. The latter category comprises states, international organisations and the ICRC.⁸⁶ It is therefore apparent that a holistic approach was adopted by including the practice of various role players and then sifting through the collected evidence to find the normatively relevant practice.

Accordingly, the approach of the Study regarding the ascertainment of CIL was cautious, through examining both the material element (*usus*) and psychological element (*opinio iuris*) in detail to

scholarly contribution to IHL although the Study has been published under the ICRC's name and is promoted by it. Accordingly, they confirm that the academic liberty of the editors and consulted experts of the Study was respected. However, MacLaren and Schwendimann 2005:1236 submit that the endorsement of the Study by the ICRC was inevitable bearing in mind its self-interest, the significant input made by the ICRC and the contribution of the Study's findings to IHL.

⁸³ Scobbie 2007:24. See sections 2 and 3 of Chapter 3, pages 160-197, above.

⁸⁴ 2005:817.

⁸⁵ Henckaerts and Doswald-Beck 2005:xxxii, Dinstein 2006:4 and Bothe 2005:156. See section 2 in Chapter 3, pages 165-170.

⁸⁶ 2007a:261 considering Dinstein 2006:4. In this regard Henckaerts, *ibid*, states that article 38(1)(b) of the *Statute of the ICJ* defines custom as 'a general practice accepted as law,' omitting any reference to the fact that this practice must emanate from a state.

ensure that these requirements were complied with.⁸⁷ Regarding state practice, those acts relevant to the formation of CIL had to be selected and then assessed to establish whether a rule of CIL had indeed formed. As was alluded to in the previous paragraph, both verbal and physical acts of states were accepted as practice relevant in the CIL-making process.⁸⁸ Despite the aforementioned, the Study relies mainly on verbal practice. However, it has been submitted that this is not problematic since access to verbal practice is easy, while physical practice is frequently more difficult to ascertain. Also 'the argument that actual physical behaviour counts more than words is flawed. In a way, it implies that states do not really mean what they say...this should not be lightly assumed'.⁸⁹

⁸⁷ Cowling 2006:71 and Henckaerts 2005b:178. MacLaren and Schwendimann 2005:1223 submit that: 'Above all, customary IHL tends to develop during wartime, but wars are (relatively) infrequent, and the development is therefore non-continuous. In order to circumvent this difficulty, *usus* was not defined for the purposes of the Study as "age-old" state practice but as practice during the last twenty years, with the caveat that sufficiently dense practice can accumulate over an even shorter period of time. In situations where relevant practice is sparse or ambiguous, *opinio iuris* plays an important role, but it too proves elusive because States rarely provide reasons for what they do or do not do. The Study's editors were evidently tempted to adopt a teleological approach that international courts and tribunals have occasionally shown, namely that a rule of customary international law exists "when that rule is a desirable one for international peace and security or for the protection of the human person, provided that there is no important contrary *opinio iuris*." See Henckaerts and Doswald-Beck 2005:xliv. Despite the attractiveness of this approach, the editors concluded that sufficient consistent support in the international community (including from so-called specially affected states) remains necessary to establish a customary international rule.

⁸⁸ Henckaerts 2005b:179. Included as practice were physical acts, like battlefield conduct, the use of particular weapons and the treatment given to various categories of persons; and verbal acts like national case-law and legislation, military manuals, instructions to armed and security forces, diplomatic protests, military communiqués during the war, opinions of official legal advisors, governmental comments on draft treaties, executive decisions and regulations, pleadings before international tribunals, governmental positions on resolutions passed by international organisations and statements made in international fora. For this list see Henckaerts 2005b:179 and Henckaerts and Doswald-Beck 2005:xxxii. See also Cowling 2006:71, Bugnion in Chatham House 2005:2-3, Schmitt 2007:133, Henckaerts, *ibid* at 179, and Bothe 2005:157-158. (Regarding the importance and problems of military manuals, see Bothe, *ibid* at 156-157, and Sassòli and Bouvier 2006:134. For the significance of international court decisions, see Henckaerts, *ibid* at 179, Henckaerts and Doswald-Beck, *ibid* at xxxiv, and Bothe, *ibid* at 158-159. See Henckaerts, *ibid* at 179, and Henckaerts and Doswald-Beck, *ibid* at xxxv-xxxvi, for the finding that the value to be ascribed to a resolution in the CIL creation process depends on the content of the resolution, the acceptance thereof and the consistency of related state practice. In this regard, see also the *Advisory Opinion on Nuclear Weapons of 1996*, ICJ Reports 1996 par. 70.) The practice from the executive, legislative and judicial spheres of a state might contribute to CIL provided that these components are not internally inconsistent. (See Henckaerts and Doswald-Beck, *ibid* at xxxiv.) Furthermore, not only battlefield practice or other practice during armed conflict was accepted as relevant – conduct of states during peacetime was also relevant. See in this regard Cowling, *ibid* at 71, Henckaerts, *ibid* at 179, and Scobbie 2007:37-38. See also Meron 1996:248-249 for the importance of practice emanating from combatants and generally similar evidence of state practice. It was also accepted that the practice of international organisations could contribute to the formation of CIL and, accordingly, the Study included 'the UN Secretary-General's Bulletin on observance by United Nations forces of international humanitarian law as relevant practice, in particular because "the instructions in the Bulletin reflect the quintessential and most fundamental principles of the laws and customs of war"'. Official ICRC statements, including memoranda and appeals for respect for IHL, were also included as practice mindful of the fact that the ICRC has legal personality in international law. See Henckaerts and Doswald-Beck, *ibid* at xxxv, and Schmitt, *ibid* at 133. See also Henckaerts and Doswald-Beck, *ibid* at xlvii, for an exposition of international sources considered. For the practice of armed opposition groups (which do not constitute state practice), see Henckaerts, *ibid* at 179-180, Henckaerts and Doswald-Beck, *ibid* at xxxvi, and Scobbie, *ibid* at 45. For the importance of treaty law, see Henckaerts, *ibid* at 182-183, Henckaerts and Doswald-Beck, *ibid* at xlv, and Meron 2005:833. See also Dinstein 2006:10-11. For the supplementary role of human rights law, see Henckaerts, *ibid* at 196, Henckaerts and Doswald-Beck, *ibid* at xxx-xxxii, MacLaren and Schwendimann 2005:1225, Bothe, *ibid* at 159, Hampson 2007:50-73 and Krieger 2006:276-277. See also section 2 in Chapter 3, pages 165-170.

⁸⁹ Bothe 2005:156 accepts that both verbal and physical practice need to be cautiously scrutinised seeing that the value

However, in this process, a requirement like verbal practice seemed slippery – did it connote state practice or *opinio iuris* seeing that it presumably embodies a state's legal opinion? The approach taken was not to draw a strict line between practice and *opinio iuris*. Accordingly, if the collected practice was dense, *opinio iuris* was accepted without having to prove it separately, but if the collected practice was ambiguous then *opinio iuris* was important to determine whether a customary rule had indeed formed. Accordingly, both verbal and physical acts are accepted as state practice, but only official practice was relevant.⁹⁰ Further important aspects included that passage of time would not be a critical factor, but the accumulation of a practice, with regard to uniformity, scope and representativeness would determine whether a new rule of customary law had been established or not.⁹¹ Furthermore, for the selected state practice to give rise to a norm of CIHL it was necessary for the state practice to be extensive and representative. However, the practice must only be general and not necessarily universal. Also, since the state practice required is qualitative rather than quantitative it is impossible to establish the precise number/percentage of states needed to constitute *general* practice. Thus, it is not only the number of states which participate that matters but also which states participate.⁹² Cowling, however, opines that the concept of specifically affected states was not applicable to armed conflict since the whole of humanity suffers under it – all states, even those not party to a conflict, have an interest that IHL be respected.⁹³

of physical practice as evidence of CIL is often difficult to determine and, with regard to verbal acts, a state which includes a rule in its national legislation or military manuals illustrates an *opinio iuris* that the state is 'entitled to do so' but not necessarily that such state is 'obliged to do so'. See also Wilmshurst 2007:403. However, see the criticism of Hays Parks 2005:208-210.

⁹⁰ Scobbie 2007:24-25 and Henckaerts and Doswald-Beck 2005:xxxii. Regarding sufficiently dense state practice, see also Henckaerts 2005b:180 and Cowling 2006:74. Scobbie, *ibid* at 25, submits that despite the fact that acts which are not public do not contribute to customary law creation, the Study nonetheless relied on ICRC communications with states irrespective of the fact that these communications are often confidential.

⁹¹ Henckaerts 2005b:181. The *locus classicus*, of course, is the *dictum* in the *North Sea Continental Shelf Cases* 1969 ICJ Rep 3:43: 'State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform'.

⁹² Henckaerts and Doswald-Beck 2005:xxxviii and Henckaerts 2005b:180-181: 'This consideration has two implications: (1) if all "specially affected States" are represented, it is not essential for a majority of States to have actively participated, but they must have at least acquiesced in the practice of "specially affected States"; and (2) if "specially affected States" do not accept the practice, it cannot mature into a rule of customary international law, even though unanimity is not required as explained. Who is "specially affected" under international humanitarian law may vary according to circumstances'. See generally Byers 1995:143-144 and Guzman 2005:150-151.

⁹³ 2006:72. Turns 2006:207 elaborates regarding the Study's position on specially affected/persistent objecting states: 'On this point, of "persistent objectors" to a customary rule, the *Study* pointedly "has taken no view" – a decidedly odd position for a work whose focus is customary law, and one which, it is submitted, damages its credibility. It might be possible to argue that humanitarian law is something that all States have an interest in upholding, to the extent that there are no "States whose interests are specially affected"; indeed, the *Study* briefly makes this point but does not seek to build an argument with it. This tantalisingly suggests the possibility of an *erga omnes* argument, notably in the statement that "it is . . . true that all States have a legal interest in requiring respect for international humanitarian law by other States, even if they are not a party to the conflict" [Henckaerts and Doswald-Beck 2005:xxxix] – but the point is neither expressly stated as such nor taken any further. Likewise, the *Study* obliquely suggests that all of its Rules may be rules of *ius cogens*, [Henckaerts and Doswald-Beck, *ibid* at xxxix] but does not seek to press the point'. See also MacLaren and Schwendimann 2005:1224.

This, in brief, entails the methodological approach of the ICRC in its Study on CIHL. However, in compliance with the wish expressed by Dr Yves Sandoz (reflected above) that the Study should be read, discussed and commented upon,⁹⁴ an increasing corpus of jurisprudence has emerged considering the method and proposed rules of the Study. It is argued that without a knowledge of these criticisms and comments pertaining to the Study, a misinformed understanding of the Study might very well result. Thus, for example, applying the proposed normative paradigm of the current dissertation to the Study ignorant of the criticisms and comments thereon would significantly detract from the value of the proposed approach of this dissertation. Consequently, the present scrutiny will turn to some of these criticisms before subjecting both the ICRC Study and its criticisms to the proposed natural law paradigm of the present study.

3.2.2 Criticisms pertaining to the methodological approach of the ICRC Study on CIHL as well as the proposed black-letter rules of CIHL

The following section intends to reflect the expanded literature on the ICRC Study which is emerging from international jurisprudence. In the process, some of the concerns levelled against the Study's methodology and proposed rules will be considered. This investigation into the literature on the ICRC Study is necessary to illustrate the overtly positivist critique of the ICRC Study, which has emanated from international jurisprudence, and, in the process, to indicate the lack of a natural law scrutiny into the Study. The present dissertation's clarion call for a return to an axiomatic natural law perspective with which to consider IHL, CIHL and, of course, the ICRC Study will be juxtaposed with this positivist approach of the international community.

As was indicated in Chapter 3, the methodology accepted to ascertain CIL (and, by implication CIHL) is bound to cause debate and criticism, since every academic seemingly has his/her own notion of how such a task should be approached. Accordingly, Scobbie submits that the Study's exposition of the notion of CIL which forms the foundation of its conclusions is 'almost telegraphically concise'. In this regard, Scobbie continues his critique by stating that even though the Study essentially invokes various *dicta* of the ICJ to establish its conception of the process of custom formation, it nonetheless reflects an 'incomplete and selective survey' of the judgments of

⁹⁴ Henckaerts and Doswald-Beck 2005:xvii-xviii.

the ICJ. Furthermore, the Study relied on the International Law Association's *Final Report of the Committee on the Formation of Customary (General) International Law*, writings by Mendelson (who acted as a rapporteur of the Committee) and Kirgis' influential sliding scale notion of CIL as a template for its codification and ordering of practice. In principle, Scobbie accepts the Study's invocation of basically verbal acts to formulate its rules 'unimpeachable'.⁹⁵ The methodology adopted by the Study towards customary law-formation is inductive except when ambiguous practice occurs. Then recourse is had to Kirgis' 'sliding scale' – where the balance between state practice and *opinio iuris* may be influenced to emphasise humanitarian considerations so that the need for practice lessens.⁹⁶ (See Chapter 3 for an exposition of the proposed importance of Kirgis' sliding scale theory of CIL formation.⁹⁷) The Study relies on Kirgis for the proposition that international courts and tribunals sometimes find a CIL rule to exist, in the absence of important opposing *opinio iuris*, if that rule is desirable for international peace and security or to ensure better protection for the human person.⁹⁸ Scobbie states that the Study's reliance on Kirgis raises (at least) two concerns, namely it points to considerations of relative normativity and by using Kirgis' analysis, customary rules may be elaborated based on 'a single or restricted array of practice'. With regard to the first concern, he argues that it is unclear where the higher normativity emanates from which attributes more value to *opinio iuris* than to state practice and how this influences the balance between these two elements. In this regard, Scobbie continues, reliance on natural law still begs the question regarding which values are privileged and the particular content to be ascribed to the values used. These concerns cause the inclusion of Kirgis' analysis to be viewed with scepticism.⁹⁹

Although the criticisms levelled against the ICRC Study's methodological approach will be discussed more fully below, some comments are in order here *vis-à-vis* the critique of Scobbie.

⁹⁵ 2007:23-24 and 37.

⁹⁶ Scobbie 2007:26.

⁹⁷ See section 3 in Chapter 3, pages 192-194.

⁹⁸ Henckaerts and Doswald-Beck 2005:xlii.

⁹⁹ 2007:27-29. A comparable criticism, which indicates the problem with attempting to determine rules of CIL is levelled by Bethlehem 2007:10, namely that although the methodology set out in the Study's introduction is basically correct, the described approach is not always clear when state practice and *opinio iuris* are weighed up. This especially pertains to the requirement of the 'density' of practice required. See also Bethlehem in Chatham House 2005:14. See also Bellinger and Haynes 2007:444 who criticise the Study for failing to apply its postulated approach to CIL determination. Bothe 2005:154 also deems the important question to pertain to how the Study's enunciated methods are applied to formulate any particular rule. See also Wilmshurst 2007:401-403 who submits that although the Study's exposition of its methodology in determination of relevant sources and the formation of customary law is a 'classic, even conservative' one, it is evident that in the application of this methodology the Study was not always as conservative as it claimed to be. Hence, the Study sometimes assumes 'a fairly relaxed view of what is needed to constitute customary law'. Accordingly, a more formalistic method to establish and formulate CIL as compared to those methods of the courts is claimed. Also, in the absence of a claim by the authors for special exemption for rules of CIHL from the traditional approach regarding the establishment of CIL, such a demand is strengthened.

Therefore, it must be noted that it has been argued that due to the ICRC Study's objective to create an instrument through which compliance with IHL might be improved, recourse to a non-traditional approach to CIL formation was imperative.¹⁰⁰ *This links up with the argument emphasised throughout the present dissertation, namely that IHL was based on higher natural law virtues.* Subsequently, it has been argued that if there is a prominent branch of CIL where morality might outweigh state practice, it must be CIHL.¹⁰¹

The present dissertation has illustrated the importance of a normative, transcendental approach *vis-à-vis* CIHL determination in Chapter 3. It has been argued throughout the current dissertation that the natural law principles, which underpin IHL and, naturally, by extension CIHL are *considerations of humanity*. Chapter 2 also investigated the substantive content of humanity precisely as countermeasure to criticisms that it is an overly vague notion. Hence, the importance of a normative, forward-looking method in CIHL was confirmed in Chapter 3 while proposing the natural law approach to the ascertainment of CIHL. Accordingly, in the view espoused by the present dissertation, the higher normativity argument raised by Scobbie is answered by considering the fundamental natural law basis and humanitarian objectives of IHL as discipline. Regarding which values need to be privileged, it seems evident that the present dissertation has indicated the historicity and centrality of considerations of *humanity* for IHL. Consequently, in the current dissertation's view the ICRC approach to CIHL determination ostensibly adheres to the traditional method, but seemingly attempts to include a form of the more flexible, normative approach argued for in the present dissertation when actually establishing the proposed CIHL rules. Although this process could be bolstered more along the proposition of Chapter 3, it still embodies a significant advance in the methodological approach to CIHL. Subsequently, since the Study's methodological approach embodies a tentative step towards the non-traditional method (which was argued for in Chapter 3 of this dissertation) it seems imperative to consider the criticisms and comments that have

¹⁰⁰ Nicholls 2006:243. Ibid at 243-244, Nicholls acknowledged that such a non-traditional approach will inevitably elicit criticisms from positivists regarding the Study's reliance on non-consensual materials. Nicholls, ibid at 252, concludes that if indeed the aim of the Study was to furnish a tool through which compliance with IHL could be promoted, then it has succeeded.

¹⁰¹ It is argued that the views expressed by Roberts 2001:764-765 regarding the decreasing importance of state practice when attempting to establish a customary rule with a strong moral content is especially relevant to CIHL. See also discussion in section 3 of Chapter 3, pages 186-197. Also the comments of Meron 1987:361 must be repeated: 'Given the scarcity of actual practice, it may well be that, in reality, tribunals have been guided, and are likely to continue to be guided, by the degree of offensiveness of certain acts to human dignity; the more heinous the act, the more the tribunal will assume that it violates not only a moral principle of humanity but also a positive norm of customary law'. The statement of Henckaerts and Doswald-Beck 2005:xlii that the views of international courts and tribunals which have on occasion concluded that 'a rule of customary international law exists when that rule is a desirable one for international peace and security or for the protection of the human person, provided that there is no important contrary *opinio iuris*', seems to echo this approach to relax the traditional requirements for a customary rule with a strong moral content.

emerged *vis-à-vis* the traditional CIL elements of *usus* and *opinio iuris* as they were invoked by the Study.

It has been indicated that *opinio iuris* – the belief that a practice is obligatory due to a rule of law requiring it – is difficult to distinguish in the crystallisation process because, in such a comprehensively codified field, how is it possible to ascertain whether a particular rule is followed as matter of treaty obligation or from a legal imperative? Furthermore, in the area of IHL it has been found that the same action can represent both *opinio iuris* and *usus*.¹⁰² Clearly, to distinguish between the objective and subjective elements of practice can be difficult.¹⁰³ Unsurprising, then, from a traditionalist perspective, that the Study's apparent merging of *usus* and *opinio iuris* has attracted criticism as both elements need to be proved separately or, if the possibility of such a merger is accepted, the Study still fails to provide a test for establishing whether practice is sufficiently dense to merely infer *opinio iuris*. Inevitably from this flows the concern that the ascertainment of *opinio iuris* lacked the necessary positive evidence.¹⁰⁴ This argument, of course, does not arise in the view accepted by the present dissertation in Chapter 3, namely that the eschewing of one element of CIL might be imperative in the determination process.

Henckaerts, the co-author of the Study, responded to these various criticisms and, it is submitted, these comments are also valuable for further elucidation of the Study and the ascertainment of CIHL generally. Therefore, with regard to the issue of 'density of practice', Henckaerts asserted that practice had to be 'extensive and virtually uniform' in order to establish a rule of CIL, but no mathematical threshold exists to establish how extensive the practice needs to be. This follows as the density of practice needed relies on the particular subject matter under consideration – some issues occur more frequently and, subsequently, produce more practice.¹⁰⁵ In addition, Henckaerts

¹⁰² Cowling 2006:73. Henckaerts 2005b:181-182: 'When there is sufficiently dense practice, an *opinio iuris* is generally contained within that practice and, as a result, it is not usually necessary to demonstrate separately the existence of an *opinio iuris*. In situations where practice is ambiguous, however, *opinio iuris* plays an important role in determining whether or not that practice counts towards the formation of custom. This is often the case with omissions, when States do not act or react but it is not clear why'. Compare Henckaerts and Doswald-Beck 2005:x1

¹⁰³ Henckaerts and Doswald-Beck 2005:x1. See also Bothe 2005:161 and Nicholls 2006:243.

¹⁰⁴ Bellinger and Haynes 2007:446-447 and Balgamwalla 2006:14. However, see also the remarks of Henckaerts and Doswald-Beck 2005:x1 who refer to the International Law Association's comment that the ICJ 'has not in fact said in so many words that just because there are (allegedly) distinct elements in customary law the same conduct cannot manifest both. It is in fact often difficult or even impossible to disentangle the two elements'. However, Bothe 2005:161, largely in conformity with the present dissertation, indicates that although such a distinction becomes very important in cases of practice which are performed without any explanation and, therefore, interpretation of such practice is necessary, sometimes such a distinction might be unnecessary.

¹⁰⁵ 2007b:475. Bothe 2005:160 accepts the Study's proposition that state practice must be sufficiently 'dense' in order to indicate the existence of a customary rule. Accordingly, enough cases of a practice must be cited to illustrate an 'extensive and virtually uniform practice' and contradictory practice must be considered to determine whether a rule

submits that the prohibitive or permissive nature of the relevant rule has to be taken into account. Thus, those rules of IHL which are prohibitive are reinforced by statements evoking the specific prohibition and through abstention from the specific prohibited action. Rules prohibiting the use of certain weapons, like blinding laser weapons, are further bolstered through perpetual abstention from the use thereof. However, it is problematic to quantify these abstentions which occur in every conflict. The second type of rule is the permissive one which is reinforced by conduct which accepts the right to act in a certain manner although such action is not required. States will normally act in accordance with these rules, while, at the same time, other states will not raise protests. An example of such a rule is the one giving states the right to establish universal jurisdiction in their courts to try war crimes (see proposed rule 157 of the Study).¹⁰⁶

When attempting to ascertain rules of CIL the cumulative effect of what states say and what they do in fact must be considered. Accordingly, the Study collected and evaluated 'operational State practice in connection with actual military operations'. In so far as official reports and statements pertaining to the performance of actual military operations were available, the Study took them into account. However, operational practice is insufficient. For an accurate determination of CIL consideration must go beyond a mere exposition of actual military operations and include considerations of the legal assessment of such military operations. This would entail an investigation into the official positions held by the involved (and other) states.¹⁰⁷ Nonetheless, the Study's approach to *opinio iuris* entailed that a separate analysis of practice and *opinio iuris* did in fact occur in order to determine whether a proposed rule was performed through a legal conviction or was merely followed due to considerations of comity, policy or convenience despite the fact that the commentaries in Volume I do not usually set this out. However, where *opinio iuris* was problematic, this is reflected in the commentaries. In other words, *opinio iuris* was not merely inferred from practice. In this regard 'the conclusion that practice established a rule of law and not merely a policy was never based on any single instance or type of practice but was the result of consideration of all the relevant practice'.¹⁰⁸ The ICRC Study, thus, clearly evidences a *via media* between the traditional approach to CIHL, relying formally on *usus* and *opinio iuris*, and the non-traditional approach advocated for in Chapter 3 of the present dissertation, which eschews one of

is not accepted or whether such action is merely a violation of the rule. The submission is made that the Study deals adequately with both questions.

¹⁰⁶ 2007b:475-476.

¹⁰⁷ Henckaerts 2007b:477.

¹⁰⁸ Henckaerts 2007b:482 states: 'It is true that it can never be proven that a state votes in favour of a resolution condemning acts of sexual violence, for example, because it believes this to reflect a rule of law or as a policy decision (and it could be both). However, the totality of the practice on that subject indicates beyond doubt that the prohibition of sexual violence is a rule of law, not merely a policy'.

the traditional elements of CIL.

The Study has also been criticised for its mere acceptance of the distinction between international and non-international armed conflicts without postulating the criteria for the assessment of the one or other's existence and the omission of scrutinising the differences between the two.¹⁰⁹ However, these omissions seem inevitable since no treaty defines 'armed conflict' irrespective of whether it is international or non-international and, furthermore, no state practice was forthcoming to establish definitions that would be accepted as part of CIL. Nonetheless, it must be stated that although classification will be necessary until such time as the legal regimes of international and non-international armed conflicts become one, the ICRC Study is useful in this regard since most of the CIHL rules it proposes are applicable in both types of conflict, thus causing classification to be a less central concern (although, of course, it has not disappeared).¹¹⁰ Also, the ICRC Study refrains from making the distinction between non-international armed conflicts in terms of common article 3 or *Additional Protocol II* as states seem to ignore the difference in their practice. This might serve to bridge the (unwanted) gap between the different non-international armed conflict legal regimes.¹¹¹ This contributes towards simplifying the process of protecting the victims of armed conflict irrespective of the classification of the conflict.¹¹² Furthermore, with reference to the natural law basis of IHL, it seems inappropriate to promote *human dignity* and *humanity* when two states are engaged in armed hostilities, but not when a state and an armed opposition group are thus engaged. Therefore, the Study's approach seems to expand the protection afforded to the victims of armed conflicts, irrespective of classification thereof. Furthermore, with reference to the argument in Chapter 2, that these essential natural law virtues, which underpin IHL, will even address an internal disturbance, it seems *a fortiori* the case when an 'armed conflict' has occurred irrespective of whether it is international or non-international in nature.¹¹³

Lastly, it has also been submitted that the Study's neglect to consider each clause of *Additional Protocol I* is puzzling; that the uncontroversial *lex ferenda* stipulations receive scant attention and

¹⁰⁹ Pejić 2007:78. See Bothe 2005:176 as well as MacLaren and Schwendimann 2005:1226-1228 for a similar criticism.

¹¹⁰ Pejić 2007:78 and 80. Furthermore, Henckaerts 2007b:486 defended the approach of the Study through stating that when the Study scrutinises non-international armed conflicts a separate analysis accompanies the rule in order to determine whether it is indeed customary in nature in those types of conflicts. Where the practice is less extensive, the rule is deemed to be only 'arguably' applicable in non-international armed conflicts.

¹¹¹ Pejić 2007:88. Bothe 2005:175 deems it to be to the Study's detriment that it fails to address the influence (if there is) on customary rules of the different kinds of non-international armed conflict (common article 3 or *Additional Protocol II*). Compare section 1 of Chapter 1, pages 21-24, above.

¹¹² Pejić 2007:100.

¹¹³ See section 3 in Chapter 2, pages 152-154.

that the whole endeavour was upside down since instead of considering *Additional Protocol I* article by article, the Study presents a set of independent rules with the commentary showing the relationship (if there is one) to *Additional Protocol I*'s clauses.¹¹⁴ Henckaerts acknowledged that this proposal to scrutinise *Additional Protocol I* article for article in order to determine which provisions are customary *lex lata* or uncontroversial *lex ferenda* stipulations is worthwhile. However, the approach taken by the study was influenced by the mandate given to them by the Intergovernmental Group of Experts for the Protection of War Victims which invited the ICRC to prepare a report on the CIHL rules that apply in international and non-international armed conflicts, and which was then to be circulated to states and other important international entities.¹¹⁵ The formulation of the mandate was such as to compel the ICRC to scrutinise IHL in a broad sense and not merely confined to the content of *Additional Protocol I* – thus Henckaerts admits that it is unfortunate that some areas of *Additional Protocol I* were not scrutinised for purposes of the Study, but, at the same time, ascribes this to the vast size of the work as it was defined in the mandate.¹¹⁶

Regarding the *proposed black-letter rules*, it is apparent that establishing a CIL rule is 'notoriously difficult' and, accordingly, the attempt of the Study to formulate comprehensive CIHL rules was inevitably going to cause disagreements and criticisms of the proposed formulations as embodying authoritative CIL.¹¹⁷ Although various scholars have critiqued the black-letter rules of the ICRC Study, it seems as though the various criticisms might be broadly summarised (cognisant of the fact that even between these categories significant overlaps occur) as entailing, firstly, that the proposed rule formulations differ from the corresponding treaty rules causing either vaguer, better or contested rules;¹¹⁸ secondly, that part of the rule's formulation might be deemed unnecessary or

¹¹⁴ Dinstein 2006:3.

¹¹⁵ Henckaerts 2007a:260 refers to Recommendation II of the Meeting of the International Group of Experts for the Protection of War Victims Geneva 23-27 Jan 2005. This is reprinted in the *International Review of the Red Cross* 1996 36(310):84. See also Cowling 2006:65.

¹¹⁶ Henckaerts 2007a:261.

¹¹⁷ Wilmshurst 2007:405.

¹¹⁸ See, for example, the general critique of Bethlehem 2007:4-5 and 9-13, Bethlehem in Chatham House 2005:13-14, Wilmshurst 2007:406-407, Schmitt 2007:168, Turns 2006:202, Balgamwalla 2006:14 as well as MacLaren and Schwendimann 2005:1225. Dinstein 2006:4 (see also Scobbie 2007:44-45) criticises the Study for attaching importance to statements in a 'most comprehensive generic fashion' calling in the process for a more focused and filtered approach to the admissibility of statements. Regarding the individual, black-letter rules, see the critique of Aldrich 2005:508 regarding proposed rule 1 and, *ibid* at 511-514, regarding proposed rules 35, 37 and 42 (see also the reaction to the criticisms against rule 42 by Henckaerts 2005a:528); Schmitt 2007:136-137 who lauds the divergence of the formulation of proposed rule 1 from the corresponding provision of *Additional Protocol I*; Rogers 2007:110 who critiques the divergence of proposed rule 4 (see also the reaction to the criticisms against rule 4 by Henckaerts 2005a:532 and 2007a:266); likewise Dinstein, *ibid* at 11, critiques proposed rule 6 (see also Schmitt, *ibid* at 143) and, *ibid* at 11-12, proposed rules 35 and 55 (see also the reaction to the criticisms against rule 6 by Henckaerts 2007a:267-268 and against rule 35 by Henckaerts 2007a:268 and 2005a:528); Aldrich, *ibid* at 510, criticises proposed rules 14, 18, 19 and, *ibid* at 516-517, proposed rules 54-56 (see also the reaction to the criticisms against rule 55 by Henckaerts 2007a:268-269); Schmitt, *ibid* at 161-164, criticises proposed rule 15; Bethlehem

misleading;¹¹⁹ thirdly, that the proposed rule might have missed an opportunity to address a particular closely linked IHL concern;¹²⁰ fourthly, that the proposed rule might be overly broad, unclear or susceptible to various interpretations;¹²¹ fifthly, that the proposed rule might suffer from terminological confusion or, closely connected, a legal doctrinal confusion;¹²² sixthly, that the

2007:11 criticises both proposed rules 23 and 24; Bellinger and Haynes 2007:448 and Breau 2007:203 criticise proposed rule 31 (see also the general criticism of Bellinger and Haynes, *ibid* at 447); Breau, *ibid* at 185-187, criticises proposed rules 35-36 and, *ibid* at 198-200, proposed rule 134; Hulme 2007:217-228 criticises proposed rule 44; Aldrich 2005:519 also criticises proposed rule 76(d) and (e); Rogers 2007:112 and 114-117, Jachec-Neale 2007:316-318 and Bothe 2005:165 criticise proposed rule 106. See also generally Bethlehem 2007:14 who opines that a more deliberative approach in formulating the black-letter rules and a less affirmative approach to the customary status of those rules is needed.

¹¹⁹ See, for example, the critique of Aldrich 2005:508-509 regarding proposed rules 1 and 10 (see also the reaction to the criticisms against rule 1 and rule 10 by Henckaerts 2005a:526-527); Dinstein 2006:9-10 submits that proposed rule 4 misleadingly neglects to reflect the controversial nature of its corresponding treaty provision (see also the reaction to the criticisms against rule 4 by Henckaerts 2005a:532 and 2007a:266); Bellinger and Haynes 2007:448-454 criticise proposed rule 31. See also Dinstein 2006:8 and Wilmschurst 2007:405-406.

¹²⁰ See, for example, the remarks of Schmitt 2007:137-139 regarding the missed opportunity to address non-kinetic warfare against civilians in proposed rule 1; Turns 2006:234-235 indicates that the Study missed out on the opportunity to further the debate on nuclear weapons from a humanitarian angle; the absence of a discussion on the *nonrefoulement* obligations in armed conflict is also criticised by Greer 2007:116-117 and 124-126. See also Fenrick 2007:256-257 who submits that various aspects pertaining to specific methods of warfare have been omitted from the Rules and could be included in an update, for example, articles 29-31 of the *Land Warfare Rules Annexed to the Hague Convention IV* of 1907. Further specific methods of warfare to consider might be: blockade, siege, sabotage, espionage and assassination. See Rogers 2007:108 who states that the Study has no particular rule dealing with combatant status, rather the principles relevant thereto have to be inferred from various rules.

¹²¹ See, for example, the critique of Schmitt 2007:139-141 pertaining to proposed rule 2 and, *ibid* at 167-168, regarding proposed rule 21; the critique of Aldrich 2005:508 pertaining to proposed rule 6; Aldrich, *ibid* at 510-511, also criticises the formulation of proposed rule 21; Hulme 2007:207-217 criticises proposed rule 43; Fenrick 2007:241-242 indicates that proposed rule 47(c) is open to interpretation, similarly, at *ibid* 251, proposed rule 62 is deemed open to interpretation; Haines 2007:263-265 criticises the formulation of proposed rule 70, similarly *ibid* at 268, he finds that proposed rule 73 could have been construed more narrowly; Haines, *ibid* at 269-270, and Turns 2006:223-224 criticise proposed rule 75 as not distinguishing between the use of riot-control agents in domestic law enforcement and military hostilities; Bellinger and Haynes 2007:460-465 criticise proposed rule 78 (see also the reaction to the criticisms against rule 78 by Henckaerts 2007b:484); Turns 2006:230 criticises proposed rule 81; Hays Parks 2005:210 criticises proposed rule 85; Hampson 2007:288; 301 criticises the chapter on fundamental guarantees as being ambiguous regarding to whom these rules are addressed; furthermore Hampson, *ibid* at 293, criticises proposed rule 95, *ibid* at 300, critiques proposed rule 105 and, *ibid* at 301, criticises rules 87-105 generally; Jachec-Neale 2007:335-336 criticises the rules pertaining to persons deprived of their liberty (i.e., proposed rules 118-123, 124B-127 and 128C); Greer 2007:120-121 criticises proposed rules 131-133; Piotrowicz 2007:352 also criticises proposed rule 133; Turns 2007:364-367 criticises proposed rule 144; Fleck 2006:188 critiques proposed rules 150 and 153; Garraway 2007:384-385 criticises proposed rule 156 and, at *ibid* 396, proposed rule 161. See also Fenrick, *ibid* at 240, for a general critique of the vagueness of the rules on specific means and methods of warfare and the critique of Hampson, *ibid* at 288, regarding the fundamental guarantees chapter, which fails to indicate to whom the rules are directed. See also Bellinger and Haynes, *ibid* at 447, and Turns 2006:203.

¹²² See, for example, Dinstein 2006:8-9 regarding terminological confusion in proposed rules 1-5 (see also the reaction to the criticisms against rule 5 by Henckaerts 2007a:265-266); likewise Hulme 2007:207-217 criticises proposed rule 43; Turns 2006:211-213 critiques the Study for neglecting to distinguish between means and methods of warfare regarding proposed rule 70; Hampson 2007:290-291 criticises proposed rule 89 as being ambiguous since murder might be confused in an IHL and domestic context; Piotrowicz 2007:341-345 also criticises the wording of proposed rule 129A regarding deportations and forced transfers; Dinstein, *ibid* at 13-14, Scobbie 2007:35-36, Hulme, *ibid* at 228-236, as well as Bellinger and Haynes 2007:455-460 indicate the confusion of the separate legal doctrines of persistent objecting states and specially affected states in proposed rule 45 (see also the reaction to the criticisms against rule 45 by Henckaerts 2007a:269 and 2007b:482); Greer 2007:116-117 and 122-124 criticises the Study regarding its proposed rules on displacement and displaced persons for allowing the conflation of distinct legal categories including refugees, IDPs and other migrants, thus influencing the 'scope of duties to these groups under the law of war'.

proposed rule might have omitted a particular concern relevant to that rule;¹²³ the seventh concern is that insufficient or incorrect evidence (*usus* and/or *opinio iuris*) was adduced to support either a part or entirety of a proposed rule (especially relevant for rules applicable to non-international armed conflicts);¹²⁴ the eighth concern entails that the proposed rule might be criticised as being

¹²³ See, for example, the critique of Schmitt 2007:139-141 pertaining to proposed rule 2 that the Study omits reference to the terrifying of civilians through lawful attacks on military targets; Schmitt, *ibid* at 141-143, also criticises proposed rule 6 for neglecting leadership qualification as combatants; Schmitt, *ibid* at 154-155, further criticises proposed rule 13 for largely omitting to address the presence of civilians and civilian objects on military installations; Schmitt, also *ibid* at 155-161, critiques the Study for omitting a consideration of the subjective realities and knock-on effects relevant for proposed rule 14; Breau 2007:183-185 indicates that the Study refrains from indicating whether special protection is part of CIHL regarding proposed rule 34; Dinstein 2007:11-12 and Breau, *ibid* at 185-186, indicate the omission of the condition that agreements be concluded on the mutual recognition of the zones by the parties to a conflict pertaining to proposed rule 35; Breau, *ibid* at 187-189, further indicates that the conditions for the establishment of non-defended localities ought to have been included in proposed rule 37; see also generally Breau, *ibid* at 203; Hampson 2007:292 submits regarding proposed rule 90 that a useful consideration would have been whether weapons which give rise to superfluous injury or unnecessary suffering (Rule 70) results *ipso facto* in inhuman treatment; for the various concerns regarding POWs and other individuals deprived of their freedom that have been omitted, see Jachec-Neale 2007:334; Piotrowicz 2007:348-349 argues that proposed rule 131 is too narrow since the obligations regarding displaced persons should not only regulate the conditions of their reception, but also the actual manner and conditions of displacement; regarding proposed rule 132, Piotrowicz, *ibid* at 349-352, also submits that a problematic area pertains to persons who choose to stay in the foreign state – does their right to return exist forever? Also, although there ought to be consequences for a failure to cooperate with reasonable attempts to ensure a quick and safe return, the Study neglects this fact.

¹²⁴ See, for example, the critique of Schmitt 2007:146-149 pertaining to proposed rule 8 and, *ibid* at 151-153, regarding proposed rule 12; and, *ibid* at 153-154, regarding proposed rule 13; likewise Breau 2007:175-182 criticises proposed rules 25-31 and, *ibid* at 182-185, proposed rules 33-34; Bellinger and Haynes 2007:448-454 criticises proposed rule 31 and, *ibid* at 455-460, proposed rule 45 (see also the reaction to the criticisms against rule 31 by Henckaerts 2007b:484 and against rule 45 by Henckaerts 2007a:269 and 2007b:482); Aldrich 2005:512 criticises proposed rule 35 and, *ibid* at 514-515, proposed rule 43B and C (see also the reaction to the criticisms against rule 43B and C by Henckaerts 2005a:529); Aldrich, *ibid* at 515; Hulme 2007:217-228 and Bothe 2005:167 criticise proposed rule 44 (see also the reaction to the criticisms against rule 44 by Henckaerts 2005a:530); Hulme, *ibid* at 228-236, also criticises proposed rule 45; see also the comments of Fenrick 2007:243-245 pertaining to proposed rules 49-51 (particularly in regard to their applicability in non-international armed conflicts); Dinstein 2006:6 criticises proposed rule 65; Turns 2006:218-221 questions the analysis of certain evidence relied on to establish proposed rules 72 and 73 (also in regard to their applicability in non-international armed conflicts); Turns 2006:223 furthermore criticises proposed rule 74 and, *ibid* at 225, proposed rule 76 as the evidence relied on seems to emanate from the Study itself; Dinstein, *ibid* at 14, criticises proposed rule 77 as not reflecting practice that might accept expanding bullets in domestic law enforcement (see similarly Aldrich, *ibid* at 520, and Haines 2007:271-272 as well as the replies made thereto by Henckaerts 2007a:270 and 2005a:531); Bellinger and Haynes, *ibid* at 465, criticise proposed rule 78; Turns 2006:226-227 criticises proposed rule 79; Haines, *ibid* at 274-275, and Turns 2006:231 criticise proposed rule 83 as not adequately substantiated with Turns further deeming this rule to pertain to *ius post bellum* rather than *ius in bello*; Aldrich, *ibid* at 521, and Turns 2006:232-233 criticise proposed rule 85 (see also the reaction to the criticisms against rule 85 by Henckaerts 2005a:531); Aldrich, *ibid* at 521-522, Turns 2006:233-234 and Haines, *ibid* at 277-278, question whether proposed rule 86 (which was based on a very recent treaty) could have crystallised into CIHL; Hays Parks 2005:211-212 criticises some of the Study's comments regarding proposed rule 86 as false; Hampson 2007:298-299 indicates some of the evidential difficulties which arise with establishing CIHL in non-international armed conflicts in proposed rules 100-103; Jachec-Neale 2007:319 criticises proposed rule 108 and, *ibid* at 320-325, proposed rules 118-121; similarly, proposed rules 123, 125, 126 and 128 are criticised by Jachec-Neale, *ibid* at 327-334; Piotrowicz 2007:345 criticises the supporting evidence to proposed rule 129A; Breau, *ibid* at 198-200, also criticises proposed rules 134, but see the remarks, *ibid* at 200-202, regarding the adequately evidenced proposed rules 135 and 138; Turns 2007:361-362 critiques proposed rule 141 and, *ibid* 374-375, proposed rule 150; Bellinger and Haynes, *ibid* at 465-471, criticise proposed rule 157 (see also the reaction to the criticisms against rule 157 by Henckaerts 2007b:484). See also, generally, Cryer 2006:239-263, Bethlehem 2007:10, Bethlehem in Chatham House 2005:14, Nicholls 2006:238-243 and Turns 2006:203. Note should also be taken of certain specific instruments that were criticised. Hence, Dinstein, *ibid* at 5 and 7-8, as well as Scobbie 2007:44 have expressed criticism at the inappropriateness of the amount of attention given to the practice of the ICRC itself in the

superfluous¹²⁵ or merely aspirational (i.e. *lex ferenda* rather than *lex lata*).¹²⁶ The ninth concern comprises criticisms against the order and structuring of the proposed rules of Study.¹²⁷ The tenth

Study since it is an NGO with only consultative status. However, Henckaerts 2007a:261 and 265 replied to this criticism by stating that, besides the unprecedented access to these confidential documents, no ICRC practice was used as a primary source for the establishment of a rule of customary law – it merely served as supportive evidence for conclusions based solely on state practice. This position also pertains to the role played by resolutions of international organisations and conferences. Dinstein, *ibid* at 5-6, also criticises the Study for including elements 'bordering on the bizarre', including the Restatement of the American Law Institute, scholarly books and the resolutions of the *Institut de Droit International*. Henckaerts 2007a:262 counters Dinstein's criticisms by submitting that the practice listed under 'other practice' was a residual category, which did not play a part in determining the customary nature of the particular rules. Although Dinstein, *ibid* at 6, commends the Study for basing the rules more on legislative Codes and Military Manuals than on any other source of practice since these are valuable sources embodying genuine state practice, he questions the so-called Israeli Manual on the Laws of War of 1998. See also the reply of Henckaerts 2007a:263-264 who states that a teaching manual which had been authorised for use in training constituted state practice irrespective of whether it was the 'official' military manual or not. This inference was drawn due to the unlikelihood that a state will endorse training of its armed forces reliant on a document the content of which it rejects. See the similar concerns pertaining to the emphasis placed on military manuals by Bellinger and Haynes, *ibid* at 446-447, and, likewise, Scobbie, *ibid* at 38-39, and the similar rejoinder by Henckaerts 2007b:483. Bellinger and Haynes, *ibid* at 444-446, also critique the state practice relied on by the Study as insufficiently dense and misdirected with undue emphasis on written materials like military manuals rather than operational practice, resolutions and statements of NGOs (including the ICRC itself). Also the practice of non-state parties are not afforded sufficient weight nor is due consideration given to the practice of specially affected states. (See also the criticisms of Balgamwalla 2006:14, Schmitt, *ibid* at 134, and Scobbie, *ibid* at 38.) See the similar reply of Henckaerts 2007b:478-480 to these criticisms of Bellinger and Haynes against the use of resolutions and ICRC practice as was stated *vis-à-vis* Dinstein earlier in the footnote. See also generally Wilmshurst 2007:407. See also Hays Parks, *ibid* at 211, who essentially accuses the Study of cherry-picking with regard to *usus*.

¹²⁵ See, for example, Aldrich 2005:514-515 regarding proposed rule 43A; Turns 2006:201, 203, 205 and 213-214 indicates that part IV of the Study could have stopped at proposed rules 70 and 71 as these rules would provide for all specific weapon prohibitions; Haines 2007:270-271 and Bothe 2005:169 thus criticise proposed rule 76 as superfluous; likewise Haines, *ibid* at 272-273, criticises proposed rules 78-80; Haines, *ibid* at 274, and Turns, *ibid* at 230, consider proposed rule 81 as far as it pertains to the prevention of indiscriminate effects to reflect proposed rule 71 and, by implication, proposed rules 1 and 7; similarly Haines, *ibid* at 275, and Turns, *ibid* at 232, criticise proposed rule 84; Haines, *ibid* at 275, also criticises proposed rule 85 thus.

¹²⁶ Turns 2006:237 indicates that the rules pertaining to weaponry might be illustrative of where the law is heading, rather than where it is. Greer 2007:116-117 criticises part of the Study's proposed rules on displaced persons (rules 129-133) to be aspirational and to contain normative value rather than being reflective of existing customary law and, thus, the actual worth of these rules are called into question. Turns 2007:362 considers the application of proposed rule 142 to armed opposition groups (which is implied by 'States and parties to the conflict') as embodying customary law to be unrealistic, and reflective of aspirations rather than actual IHL. Turns, *ibid* at 363, deems proposed rule 143 to represent a 'laudable aim but it probably represents wishful thinking to assert that it is a rule of customary international law'. Teaching IHL entails 'staff interest and expertise' and, moreover, resources which are not available everywhere in the world. Also, the proposed rule is a vague exhortation for an 'undefined amount of activity and effort' rather than an 'absolute obligation to teach humanitarian law'. Turns, *ibid* at 370-371, states that proposed rule 148 is the most controversial rule on reprisals of the Study. Due to the lack of treaty support, it is easy to comprehend why the Study sought to find that customary law prohibits reprisals in non-international armed conflicts. Regarding the formulation of the rules on war crimes (rules 151-161), Garraway 2007:397 has submitted that the standards imposed are idealistic and more than what States would really be willing to accept. See also generally Wilmshurst 2007:406 and Nicholls 2006:232. See Rowe 2006:167 for the finding that even if a state should accept any of the Study's proposed rules as being part of CIL it remains the actual rules of CIL – not the potential ones – which can be subsumed by national law. (For the accompanying concerns pertaining to whether the ICRC Study's proposed rules are automatically subsumed by national law, see Rowe, *ibid* at 165-177.)

¹²⁷ Hulme 2007:207-217 states that proposed rule 43A-C would have been improved if the order of 43B and 43C were reversed. Bothe 2005:164 finds the introduction to Chapter 33 of the Study to elucidate the essential rule regarding the rights of a combatant. However, this exposition of the Study is criticised by Bothe, *ibid* at 164, as: 'That being true, indeed, it is hard to understand why it is formulated in an explanatory text and not as a formal rule'. Piotrowicz 2007:347-348 argues that a better structure would have been rule 129A, rule 130 and then rule 129B since rule 129B seems to include both situations considered in rules 129A and 130. However, the proposed rule is accepted as reflective of CIHL. While considering the rules of the Study which pertain to POWs, Jachec-Neale 2007:315

concern relates to the so-called loose legal reasoning/inference of the proposed rules.¹²⁸ Cryer points out another structural concern in that regarding some of the rules, what the rule gives, the commentary takes away. This emanates from the frequent lack of indication as to whether evidence is merely cited for comprehensiveness rather than for its authority and where it is aimed to qualify or interpret the language of a rule.¹²⁹

Addressing the concern regarding the formulation of the CIHL rules and the amount of information included in the commentaries, Henckaerts submits that any ascertainment of CIHL rules are bound to advance rules which are simpler than the highly detailed rules found in treaty law. Furthermore, it may be problematic to prove the customary nature of every detail of the parallel treaty provision. Accordingly, the determination of CIHL rules through reliance on practice cannot provide the same detail as that which can be gained through negotiating at diplomatic conferences. Inevitably, therefore, particular issues had to be considered in more detail in the commentaries.¹³⁰ Nonetheless, Henckaerts indicates that only the black-letter rules are proposed to embody CIHL rules and not the commentaries to those rules as well. Despite this, the commentaries might at times reflect important and useful clarifications with regard to the implementation of the black-letter rules.¹³¹

Accordingly, having briefly considered and juxtaposed some of the general comments and criticisms regarding the Study's methodological approach to the ascertainment of CIHL with the natural law approach argued for in the present dissertation, as well as having stated the criticisms

arrives at the conclusion that these rules are scattered throughout the Study and that the scrutiny of those rules are complicated in the absence of a terminological index. A similar concern pertains to some rules which should arguably not have been included in the Study, hence, Turns 2007:375 finds rules 139-150 to comprise other rules besides substantive rules of CIHL including, for example, technical, procedural and aspirational rules. Furthermore, some of the rules are part of general principles of law rather than customary law.

¹²⁸ The Study is criticised by Wilmschurst 2007:407 for its too easy cross-pollination of CIHL applicable in international to non-international armed conflicts. See the criticisms of Bothe 2005:167 regarding the legal reasoning behind proposed rule 44; likewise Turns 2006:220-221 criticises proposed rule 73 and Jachec-Neale 2007:326 criticises proposed rule 122. See also generally Turns, *ibid* at 203, for the criticism that the extrapolation of treaty rules to CIHL by the Study is too easy. See also the critique of MacLaren and Schwendimann 2005:1236 pertaining to the process by the ICRC to 'establish' CIHL. The proposed rules are presented by the Study as settled CIL since the research is reflected as an attempt to find the current law in force and, consequently, as a restatement of these rules which are already in existence. In this regard, see also Nicholls 2006:236.

¹²⁹ 2006:262. Compare also Bellinger and Haynes 2007:447.

¹³⁰ Henckaerts 2007b:483. See also Bothe 2005:161 who deems the Study's approach to address some details in the commentaries to be reasonable. A very interesting analogy is drawn by Schmitt 2007:135 in that the Study seems to embody a customary equivalent of treaties where imprecision in formulation is frequently necessary to ensure approval by states due to their varying self-interests. Compare Fenrick 2007:240 regarding the imprecision required for treaties, but who continues that CIL is also held to lack precision since it emerges as a result of the gradual accumulation of state practice.

¹³¹ 2007a:268-269 and 2007b:484. Accordingly, Henckaerts 2007b:484 submits that '...the Study does not claim to have proven that each and every element of the commentaries themselves is part of customary law, such as the list of war crimes in Rule 156'.

regarding the proposed black-letter CIHL rules, it remains to add to the Study further considerations from the natural law approach argued for in the present dissertation. In this regard, sections 3 and 4 of Chapter 3 must also be kept in mind.

3.2.3 A further consideration of the ICRC Study's methodological approach and black-letter rules of CIHL *vis-à-vis* the proposed natural law paradigm

Chapter 3 advanced a proposed understanding of CIHL determination based on the normative requirements and moral, natural law basis of IHL. Subsequently, the proposed approach was applied to a selection of the ICRC Study's black-letter rules in order to indicate how the Study's findings were enhanced by resorting to such a fundamental approach to CIL establishment. Some further comments will accordingly be made regarding the criticisms of the Study's methodology and proposed rules as well as the Study itself, to supplement the findings of Chapter 3.¹³²

At the outset it must be emphasised that the criticisms against the Study's methodological approach are positivist in tenor. Accordingly, arguments are made for the close adherence to a rigid, theoretical conception as basis of CIL. However, a few concerns emerge. Firstly, cognisant of the fact that subjective considerations play a role in postulating the approach necessary for CIL-determination, it seems difficult to argue for a rigid understanding thereof; secondly, since CIL is a branch of law that consistently evolves and adapts to new practices of states, one might question whether it follows to advocate for an inflexible theory regarding the ascertainment of this dynamic branch of law; thirdly, the question also arises as to whether all branches of CIL are equal; and fourthly, what would be surrendered or lost in the process if a flexible, dynamic theory of CIL-making was indeed accepted?

It seems evident, mindful of the natural law foundation of IHL as it has been established in the present dissertation, that a dynamic means is necessary to identify and describe a dynamic source like CIL. Rigid (positivist) adherence to an inflexible theory might not only undermine the value of this flexible legal source, but, in the (natural law) branch of IHL, it will inevitably lead to *increased* suffering and hardship. However, pursuing a more flexible approach (which does not mean an approach with no frontiers – just one with broader boundaries as was indicated in Chapter 3) to the

¹³² See sections 3 and 4 in Chapter 3, pages 186-201.

ascertainment of CIHL, will inevitably improve the possibility of adherence to the rules of IHL. This, together with the arguments advanced in Chapter 3, leads to the submission that question three must be answered negatively. It does not make sense in a legal order as varied as the international one, to adopt a 'one size fits all' approach to the establishment of CIL – a source of law which is closely linked to the particular branch of law it pertains to. How, for example, can the ascertainment of the CIL rule that ships must pass on the left be compared to the CIHL rule prohibiting torture? In this regard, it is submitted that the proposed approach of Chapter 3, reliant on Kirgis' sliding scale and Roberts' approach to distinguish between the moral and facilitative nature of CIL rules, must be supported.¹³³ This will inevitably lead to a more flexible approach to the ascertainment of morally permeated CIL rules such as those applicable in IHL.

In sum, the present dissertation – also in Chapter 3 – argues that, cognisant of the differences between the various branches of CIL, a rigid positivist approach to CIL-determination should not be brought to bear on a natural law branch of international law such as IHL, without a careful consideration of the rule in question, since to do so might be akin to forcing a square peg into a round hole. The concern is not that the traditional approach to CIL is necessarily incorrect, but rather that an *over-emphasis* and *rigid* adherence thereto regarding CIHL seems troubling. Lastly, it seems as though the repercussions involved in accepting a dynamic approach to CIHL determination will be unacceptable to legal positivists. Hence, arguably, legal certainty would be surrendered in the process (however, it would be false to accept strict adherence to the traditional approach as conducive to legal certainty), subjectivity might increase towards methods for establishing CIL (although, firstly, the approach proposed in Chapter 3 still provides certain boundaries and, secondly, from the preceding criticisms it is inevitable that subjectivity already exists *vis-à-vis* CIL ascertainment) and an overlap might occur between legal and non-legal aspects. It is argued that those branches of international law based on natural law, like IHL, must be recognised and treated as such (thus including non-legal components, like morality and considerations of humanity) otherwise the resultant rules therefrom will not be in keeping with its essential aims and basis.

Accordingly, the approach argued for would entail a holistic consideration of all possibly relevant materials for determining CIHL, including state practice, *opinio iuris*, morality, time frames, considerations of humanity, objections, human rights law and non-state practice. In this regard the

¹³³ Kirgis 1987:149 and Roberts 2001:764-765. See also section 3 in Chapter 3, pages 189-194.

ICRC needs to be commended for the significant amount of evidence collected from international sources, international organisations and national sources. Subsequently the Study maintained that if the evidence was sufficiently dense then *opinio iuris* would be contained in the practice and need not be proved separately. It is suggested that this approach is both sensible in an area of international law where evidence is frequently scarce and/or contradictory and an emanation from the modern approaches to the ascertainment of CIHL. Hence this approach links the Study to the approach suggested in Chapter 3 and, in particular, those approaches of Roberts and Kirgis. Thus, whereas the model of Roberts, which focuses on the morality of the proposed rules, eschews state practice, the theory of Kirgis might eschew either element depending on the type of action under discussion. It is submitted that besides the fact that the ICRC Study explicitly relied on Kirgis' sliding scale, its approach to accept the 'density' of evidence also, in effect, eschews one of the traditional elements of CIHL (whether it eschews *opinio iuris* or *usus* seems unclear due to the diverse nature of the material it considers). Such an approach is harmonious with the essential natural law foundation of IHL as it has been argued throughout the present dissertation. Evidently, a natural law branch of law must be ascertained through a natural law approach for a coherent determination of the law. It is, however, submitted that the approach of the Study still clings to the terminology of positivism. Also, the approach could have been more robust by not merely accepting Kirgis' theory but also that of Roberts and possibly even considering the potentially important uses of the Martens clause to attenuate or dislocate the traditional requirements of CIHL.¹³⁴ It is submitted that this would essentially be the optimum approach to ascertain rules of CIHL since the laws of humanity, dictates of public conscience, the moral distastefulness of the action and the reasonableness of the proposed CIHL rule will be considered – all critical natural law considerations for this branch of IHL. Accordingly, the Study's approach to establish CIHL seems to take a *via media* between the traditional approach and the modern approach – while referring to the terminology of the traditional approach, it simultaneously seems to accept the *bona fide* possibility of eschewing one of the traditional requirements of CIL. It is submitted that this Study provided the perfect opportunity to break the thrall of the traditional article 38 requirements, as basis, for the determination of CIHL and, in the process, *to include a more robust natural law approach*, but in light of the (positivist) scepticism, which still permeates the international community, it seems that the more cautious option was exerted. *In this regard, the omission of a discussion on the Martens clause is a particular concern seeing that it constitutes a nexus point between legal positivism and natural law.* (See also Chapter 2 where this concern and the clause are

¹³⁴ See section 2.4.1.1 in Chapter 2, pages 115-117, for the Martens clause and section 3 in Chapter 3, pages 189-194, for Roberts and Kirgis.

discussed in detail.¹³⁵) However, by including the density requirement, it is submitted that the Study made a significant contribution towards CIHL ascertainment, cognisant of the influence the Study is bound to exert on this process in the future due to its monumental stature.

Regarding the proposed black-letter rules of CIHL, it is submitted that these criticisms from international literature essentially also reflect a legal positivist approach as the concerns aired relate to the structure of the rules; how narrowly they conform to their corresponding treaty rules; whether sufficient evidence has been adduced to establish them (which seems to be an extremely subjective criterion as one writer accepts a particular rule as sufficiently evidenced while another does not) *and thereby these criticisms neglect to consider the spirit, purport and objectives of these proposed IHL rules cognisant of their natural law, principled foundation.*¹³⁶

It must be noted, however, that on the details of these individual rules, very many of these criticisms might be true, but the argument advanced in this dissertation calls for a more discriminating appraisal regarding the *natural law, principled basis of IHL and CIHL* since, it is submitted, it is only with the aid of a robust theoretical conception of IHL and CIHL that these notions can be properly understood and implemented.

In limine, the proposition of Chapter 3 must be re-emphasised, namely that when considering these substantive rules, it seems completely congruent with the natural law approach to IHL that aspirational, *lex ferenda* be postulated.¹³⁷ The positivist argument to the contrary seems almost nonsensical as it basically states: 'We'll change the law to provide for the victims after the first lot have already suffered their due'.¹³⁸ This *ex post facto* approach, especially in the situation of armed conflict, seems completely misplaced since human lives and dignity are on the line. However, by rigidly clinging to the theoretical components of *usus* and *opinio iuris*, as basis of CIHL, this is precisely what these academics are doing. Accordingly, it is submitted that the Study's aspirational rules, for example rule 86 regarding blinding laser weapons, must be lauded as forward-looking and

¹³⁵ See section 2.4.1.1 in Chapter 2, pages 102-122.

¹³⁶ See also Weeramantry's *The Revival of Customary International Humanitarian Law* in Maybee and Chakka 2006:39 who indicates that the desire to have precisely formulated rules emanates from positivism, against which we 'have got to arm ourselves'.

¹³⁷ See pages 82-83, 189-190, 199 and 205-206 for the discussion on *lex ferenda*.

¹³⁸ See for example Nicholls 2006:245-246 who submits that the Study is likely an accurate reflection of what CIHL ought to be, but that this normative aspect is not what the 'accepted definition' of CIL entails. In this regard, on the contrary, Best 1997:7 has stated that much of the international legal order, including IHL and those areas where the General Assembly of the United Nations is engaged, is *normative*. Normative, in this context, has been defined as *standard-setting*; adding to established state practice, the *aspirational* concept of state practice as it is expected, intended, or hoped to become at some future date.

aimed at protecting humanity and human dignity – the essential principles in IHL.

However, the Study's close parallel of corresponding treaty provisions in the formulation of their proposed rules gives rise to concern. This seems reflective of the positivist need for legal certainty inherent in written documents, but on the argument furthered in the present dissertation, CIHL rules preceded treaty rules and, hence, should not be limited to the treaty formulations. Furthermore, if the proposed CIHL rule diverges from the corresponding treaty provision then this should not *ipso facto* give rise to such concerns; inevitably the two sources of international law differ, hence, different formulations seem inevitable. It is opined that this desire to adhere as closely as possible to the parallel treaty rules has deprived CIHL of its inherent natural law principles. This is due to *the fact that principles initially influenced CIHL which influenced treaty law*. Accordingly, although principles indirectly influenced treaty law, this was largely lost in the processes of codified instruments. Attempting to derive CIHL now from treaty law would overlook these principles which, it has been argued throughout the present dissertation, shaped and informed CIHL *ab initio*. The call of the present dissertation, therefore, is for the frank acknowledgment of these inherent principles in the international legal order *à la* Ronald Dworkin.¹³⁹ Such an acknowledgment would enhance and promote the essential virtues underlying IHL and thereby provide better protection for those victims of armed conflicts.

Henceforth, it needs to be considered which proposed rules of the ICRC Study arguably embody such natural law principles. It is submitted that the *principles of humanity* and *human dignity* are visible in proposed rules 47, 53, 54, 87, 90, 93, 109, 119, 120, 121, 134, 135, 136, 137 and 138 (for the black-letter rules, see appendix). However, the call is for a more robust assertion of the link between these principles and natural law seeing that such a finding would strengthen the particular norm enormously. From the present dissertation the objective, universal nature of these proposed rules can also be established. Hence, for example, from this dissertation it is possible to illustrate that torture, degrading or inhuman punishment (thus outrages on human dignity) is forbidden by proposed rule 90 of the ICRC Study (which, of course, reflects the various international instruments, including the Lieber code, to have subsumed this rule¹⁴⁰), subsumed by Pictet in his principles of IHL, accepted as a norm of *ius cogens*; included in the draft discussed at the San Remo International Institute of Humanitarian Law in 1977 regarding the fundamental principles of IHL¹⁴¹

¹³⁹ Dworkin 1977:22, 26, 40 and 44.

¹⁴⁰ Henckaerts and Doswald-Beck 2005:315-319.

¹⁴¹ International Committee of the Red Cross 1978:247-249, Gasser 1993:15-16 as well as Sassoli and Bouvier

and accepted, albeit in various degrees of sophistication, by Francisco de Victoria (1480-1546), Pierino Belli (1502-1575), Albericus Gentili (1552-1608), Hugo Grotius (1583-1645), Christian Wolff (1679-1754) and Emmerich de Vattel (1714-1767).¹⁴²

Furthermore, the rule that persons *hors de combat* must not be attacked is reflected by proposed rule 47 of the ICRC Study, subsumed by Pictet in his principles of IHL, included in the draft discussed at the San Remo International Institute of Humanitarian Law in 1977 regarding the fundamental principles of IHL¹⁴³ and reflected by Giovanni da Legnano (d. 1383), De Victoria, Francisco Suarez (1548-1617), Grotius, De Vattel, Richard Zouche (1590-1660), Wolff, Johann Wolfgang Textor (1638-1701), Jean-Jacques Rousseau (1712-1778) and Gentili who limit the violence allowed against the vanquished.¹⁴⁴ Therefore also this rule is bolstered by including references to its historicity.

Although the principle of distinction is not contested, it may also be strengthened by the approach of the current dissertation. Hence, the importance of distinguishing between civilians and belligerents is reflected by its inclusion in proposed rule 1 of the ICRC Study, its acceptance in the Pictet principles, its inclusion in the draft discussed at the San Remo International Institute of Humanitarian Law in 1977 regarding the fundamental principles of IHL¹⁴⁵ and its acceptance by Gentili, De Victoria, Balthazar Ayala (1548-1584), De Vattel, Wolff, Textor, Suarez, Grotius and Rousseau.¹⁴⁶ Consequently also, this principle's normativity is enhanced by considering its ancient, natural law roots.

A rule, which arguably does not *prima facie* reflect natural law considerations that may be bolstered by this dissertation's approach is that pertaining to the respect to be accorded to cultural, religious or charitable property since it is subsumed by proposed rules 38 and 39 of the ICRC Study, the Pictet

2006:81.

¹⁴² De Victoria 1917:182-183, Belli 1936:85-86 and 186-187, Gentili 1933:285, Grotius 1925:763-764, Wolff 1934:409-411 and De Vattel 1916:280-284.

¹⁴³ International Committee of the Red Cross 1978:247-249, Gasser 1993:15-16 as well as Sassoli and Bouvier 2006:81.

¹⁴⁴ Compare Da Legnano 1917:254 and 274, De Victoria 1917:182-183, Suarez 1944:850, Grotius 1925:737-740, De Vattel 1916:280 and 284, Zouche 1911:55, Wolff 1934:409-412, Textor 1916:187-189 and 303, Rousseau 2007:31, see also generally Gentili 1933:209-210, 216, 223, 285, 322-325 and 327. Contrast Rachel 1916:186 and Van Bynkershoek 1930:16

¹⁴⁵ International Committee of the Red Cross 1978:247-249, Gasser 1993:15-16 as well as Sassoli and Bouvier 2006:81.

¹⁴⁶ Compare Gentili 1933:251-252, 260 and 262, De Victoria 1917:171 and 178-179, Ayala 1912:33 and 44-45, De Vattel 1916:280, 282-283 and 318, Wolff 1934:409-411, Textor 1916:187-188, *vis-à-vis* the inviolability of women, children and the elderly in war. See also Suarez 1944:840 and 843-848, Grotius 1925:733-737 and Rousseau 2007:31. Contrast Rachel 1916:186 and Van Bynkershoek 1930:16.

principles and, in regard to ecclesiastical property, the writings of Gentili, Suarez, Grotius, De Vattel, Zouche, Wolff, Textor and Samuel Rachel (1628-1691).¹⁴⁷

It is submitted that the normative status of these rules is significantly enhanced when viewed through this paradigm indicating its acceptance over 500 years. Moreover, the theoretical approach of the present dissertation constitutes an elaboration of that taken by the ICRC Study since the current approach embodies an integrative approach, including natural law, legal positivist and historical materials to enhance and reinforce the proposed rules of CIHL.

Reliant on the natural law paradigm of the present dissertation, some notable omissions of the Study can be identified including the Martens clause, norms of *ius cogens* and laws/considerations of humanity. It would have greatly promoted natural law virtues in CIHL if these components were scrutinised. It is hoped that the present dissertation may begin the process to consider these rules from a natural law perspective. Nonetheless, the ICRC Study remains an invaluable work and, evidently from the above, has already led to significant re-investigations into the initial conventional source of substance for IHL, namely CIHL. Hence, in order to illustrate the support which does exist for the ICRC's endeavour as well as to reflect on the future thereof, some comments from the international jurisprudence need to be observed.

4. Some conclusions on the Study from international literature

It remains to survey briefly the conclusions regarding the ICRC Study to have emerged from international jurists. In the process, the current dissertation's objective to enhance the Study will also be significantly furthered.

Unsurprisingly, the Study has been lauded as a 'remarkable feat' that embodies an important contribution to legal scholarship and discussion in IHL.¹⁴⁸ Turns submits that the Study must be lauded for its objectives and respected for its vastness and the clarity and persuasiveness with which

¹⁴⁷ Compare Gentili 1933:270, Suarez 1944:845, Grotius 1925:751-753, De Vattel 1916:293-295, Zouche 1911:56 and 182, Wolff 1934:429 as well as Textor 1916:156, 191-192 and 306. Contrast Rachel 1916:186, but compare Rachel, *ibid* at 212.

¹⁴⁸ MacLaren and Schwendimann 2005:1217. See also Bethlehem in Chatham House 2005:9. Likewise, Rowe 2006:165 calls the ICRC Study a 'milestone in the development of international humanitarian law'.

it is formulated.¹⁴⁹ Meron indicates that the 'seriousness and breadth' of the Study's chosen method to ascertain practice lends it its *sui generis* nature. By conducting its research on IHL in the ICRC archives, international sources like those of the United Nations, regional and other international organisations and relying on research projects from approximately fifty countries, the effort of the Study, to collect such a vast amount of empirical information on international law, is unprecedented.¹⁵⁰ It has consequently been postulated that the Study may serve as an instrument through which IHL may be disseminated. The Study is a source of rules, which, because they are customary, emanate from a different normative foundation compared to the conventional rules which have influenced IHL.¹⁵¹ Moreover, the Study's utility is evident in cases of armed conflict where not all the parties are party to the applicable treaty regime, it has been submitted that CIHL should prevail as it binds all the parties to that conflict. This view would be especially useful in non-international armed conflicts where IHL would be imposable on non-state role players.¹⁵²

Furthermore, despite the various criticisms alluded to above, some comments on the substantive merit might be reflected. Hence, the Study's methodological approach to determine customary legal rules has been lauded as 'realistic, well considered, cautious yet not unnecessarily timid' and, thus, of persuasive character.¹⁵³ A significant caveat when considering the various criticisms levelled at the Study is voiced by Dinstein when he submits that the initiative of conducting the Study was absolutely right even if he does not concur with some of the results.¹⁵⁴ This neatly encapsulates the worth of the Study – it fills an important gap in international humanitarian jurisprudence, but at the same time, its contents must not be accepted as the absolute truth. The collected state practice of the Study has also been praised as an impressive effort although the call has been for greater reliance on actual battlefield behaviour. However, with regard to the special methods of warfare addressed by the Study (proposed rules 46-69), it has been suggested that greater reliance on actual battlefield practice would not be likely to have influenced the rules as they were derived since many of them have a longstanding basis in customary law, especially in regard to international armed conflicts.¹⁵⁵ Cowling submits that the Study indicates that the rigid theoretical distinction between

¹⁴⁹ 2006:202. However, Turns, *ibid*, admits that upon closer scrutiny the Study inevitably reveals some flaws.

¹⁵⁰ 2005:833 and Meron in Chatham House 2005:48. Meron 2005:833 opines that '[n]o restatement of international law has even tried to amass such a rich collection of empirical data'. See also Henckaerts 2007b:476.

¹⁵¹ Scobbie 2007:47. See also *Military and Paramilitary Activities in and against Nicaragua Merits*, Judgment of 27 June 1986 ICJ rep. par. 178.

¹⁵² Scobbie 2007:48. See also Fleck 2006:191-193, MacLaren and Schwendimann 2005:1221 and, generally, UN Doc. E/CN.4/1998/87 par. 60 for a confirmation that IHL applies to armed groups.

¹⁵³ Bothe 2005:163.

¹⁵⁴ 2006:2.

¹⁵⁵ Fenrick 2007:256.

the legal regimes applicable to international and non-international armed conflicts has not been conveyed into practice and that, by substituting notions like 'POW status' with 'POW treatment', gaps in IHL pertaining to non-international armed conflicts have been filled through reliance on rules and principles that emerged in the context of international armed conflicts. This approach is lauded as it more effectively causes IHL's development in accordance with the real needs of the international community as opposed to jealous individual self-interest. Also, any legal development which lessens human suffering in international and non-international armed conflicts must be supported within the paradigm of IHL.¹⁵⁶ Accordingly, Meron also deems the ICRC study to result in a broad restatement of CIHL and to be an instrument to strengthen the normative structure of IHL – especially with regard to non-international armed conflicts.¹⁵⁷

The Study is proposed as the best possible effort at giving a snapshot of CIHL that is as accurate as possible.¹⁵⁸ It has been predicted that the Study will have practical impact as it is itself part of the dynamic development of CIL. Formally, it is not an official statement of the ICRC and it does not have formal authority. At the most it is part of the 'judicial decisions and the teachings of the most highly qualified publicists of the various nations', as stated in article 38(1)(d) of the *ICJ Statute*, and, accordingly, it will function as a 'subsidiary means for the determination of rules of law'. However, it may be safely assumed that because 'the Study constitutes a reliable, well researched resource of knowledge about relevant constitutive elements of the formation of customary law', various actors like the military and Courts will have recourse to the Study to help with the formulation of military instructions and orders and judicial pronouncements respectively. The utility of the Study will be further reflected in that it will be used by various other groups, thus civil society organisations could become more important in international discourse. It is foreseeable that they will rely on the ICRC Study to claim compliance of those states not party to the *Additional Protocols* with certain rules of those *Protocols*, thereby increasing the Study's political and practical value. Furthermore, academics also have a role to play in this discourse as their analyses are bound to be taken into consideration in the political arena.¹⁵⁹ Likewise, Fleck expresses the hope that when states, IGOs and individuals rely on and invoke the Study it will lead to increased knowledge and public awareness of legal duties incumbent upon states and individuals during wartime and, further,

¹⁵⁶ 2006:87.

¹⁵⁷ 1996:249.

¹⁵⁸ Henckaerts 2007b:487.

¹⁵⁹ Bothe 2005:176 and 178. See also Henckaerts 1999 Study on customary rules of international humanitarian law: Purpose, coverage and methodology (<http://www.icrc.org/web/eng/siteeng0.nsf/html/57JQ3K> accessed on 3 September 2010). Regarding the use civil society might be able to make of the Study in order to evaluate the actions of public authorities, see MacLaren and Schwendimann 2005:1239. For the view that the ICRC's acceptance of the proposed rules as part of CIHL does not *ipso facto* render them thus, see Rowe 2006:167.

that improved policies will emerge to protect victims irrespective of the type of conflict. Naturally, attaining these significant goals justify and need great effort.¹⁶⁰

With regard to the utility of the study, Henkaerts has stated that 'given the difficulty in determining the content of customary international law and the time needed to collect and assess practice and *opinio iuris*, it can be hoped that the study will be used in practice'.¹⁶¹ This wish was fulfilled through the fact that CIL can be applied directly in the national courts and tribunals of many states. Accordingly, the Supreme Court of Israel has used CIL in its decisions, recently even referring to the ICRC Study on CIHL.¹⁶² As Henckaerts sums up:

...on the so-called neighbor procedure used by the Israel Defence Forces (IDF) to capture persons, the Israeli Supreme Court referred with approval to the study's findings on the customary nature of the precautions to give effective, advance warning (Rule 20) and to remove civilians from the vicinity of military objectives (Rule 24) as well as the prohibition of human shields (Rule 97)¹⁶³....on the policy of targeted killing, the Israeli Supreme Court referred with approval to the study's conclusions concerning the principle of distinction between civilians and combatants and between civilian objects and military objectives (Rules 1 and 7), the principle that civilians are protected against attack, unless and for such time as they take a direct part in hostilities (Rule 6), the prohibition of indiscriminate attacks (Rule 11) and the prohibition to cause excessive incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof (Rule 14).¹⁶⁴

Naturally, international courts and tribunals also invoke CIL. Thus, the Special Court for Sierra Leone has referred to CIHL and the ICTY frequently relies on article 3 of its Statute, which ensures the Tribunal's jurisdiction over "violations of the laws or customs of war".¹⁶⁵ Meron states that the Study, which largely returns to the traditional approach towards the identification of CIL, will help the international tribunals greatly in conducting their affairs in harmony with the legality

¹⁶⁰ 2006:199. See also Scobbie 2007:21 who indicates that this dissemination may further the adherence to IHL. CIL rules will be available for non-specialists in a form which seems authoritative and definitive. The effect of this is that derogations by (democratic) states from the rules of CIL, might have to be justified to national political audiences or to the judiciary in the case of states where CIL automatically becomes part of the national law.

¹⁶¹ 2008:125. See Nicholls 2006:249 who submits that the invocation of the Study by judges is inevitable. Bugnion 2008:85 states that if states, tribunals and academics reject the findings of the Study then the (expensive) endeavour would have been in vain, essentially questioning CIHL in lieu of strengthening it, but if the Study influences states in writing military manuals, tribunals consult it and academics debate it then the Study will indeed have strengthened IHL. See also Meron 2005:834 considering the Study's destiny to be an aid for courts and tribunals. See also Nicholls 2006:245 regarding the adverse impact on the ICRC's image if the Study's list of rules were to be rejected. See also Scobbie 2007:20.

¹⁶² Henckaerts 2008:126. Domestic cases which cite the Study include *Adalah and others v GOC Central Command, IDF and others*, Israel Supreme Court, 23 June 2005 (HCJ 3799/02) paras 20, 21 and 24 as well as *Hamdan v Rumsfeld*, United States Supreme Court, 29 June 2006, 548 U.S. Reports 196. See also MacLaren and Schwendimann 2005:1231, Henckaerts in Barnaby, Yang, Faite and Henckaerts 2006:23.

¹⁶³ 2008:126 refers to *Adalah and others v GOC Central Command, IDF and others*, June 23, 2005, HCJ 3799/02, paras 20, 21 and 24.

¹⁶⁴ 2008:126 refers to *The Public Committee against Torture in Israel and others v The Government of Israel and others*, December 13, 2006, HCJ 769/02, paras 23, 29-30 and 41-42.

¹⁶⁵ Henckaerts 2008:126-127.

principle.¹⁶⁶ An example of the ICTY referring to the ICRC Study was:

...in *Prosecutor v. Hadžihasanović*, the Appeals Chamber of the Tribunal concluded that the prohibition of wanton destruction of cities, plunder of public or private property, attacks against cultural property, and more broadly, of attacks on civilian objects were customary norms whose violation, including in non-international armed conflict, entails individual criminal responsibility under customary international law. In doing so, it cited practice recorded in Volume II of the ICRC study on customary humanitarian law, rather than the black-letter rules in Volume I of the study.¹⁶⁷

States and the armed forces will inevitably have to use the Study for guidance and reference, according to Wilmshurst, since courts, human rights bodies, NGOs and the ICRC will invoke the Study as a first point of reference for the existence of a particular rule of CIL.¹⁶⁸ More possible examples of the Study's utility might include its value for dissemination of IHL and the fact that it furnishes a framework for the drafting of other instruments.¹⁶⁹ Certain results have already manifested, namely that the relevant law pertaining to international and (especially the laws pertaining to the conduct of hostilities and) non-international armed conflict has been extended, the Study was not intended to force the hand of sovereigns by attempting to bind them to treaties they have not ratified, the universality of IHL was confirmed and the nature and substantive content of many rules were clarified.¹⁷⁰

The Study is also a component in the 'dynamic dialectic process' of CIL formation. Although the Study takes stock, it is part of a continuous process. The Study refrains from deciding on legal policy concerns regarding IHL's fundamental issues. It rather embodies an important advancement in the process of comprehending what IHL is today.¹⁷¹ Accordingly, Henckaerts acknowledges that certain areas still need further clarifying and, as such, the Study shows areas where practice might

¹⁶⁶ 2005:833. See also Henckaerts 1999 Study on customary rules of international humanitarian law: Purpose, coverage and methodology (<http://www.icrc.org/web/eng/siteeng0.nsf/html/57JQ3K> accessed on 3 September 2010).

¹⁶⁷ Henckaerts 2008:126-127. See *Prosecutor v. Hadžihasanović (Decision on Joint Defence Interlocutory Appeal of 11 March 2005)*: paras 45-46. See also Nicholls 2006:250-251 and Wilmshurst 2007:409-410.

¹⁶⁸ 2007:411. See also Weeramantry's *Closing Remarks* in Maybee and Chakka 2006:222. Wilmshurst 2007:411-412 neatly summarises the conclusions of the articles pertaining to the Study (and which have been dealt with in this dissertation at length): 'The literature has pointed to, among other things, the relevance of the Study in the development [compare MacLaren and Schwendimann 2005] and in the revival [compare Meron 2005] of customary international humanitarian law, the relationship between international humanitarian law and human rights law in the Study [compare Krieger 2006], the impact of the Study on customary humanitarian law [compare Fleck 2006], and the influence of international criminal tribunals on the Study [compare Cryer 2006]'.

¹⁶⁹ Henckaerts 1999 Study on customary rules of international humanitarian law: Purpose, coverage and methodology (<http://www.icrc.org/web/eng/siteeng0.nsf/html/57JQ3K> accessed on 3 September 2010). See also Harland's *Relevance for the National Implementation of International Humanitarian Law* in Maybee and Chakka 2006:97-98 and Kadam in Barnaby, Yang, Faite and Henckaerts 2006:51.

¹⁷⁰ Bugnion 2008:86-87. See also Bugnion in Chatham House 2005:83. Bethlehem 2007:7 also states that we should be cautious in considering the crystallisation of custom merely to circumvent the non-participation of states to a particular treaty regime. See likewise Bethlehem in Chatham House 2005:13.

¹⁷¹ Bothe 2005:176-177.

be unclear or ambiguous.¹⁷² Therefore, Henckaerts concludes that:

In the light of the achievements to date and the work that remains to be done, the study should not be seen as the end but rather as the beginning of a new process aimed at improving understanding of and agreement on the principles and rules of international humanitarian law. In this process, the study can form the basis of a rich discussion and dialogue on the implementation, clarification and possible development of the law.¹⁷³

Various writers agree with this statement, and Dinstein and Meron find that the Study is destined to be considered, scrutinised, cited and debated for a significant time into the future.¹⁷⁴ Hopefully, the Study will elicit discussions among governments, scholars and interested institutions of civil society.¹⁷⁵ In similar vein Aldrich has stated that the Study is very important, but that the importance lies in the Study serving as the basis for further scholarly debates and works rather than in the conclusions of the Study.¹⁷⁶ This was also echoed thus:

We hope that the international attention and debate that has been focused on IHL during the past five years will ultimately result in an increased awareness of the rules of international humanitarian law that apply in all armed conflicts. It is further hoped that this attention will act as a catalyst for the positive development of international humanitarian law, where required ... the publication of the Customary Law Study is, however, only the first step. To have the desired impact the Study will need to be distributed widely, studied and critically analysed by various sectors of society, including academics, government officials, the military and, of course, the legal profession, including the judiciary. Academic writings and its use by judges in particular will be critical to the success of the Study. To be effective, the Study will need to become a credible and indispensable tool used by courts and tribunals to guide them in their decisions.¹⁷⁷

This argument might also hold true for all the individual rules of the Study. Hence, regarding the Study's rules on the natural environment (which it is submitted applies to all the proposed rules *mutatis mutandis*) Hulme states that the Study's attempt to formulate IHL as it applies to the environment is undoubtedly valuable. Thus, the Study provides a useful point of departure from

¹⁷² 2005b:190, 197 and 2005c:426. See also Henckaerts 1999 Study on customary rules of international humanitarian law: Purpose, coverage and methodology (<http://www.icrc.org/web/eng/siteeng0.nsf/html/57JQ3K> accessed on 3 September 2010).

¹⁷³ 2005b:197 and 2005c:428. See also Henckaerts in Chatham House 2005:9, Bugnion in Chatham House, *ibid* at 2, 84 and Wilmshurst in Chatham House, *ibid* at 85. Henckaerts 2007b:487-488 formulates it thus: 'Although the Study has now become the starting point of any discussion on customary humanitarian law, it should not be seen as the final word on custom because, per definition, it cannot be exhaustive and the formation of customary law is an ongoing process. The ICRC has accordingly teamed up with the British Red Cross Society and initiated a project, based at the Lauterpacht Centre for International Law of Cambridge University, to update the practice contained in Volume II of the Study'.

¹⁷⁴ 2006:1 and Meron 2005:834. See also Dr Kellenberger's prediction that 'governmental experts to use the study as a basis for discussions on current challenges to international humanitarian law' referred to in MacLaren and Schwendimann 2005:1237.

¹⁷⁵ Fleck 2005:246 and Cowling 2006:74.

¹⁷⁶ 2005:505.

¹⁷⁷ Maybee *Introduction* in Maybee and Chakka 2006:2-3. See also the comments of Kamil in his *Foreword* to Maybee and Chakka, *ibid* at xii, and his *Introductory Remarks*, *ibid* at 16.

which dialogue between states can commence and that might, hopefully, lead to agreement on such a vital concern.¹⁷⁸ Also, although the Study does not reflect a comprehensive collection of means and methods of implementation and enforcement of IHL, it remains valuable as a restatement of contemporary CIL, which is evidently shown to be less than perfect and in need of further elucidation.¹⁷⁹ Accordingly, the value of the Study in identifying current problems in contemporary CIHL is re-emphasised and its potential value as springboard for discussion apparent. Evidently, greater certainty is achieved through the Study regarding the rules pertaining to armed conflicts and, as such, the Study must inevitably have a positive impact. It furnishes a much needed 'new and creative law-creating mechanism' with which existing rules of CIL may be identified.¹⁸⁰

MacLaren and Schwendimann believe that approaches, like that of the Study, to determine rules of CIL may indicate important differences in the *usus* and *opinio iuris* of states. Therefore, to ensure the success of such an approach it must be conducted without haste and with due diligence. The ICRC deems the Study to be aimed at those responsible for the application of CIHL and those who can lend aid in gaining and mobilising support for the Study's findings. By aiming at both of these groups, MacLaren and Schwendimann deem the ICRC to indirectly pressurise governments that are not in agreement with the findings of the Study, to change their perspectives and/or conduct. Thus, the ICRC intends both to convince states that the Study's findings are authoritative and to rally public opinion which will serve as a further check on decision-makers. Subsequently, one of the tasks facing the ICRC is to persuade those responsible for the application of CIHL that the Study is simultaneously comprehensive and illustrative while remaining legally correct.¹⁸¹

Regarding the aspirational nature of some proposed rules, Fleck submits that it is needed, at times, for those that apply the law and those that aid in efforts to ensure the proper implementation thereof, to go beyond existing practice. Accordingly, while *lacunae* exist in positive law, states should be persuaded to rely on the Study with the objective to fill these *lacunae* and not to take the Study to task for its progressive statements or to exploit these legal *lacunae* for any profit at the expense of the victims of armed conflict.¹⁸²

¹⁷⁸ 2007:236-237.

¹⁷⁹ Fleck 2006:197-198.

¹⁸⁰ Cowling 2006:74.

¹⁸¹ 2005:1238-1239. See also Henckaerts 1999 Study on customary rules of international humanitarian law: Purpose, coverage and methodology (<http://www.icrc.org/web/eng/siteeng0.nsf/html/57JQ3K> accessed on 3 September 2010).

¹⁸² 2006:180-181.

Bethlehem comments that despite his criticisms, the purport thereof is not to negate the Study's structure or to lessen its significance. As such, the Study remains a noteworthy feat that will make an immense contribution to legal scholarship and discourse, thereby ultimately improving compliance with IHL in the future.¹⁸³ Likewise, Wilmshurst and Breau state that the Study is a significantly valuable work which will be of great service to IHL.¹⁸⁴ In assessing the Study, Judge Aldrich also remarks that despite his criticisms of certain individual rules of the Study, the Study cannot be held to embody anything less than a 'monumental work' which reflects a significant contribution to the dissemination of knowledge regarding modern IHL. Accordingly, he holds most of the Study's findings to be accurate, while other proposed findings he deems to be 'reasonable proposals' that will have to be considered in the development of IHL. The essential problem with some of the rules, according to Aldrich, pertains to their simplified nature which would not have found favour during the negotiation of *Additional Protocol I* nor with many states today. The supporting evidential material collected in Volume II is nonetheless lauded as being 'irreplaceable'. The hope expressed by Aldrich, and with which the present author concurs, entails that 'this truly monumental study should be the catalyst for further efforts to identify both feasible improvements in the body of the law and in the level of compliance with it'.¹⁸⁵

Wilmshurst, in commenting on the feedback from various experts in IHL in the work, *Perspectives on the ICRC Study on Customary International Humanitarian Law*, also submits that despite some criticisms being levelled at the Study from the contributors, the overall worth and importance thereof endures. Furthermore, it is the concerted submission of all the contributors that the Study is a 'valuable work of great service' to IHL. Due to the Study, it is now clearly easier to furnish an answer to the question of what comprises CIHL.¹⁸⁶ Cryer states that 'the work of a critic is an easy one, especially when compared with that of an author. As a work of scholarship, the *Study* is a stunning piece of work. Against the background of the difficulty of establishing custom at all, the Study has gone a huge way towards setting out the position under custom, and by even setting down the rules for debate'. Nonetheless, Cryer comments that although the Study has been described as a photograph, it can be deemed a great impressionist painting. 'From a broad view, in its general conception and in many ways, it is a masterpiece, but the closer the look taken into the way it

¹⁸³ 2007:13. Later, Bethlehem 2007:14 continues that the Study will become the starting point when reviewing state practice and *opinio iuris* in the process of custom's crystallisation. However, the Study is not to be accepted as the final statement on this process. Compare Bethlehem in Chatham House 2005:10 and 16-17 and see also Momtaz *The ICRC Study on Customary CIHL – An Assessment* in Maybee and Chakka 2006:71.

¹⁸⁴ 2007:vii. See also Weeramantry's *Closing Remarks* in Maybee and Chakka 2006:221-222.

¹⁸⁵ 2005:523-524. See the similar comments of Kamil in his *Foreword* to Maybee and Chakka 2006:xii.

¹⁸⁶ Wilmshurst 2007:409.

approaches custom, the less beautiful it can seem'. Cryer adds, however, that the Study has an overall quality that can be missed if one gets tangled up in the details. Close scrutiny of the Study is important though if it is to serve as the foundation for further discussions on IHL.¹⁸⁷

Referring to the title of Henckaerts' article in the *International Review of the Red Cross* in 2005, MacLaren and Schwendimann submit that the evident objective of the ICRC Study on CIHL is to further a deeper understanding and respect for this branch of law. Accordingly, the learned authors opine that the Study is destined to become the dominant source of CIHL as its unequalled research into CIHL must inevitably provide the foundation for future discourse about these rules. However, an important consideration pertaining to the Study's worth for IHL relates to whether it will lead to increased protection for victims of armed hostilities. In this regard the Study *must be viewed as an element of a dynamic process, thus it is not to be viewed as the final word, but rather as the foundation for further development in IHL*. Regardless of specific criticisms levelled against the Study, it is beyond dispute in general legal and practical thought that an undertaking such as this, which purports to elucidate existing rules, may assist the efficacy and refinement of those rules. Naturally, the utility of having rules of CIL written down in a branch of law like IHL with its 'deficiencies, loopholes and ambiguity' is clearly evident. Due to the emergence of the Study, reliance may now be placed on a concrete rule rather than a 'nebulous custom', thereby greatly increasing the possibility for agreement between role players as to what a particular rule entails. The consequence hereof might very possibly be improved protection for the victims of armed conflict in the field as well.¹⁸⁸

In academic circles the Study will provide the point of departure for more research and discourse and, likewise, in intergovernmental bodies it will further dialogue and perhaps even cross-cultural dialogue at that. However, MacLaren and Schwendimann add a few caveats, namely that when unwritten law is reduced to paper it becomes fixed and faces the possibility of losing touch with changing circumstances. Thus, the research of the ICRC should be continuously updated and future editions of the Study should be published to ensure its authoritativeness. Furthermore, a call is made for the ICRC to determine whether its ambit might be broadened in future editions including, for example, the definition of terms such as 'armed conflict'.¹⁸⁹

¹⁸⁷ Cryer 2006:241 and 263.

¹⁸⁸ 2005:1240-1241. See also Nicholls 2006:247-248.

¹⁸⁹ 2005:1241. Regarding future updates, Henckaerts 2007:488 states that: 'With a view to this update we remain receptive to further comments on the Study in general but also to information and comments on any further specific practice states and experts wish to share with us. This should be part of an ongoing dialogue'.

Also, and this is important for the present Study, the *principles* that shape IHL should not be ignored in favour of treaty law and CIL. These principles are 'fundamental, abiding, incontrovertible and more, should ultimately guide all concerned'. Consequently, when there exists uncertainty regarding the law in force for a specific situation, a humanitarian solution must be sought that furnishes both protection of and aid for victims of armed hostilities. In this regard, the Martens clause might have a significant role to play. This function lies in the Martens clause 'legislating IHL in addition to conventional and customary law, as it constitutes a provision of positive law that is not merely declaratory. Should the other sources prove wanting, they are to be completed by reference to the "laws of humanity" and "the requirements of the public conscience"'.¹⁹⁰ Importantly, from the perspective of the present dissertation, Wilmshurst asks whether the influence of the Martens clause should not persuade acceptance of 'principles of humanity and dictates of public conscience' as customary law, which in turn should lead to a possibly less formalistic approach to the assessment of custom.¹⁹¹ That customary law is accepted to exist outside the confines of the Study is evident since, by virtue of the Martens clause, IHL acknowledges its own treaties to lack comprehensiveness and that, as a legal discipline, it cannot be isolated from other developments happening in other branches of international law. This narrow interpretation of the Martens clause seems to be sufficiently supported in *usus* and judicial decisions. The Martens clause's continued relevance was accepted by the ICJ, although the problematic aspects pertaining to its interpretation were not resolved.¹⁹² Scobbie comments that precisely on account of this uncertainty pertaining to the clause, it was unexpected that the influence of the Martens clause was not investigated to a greater extent, especially cognisant of the dynamic and generative function the clause performs in IHL. Arguably, this omission might reflect a structural issue in that the Study assumes an 'unduly atomised' stance regarding the rules of CIL which it postulates. Thus, the question emerges as to whether the Study fails to consider the 'systematic location and the internal relationships' which exist between norms. From these concerns, it becomes evident that an analysis of the Martens clause, which is a dynamic component unique to the development of IHL, should have been conducted.¹⁹³

¹⁹⁰ MacLaren and Schwendimann 2005:1241-1242.

¹⁹¹ Wilmshurst 2007:408 and 412.

¹⁹² Scobbie 2007:18. *Advisory Opinion on Nuclear Weapons of 1996*, ICJ Reports 1996: paras 78 and 84.

¹⁹³ 2007:18-19. Scobbie 2007:18 n. 20 states that Henckaerts, one of the Study's co-authors, related that practice regarding the Martens clause had been collected, but that an analysis of its implications for CIL was omitted from the Study due to time constraints. Scobbie, *ibid* at 44, continues that the omission to scrutinise the Martens clause may have limited the Study's ability to ascertain the normative value of the collected practice.

This further confirms the importance of ascribing to a 'higher normative' system as basis for IHL and CIHL. However, Wilmshurst counter-balances this thought with the alternative point of view, namely that although it is important to exhort state and non-state forces to conduct affairs in a humanitarian manner and also to act in pursuance of the Martens clause, the demands of armed hostilities and the interests of the combatants are of such a nature that often only firmly entrenched rules of IHL will be adequate to restrain battlefield behaviour to a manner contrary to what is dictated by military desirability. In those instances, reliance on the existence of legal rules, irrespective of whether it is treaty or customary law, must be proven as such. In sum, coherence regarding the existence of legal rules may contribute to ensure compliance therewith.¹⁹⁴

One of the constructive consequences of the Study is that:

The development of customary law which has been described can be explained as a recognition of, and adherence to, *common values*. The limitation of the 'scourge of war' which IHL provides, its concern for the human being and, in particular, for human dignity, respect for the interest of future generations through an enhanced protection of the environment in times of armed conflict – all this is part of the recognition and realisation of common values. They are documented in the Study and the Study strengthens them.¹⁹⁵

Consequently, although various criticisms have been levelled against the Study, the overwhelming majority of scholars laud the ICRC's endeavour as a landmark in the jurisprudential debate pertaining to IHL. Also, it clearly emerges that the Study provides a springboard from where debates regarding increased protection of those suffering as a result of armed conflict will ensue. It is also apparent from the comments emanating from international jurisprudence that the questions regarding IHL's foundation and the pursuance of natural law virtues in IHL have not been comprehensively considered *vis-à-vis* the ICRC Study. It is postulated that the present dissertation, in fact, emerged precisely to address these concerns and, hopefully, to encourage increased investigations into the foundational basis of IHL as discipline.

¹⁹⁴ 2007:413.

¹⁹⁵ Bothe 2005:178 also cites another procedural benefit emanating from the Study thus: 'A look into the sources quoted by the Study shows that this development of customary law has been promoted by the development of procedures implementing this value system: the increased importance of judicial procedures at the international level, but also the perfection of non-judicial tools, such as the role of the Security Council in the implementation of IHL and the improvement of the procedural tools of the ICRC. In other words: the Study also shows that the arsenal of mechanisms designed to implement the common values has been considerably enriched'.

5. Conclusion

It was indicated that the ICRC is a unique role player in the international (humanitarian) system, as it emanated from the very considerations of humanity upon which, according to the argument presented in Chapter 2, IHL itself was established. Bearing in mind the stature of the ICRC in the contemporary international community, its pivotal role in regard to the principle of humanity must be emphasised. Accordingly, the ICRC is not only premised upon humanity as central virtue, which it attempts to realise in practice, but, due to the educational and dissemination functions of the ICRC, this NGO is also intimately involved in promoting humanity in theoretical discussions.

The importance of CIL (and, of course, CIHL) as source of international law was confirmed in Chapter 3. Moreover, the present dissertation indicates that, due to its universal grasp and historical nexus with the foundational virtues of natural law, which provided the impetus for IHL (as opposed to treaty law, which although important, is neither necessarily universal nor always explicitly based upon these principles), CIHL has an important role to play in reintroducing higher, normative considerations into the IHL debate. In light of the atrocities being committed in the world, recourse to a universal, higher set of norms has become imperative. It was therefore unsurprising that the ICRC was requested to undertake the investigation into CIHL by the International Conference for the Protection of War Victims in 1993.

The resultant ICRC Study on CIHL has justifiably been lauded as a monumental work, which is bound to constitute the starting point of discussions on CIHL emanating from courts, tribunals, academics and military personnel. However, this endeavour has been clouded by the legal positivist debate. The overwhelming majority of criticisms levelled against the Study were seen to emanate from the positivist desire for certain, inflexible methods and clear, unambiguous, written rules. It is submitted that very scant criticism has been directed at the rules' fundamental natural law basis. Hence, the Study (and the criticisms thereof) omits clearly reflecting on *principles and standards* in CIHL, whether pertaining to the methodological approach thereto or the formulation of the proposed rules. This is an important oversight. As has been indicated in this dissertation, natural law virtues have been essential to IHL from the moment the first wars were fought. This argument was confirmed, in Chapter 2, in that philosophers, writing prior to the conclusion of modern treaties, already accepted various principles, especially the considerations of humanity, as rules of IHL. Subsequently, both the present and previous chapters indicated the need for a flexible, normative methodological approach to ascertain CIHL and the importance of enhancing the

proposed rules through a natural law paradigm which emphasises the central principle of humanity. Arguably, the ICRC Study did attempt to alleviate the rigidity of *solely* relying on the traditional approach pertaining to CIL by inclusion of the 'density' requirement and, although criticised from other sectors, is lauded in this regard by the present dissertation. This normative approach could have been even more robust, but it seems inevitable that the Study would be cautious in the (still) legal positivist dominant international order. However, although many of the proposed rules of the Study are evidently influenced and informed by natural law virtues, like the considerations of humanity, very few contain pertinent references thereto (see, for example, proposed rule 87). In light of the classical writers, Pictet principles, human rights influences and inherent morality of IHL, this dissertation purports to further the debate in this regard by postulating a framework with which to enhance the normative status of the Study's findings. Moreover, by indicating the importance of the Martens clause, norms of *ius cogens* and obligations *erga omnes*, which are all absent from the ICRC Study, the present dissertation wishes to further the debate regarding the higher, normative status of IHL.

There is, indeed, something enigmatic about the ICRC Study in the sense that, firstly, it is one of the most unique reflections of CIL due to its detailed normative content. As is evident from the preceding, there is commentary on the Study that even proposes additions to its content. Secondly, among the voices of criticism there are, in the same breath, intimations of support for the Study. It is acknowledged that there is much to be criticised regarding a technical and theoretical approach to the Study, yet within oneself one feels adamant that this Study must be supported. *Improvement without a major negation is also a good thing.*

CHAPTER 5

CONCLUSION

*Arma virumque cano*¹ – thus Vergil began the *Aeneid*. However, singing of arms and bravery in war have long since paled in comparison with lamenting over the atrocities, cruelty and suffering which emerge from it. Accordingly, any and every endeavour to further and enhance international humanitarian law (IHL) must be supported. In this regard the ICRC Study and the criticisms it has evoked are invaluable. The comments and criticisms made in this dissertation aim to supplement and promote the various issues that have crept in regarding customary international humanitarian law (CIHL) and the ICRC Study.

The essential argument furthered by this dissertation entails that IHL, as a specialised branch of international law, dealing with the most atrocious conditions known to man, originated from and was shaped by natural law virtues. In the words of Pictet, IHL combines a 'legal and a moral idea'.² Subsequently, the centrality of humanity for IHL was indicated as well as the influence of religious norms, notions of chivalry, mercy, charity and generosity. It is therefore appropriate to reconsider the question, succinctly formulated by Bederman, and which was included in the introduction to the present dissertation, regarding whether all rules in international law are the result of internal, agreed upon processes of the participants thereto or if there do indeed exist 'enduring truths that somehow reflect the fundamental values of that community'? In light of the findings in the present dissertation, it must be respectfully submitted, *with regard to IHL*, that such 'first principles' do indeed exist. Furthermore, it has been argued in the present dissertation that the *principle of humanity* and the protection of *human dignity* embody the central virtues of IHL. Therefore, *regarding IHL*, Bederman's question must be answered in favour of the existence of 'a metaphysic of first principles that governs the system'.³

It is, however, recognised that conflict is inevitable between a natural law approach to IHL, such as that espoused in the present dissertation, and a legal positivist approach thereto. In this regard, the reaction of Best must be supported when he opined that the mere invocation and citation of these

¹ I sing of arms and a man (or *the* man). [Present author's translation.]

² 1985:1. See section 1 in Chapter 1, page 16.

³ Bederman 2003:1537. See also Hoffman 2004:247-248 for the acknowledgment that such essential values or principles do exist in IHL.

'theoretical fundamentals of IHL' will elicit the rejoinder that they constitute ideals, mostly alien to the actual reality of armed conflict. He acknowledged such a statement to be fair and unsurprising. However, '[h]onest writing about IHL can never pretend that it is ever observed perfectly, even where circumstances are most favourable to its being so, and must also always admit that the usual levels of observance range between the indifferent and the lamentable'. This is the result of the paradoxical nature of IHL based on war on the one hand and human nature on the other. However:

'...the enterprise is not abandoned. *The self-respect of civilization dare not let it be.* And just as some life and credibility is kept in it at one end of the scale by the purposeful prudence which works with calculations of reciprocity and consequences, so at the other end does it depend on the potentially imprudent principles of humanity and honour which decline to believe in the total, unrecognizable alienness, the non-humanity of the enemy, and which accordingly will not resort to perfidy in fighting him'.⁴

Simultaneously, state interests frequently interfere with the duties they might have under IHL. Henceforth, the reason why IHL and CIHL might be ignored does not necessarily pertain to the correctness or not of the particular rules, but rather to other concerns independent thereof, including political, economic or other interests. *Therefore, it is acknowledged that the present dissertation with its focus on natural law virtues might inevitably draw criticism, but it is nonetheless hoped that the debate regarding the protection of war victims will be renewed and enhanced in the process.*

It must be emphasised that including principles and standards of natural law in the IHL debate will not undermine the power of states (as is feared by very many legal positivists), in fact it is submitted that states committing themselves to promote the humanitarian endeavour will clearly indicate their concern for the well-being and welfare of the human person and, thus, enhance their reputations as advocates for a better world where humans are treated with care and respect. Furthermore, reliance on natural law as the basis of IHL is not only inevitable – seeing that IHL had its *de facto* origins in natural law – but, neglecting to do so would undermine this entire branch of international law's vitality. States must understand that accepting natural law as basis for IHL will not be detrimental to their policies and interests – the moment this realisation occurs, real, tangible change will be possible with regard to the global effort at improving the plight of the victims of armed hostilities.

It was further indicated that these principles also permeated and informed the initial source of IHL to be invoked by ancient collectives, namely CIHL. Accordingly, these principle-containing CIHL

⁴ Best 1997:290-291. [Emphasis added.]

rules endured for many centuries before being subsumed into systematic treatises on international law by eminent publicists of the fifteenth to eighteenth centuries. It was indicated how, *inter alia*, Gentili, De Victoria, Suarez, Ayala, Belli, Grotius, Zouche, Pufendorf, Rachel, Textor and De Vattel proposed rules of IHL that were informed by natural law principles. Accordingly, the importance of these natural law principles was re-emphasised while the significance of CIHL, as historical first source of IHL and embodiment of these natural law virtues, also became apparent.

The natural law basis of IHL was therefore unambiguously postulated. It was indicated that the natural law considerations of humanity directly influenced the next major development in IHL, namely the emergence of a treaty regime. Thus, the influence of humanity on the law of Geneva and The Hague was evident. Hereafter the dissertation considered the aims and objectives of IHL. It was indicated that IHL essentially strives to protect the human individual. Accordingly, the importance of humanity as *raison d'être* of and motivating factor for IHL became apparent. Hence, the close *nexus* between CIHL and treaty IHL and this essential *principle of humanity* was confirmed – not only does the principle of humanity permeate and shape these sources of IHL, but it also provides the objectives and goals towards which this branch of international law aspires.

Subsequently, due to this axiomatic point of departure, namely that *natural law* principles form the essential basis of IHL, the need arose to reconsider some of the criticisms which have been levelled against IHL as being constitutive of 'law'. Naturally, when arguing that morality informed and shaped a branch of law, (positivist) questions emerge as to whether the particular branch of law is 'law' or mere 'morality'. These criticisms were laid to rest when IHL was in fact found to be law as it is recognised as such by those subject to it. Hereafter, the broader philosophical traditions that have influenced IHL were scrutinised, including natural law, legal positivism and the historical school of jurisprudence. Since all three jurisprudential paradigms have influenced IHL at various stages during its development, it became essential to consider the main aspects of each. Hence, while natural law constitutes the *fons et origo* of IHL, legal positivism has emerged lately to especially emphasise codified, written formal sources of law (of which the ICRC Study on CIHL might serve as an example). The historical approach was also considered as it re-affirms the importance of CIHL as source of IHL as well as the necessity of investigating the historical development of IHL.

In this regard, the present dissertation itself seems to embody a sort of integrative jurisprudential approach to enhancing IHL, seeing that it reflects on the natural law basis thereof, investigates

various positivist components thereof (including treaty law and the written ICRC Study) and considers the historical development of the *ius in bello* both in actual conflicts and through theoretical expositions thereon written by the most influential academics of the sixteenth to eighteenth centuries. It is submitted that this holistic approach contributes to the unique framework of the present dissertation.

Subsequently, the scrutiny turned more directly towards *humanity* as central principle in IHL. First, its substantive content was investigated in order to illustrate that the positivist critique pertaining to the inherent malleability of natural law principles was unfounded. Accordingly, it was indicated that humanity connotes altruism and compassion; in short, a feeling of charity towards your fellow man. To address the positivist critique that natural law principles are unenforceable, the scrutiny turned to the Martens clause, as a treaty provision which embodies the laws of humanity. It was indicated that this provision serves as a link between legal positivism and natural law principles. Also, it was indicated that this provision has the very important (potential) function of supplanting the traditional requirement of *usus* when ascertaining CIHL. It is submitted that this use of the Martens clause is significant as it brings moral criteria to bear on the procedure to determine CIHL rules. Thereafter, the conceptual principles of *ius cogens* and obligations *erga omnes* were considered as norms which could accord substantive norms the status of higher norms in international law and, thereby, greatly increase their normative status. It was indicated that the principle of humanity could be postulated in this regard and that finding it to be subsumed by one of those conceptual principles was not without precedent in international law.

Hereafter, the investigation turned towards an inquiry regarding the substantive principles of IHL that were postulated by Jean Pictet in 1985. The reasons for this consideration were twofold, namely in order to further illustrate that the principle of humanity shaped *de facto* norms of IHL and to indicate which IHL principles have crystallised into CIHL between 1985 and 2005 when the ICRC Study was published.⁵ It is hoped that this process could further enhance these rules' normativity.

At this stage it must be noted that although international legal writers like Jean Pictet have illustrated the importance of *morality* for IHL, it is postulated that the present dissertation's *sui generis* nature is further strengthened when considering its unique framework of considering

⁵ It was indicated that, *inter alia*, proposed rules 1, 2, 3, 6, 7, 11, 14, 15, 25, 37, 38, 42, 43-45, 52, 53, 65, 70, 87, 88, 90, 96, 97, 103, 104, 105, 118, 122, 125, 144-148 and 151 are visible in the Pictet principles.

classical sources as well as modern expositions on IHL, most notably, of course, the ICRC Study on CIHL. The present dissertation, thus, uses a kind of dialectical model moving between older and more recent expositions on IHL (thereby naturally strengthening the arguments for the existence of inherent, universal, immutable, objective principles in IHL).

A comparison was also drawn between the other branch of international law which purports to further *human dignity* and *humanity*, namely international human rights law. The importance of international human rights law for IHL and *vice versa* was established seeing that IHL norms cannot be derogated from (whereas derogation is possible in the case of international human rights rules) and human rights law applies always (unlike IHL which only applies when an armed conflict occurs). Accordingly, the complementarity between these regimes was established. However, it was also suggested that cross-pollination has and might yet occur between these regimes. In this regard, it seems as though, due to their comparable objectives to protect *humanity*, these branches of international law might reinforce and bolster each other. Unsurprisingly, therefore, human rights instruments were used in the ICRC Study to determine certain proposed rules. Human rights rules were also seen to be primary candidates for acceptance as norms of *ius cogens*. Hence, it was also indicated that those human rights rules which have been extrapolated to IHL also have a stronger case for being subsumed under norms *ius cogens* and, thus, enjoying an enhanced normative status in international law.

By acknowledging this natural law foundation of IHL, it is submitted (and it was indicated that the United Nations advocated the similar belief⁶), a more flexible approach might be taken to alleviate the plight of the victims in conflicts. Thus, for example, certain minimum safeguards might exist even prior to the classification of a conflict as 'international' or 'non-international' or 'internal disturbance'. In this regard, it seems as though the cooperation between IHL and international human rights law may have a significant role to play to extend protection to the victims of conflict irrespective of a technical definition thereof. Although this allows some aid to those suffering as a result of disturbances, it does not mean that internal disturbances would become subjected to all IHL rules. An essential *core minimum of rules* would apply to alleviate suffering and no more – is such an approach not much more to be preferred than mere ignorance?

Hereafter, the scrutiny turned, in Chapter 3, to a consideration of the third possible source, and

⁶ See Chapter 2, section 3, pages 152-154, above.

historically the first, to embody natural law principles – CIHL. The rigidity of the traditional approach, as sole basis to its determination, was apparent after considering the requirements of *usus* and *opinio iuris*. It was indicated, and this merits re-emphasis, that although article 38(1)(b) of the *Statute of the International Court of Justice* (ICJ) states both requirements, this article was created for a specific international tribunal to establish CIL relevant in any dispute which might arise before it.⁷ Hence, this article is not particularly nuanced when CIL rules have to be determined in a specific branch of international law. This problem seems to be compounded when the dispute arises in areas of international law, like IHL or international human rights law, where there evidently exists a moral component. It needs to be indicated that a rigid adherence to *usus* and *opinio iuris* as the only requirements of CIL in any branch of international law, seems to illustrate a positivist approach. However, it was indicated that the modern tendency was to eschew one of the traditional elements when ascertaining a *morally* loaded rule, which would obviously include CIHL rules. Accordingly, Kirgis' sliding scale and Roberts' theory were advanced as appropriate methods with which to identify rules of CIHL. Hence, Roberts' theory espouses eschewing *usus* when a moral norm is pursued while Kirgis' sliding scale evaluates the relevant conduct in order to determine the relative weight to be accorded to the traditional CIL requirements. It was argued that these approaches, which take the moral permissibility of the proposed rule into account, rather than a rigid theoretical clinging to the rhetoric of *usus* and *opinio iuris*, as absolute basis of CIL, are very important for CIHL determination. Also, the importance of 'elementary considerations of humanity' as a further component to invoke while ascertaining CIHL, was emphasised in light of the fact that IHL, in the view presented in the current dissertation, is premised thereon.⁸

Subsequently, the most significant modern restatement of CIHL was considered, in Chapter 4, namely the ICRC Study on CIHL. It was indicated that this Study emanated from the ICRC, whose essential motivating principle is humanity. The methodological approach of the Study and its black-letter rules were considered as well as the criticisms levelled against it. It was argued that the Study, by accepting that if state practice was dense then *opinio iuris* would be accepted to exist without separate proof thereof, seems to approve the more modern approach to the ascertainment of CIHL by eschewing one of the traditional requirements of CIL. In this regard, the ICRC Study was

⁷ In this regard notice must be taken of the notion held by Weston, Falk, Charlesworth and Strauss 2006:81, namely that article 38 has 'come to live beyond the Court'. However, it is respectfully submitted that this does not save this article from the criticisms levelled against it in the main text.

⁸ See *Corfu Channel (merits)* ICJ Reports, 1949, p. 22, *Case concerning Military and Paramilitary activities in and against Nicaragua*, Judgment of 27 June 1986 (merits) par. 218, the *Advisory Opinion on Nuclear Weapons of 1996*, ICJ Reports 1996 paras 78-79 and the *Advisory opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Advisory Opinion of 9 July 2004 [2004] ICJ Rep. par. 157.

lauded as it commences the process of loosening the rigid, absolute hold of the traditional approach to CIL determination. Nonetheless, this dissertation further illustrated certain fundamental concerns regarding the Study:

firstly, when considering the Study's introduction, there is a need for more substantive scholarship on the relationship between CIL, IHL and CIHL. It is submitted that the present dissertation signifies an attempt to address this gap;

secondly, the development of a more robust and well-thought through alignment of the Study to natural law approaches is needed. This is also something that lacks in the forewords and introduction to the Study. It is interesting to note that over the expanse of the forewords to the Study as well as 621 pages of rules, references to foundational norms such as 'humanity', 'natural law' and 'morality' as qualification for a norm are difficult to detect. Those few indicators detected were for example: Kellenberger's referral to 'demands of civilization' and the limitation of violence as being the 'essence of civilization'⁹ and Sandoz's referral to the rules of IHL as reflecting 'a common heritage of mankind'¹⁰;

thirdly, emanating from the preceding point, it is submitted that the more pertinent inclusion of principles such as 'humanity', 'humaneness' and 'human dignity' ought to provide a stronger qualification to the essential core of IHL. In this regard, establishing the possibility of considerations of humanity embodying a substantive rule (with or without the nature of *ius cogens*) would have been a particularly worthwhile investigation;¹¹

fourthly, a critical comparative analysis of the 161 rules of the Study with one another against the background of natural law, morality, and the conscience of mankind is required. Not all the rules should, morally speaking, be on the same level, and here one could apply the present dissertation's, Roberts' or Kirgis' approach to CIL, which requires less practice as the norm becomes more fundamentally universal and moral. In this regard, the proposed normative method to CIHL determination of the present dissertation was applied to a selection of the ICRC Study's proposed

⁹ Foreword in Henckaerts and Doswald-Beck 2005:ix.

¹⁰ Foreword in Henckaerts and Doswald-Beck 2005:xvii.

¹¹ Essentially, only proposed rules 87 and 90 contain the words 'humanely' and 'human dignity'. For the acceptance of humanity as legal rule, see *Case concerning Military and Paramilitary activities in and against Nicaragua*, Judgment of 27 June 1986 (merits) par. 218, *Corfu Channel (merits)* ICJ Reports, Judgment of April 9th, 1949, 4 at 22 and *Advisory Opinion on Nuclear Weapons of 1996*, ICJ Reports 1996 par. 79. For the argument that principles are part of the law, see Dworkin 1977: 22, 26, 40 and 44.

black-letter rules of CIHL, thereby illustrating how the rules could be considerably strengthened and enhanced when the moral value thereof was also underscored; and

fifthly, it was indicated that the ICRC Study missed out on an important opportunity to enhance the normativity of its CIHL rules due to its neglect to consider *humanity* as core principle of IHL, the Martens clause (both as substantive positivist embodiment of humanity and potential formal source for the implementation thereof) and norms of *ius cogens*. It was especially emphasised that, although the absence of the Martens clause from the Study has been identified as an important *lacuna*, this omission is of the utmost importance seeing that the Martens clause comprises a gateway between natural law principles such as that of humanity and the dictates of the public conscience on the one hand, and legal positivism, in the form of conventional treaty law, on the other. It is submitted that through the Martens clause, practical effect may be given to these principles and non-legal moral values, which have been illustrated throughout the dissertation to form part of IHL.

The present dissertation indicated how, by relying on the writings of eminent publicists, treaty provisions, norms of *ius cogens* as they have emerged, the IHL principles of Jean Pictet and the ICRC Study (with its wealth of collected evidential material) particular rules of CIHL could be enhanced and strengthened normatively. Therefore, the importance of the ICRC Study, as well as all endeavours to promote and enhance its findings, is confirmed.

Undoubtedly, the advantages of the ICRC Study, as was seen from Chapter 4, are many. As has been predicted the Study has given rise to renewed investigations into IHL and the nature thereof as the present dissertation bears testimony of. Furthermore, the Study was used in the present dissertation to propose various CIHL rules as candidates for being included in norms of *ius cogens* and/or obligations *erga omnes* thereby illustrating its possible utility for theoretical discussions on IHL.

Also, due to the emergence of the ICRC Study and the clarion call of the present dissertation for IHL (and, by implication, CIHL) to return to its natural law origins, it seems that the sources of IHL have now reached a complete circle. Accordingly, as was argued for in this dissertation, morality/natural law virtues shaped and informed the initial, primitive, customary rules of ancient societies. These customary rules held sway for many centuries, even influencing the eminent writers on IHL, as was indicated. However, in the nineteenth century, a new source of IHL

emerged, namely treaty law. Naturally, being the product of negotiation and agreement, these written materials ensured greater legal certainty in IHL than had been the case under only CIHL. Also, with the rise of positivism during this period, it was inevitable that this source of IHL would be supported rather than CIHL. However, these treaty rules were nonetheless influenced by the body of law in existence – CIHL. CIHL, thus, formed the basis of the majority treaty provisions. In an indirect sense, the principles underpinning CIHL, therefore, also came to permeate IHL treaty law, although, due to the positivist focus of the time, this was either overlooked or ignored. In the wake of the atrocities emanating from World War II, however, natural law values again gained the ascendancy. But in the international legal order the emphasis on positivist legal instruments endured. Accordingly, the situation emerged where support was given to natural law substantive rules and positivist formal legal sources. It is submitted that this tension has remained up to the present day. However, with the emergence of the ICRC Study on CIHL it seems as though the international community has begun to attempt to alleviate this tension.

An evident desire to return to a universal source of international law is clear from the conducting of this Study. It is with this development (and the clarion call of the present dissertation to return to the natural law *fons et origo* of IHL) that the circle of IHL sources has again converged. Thus, while over the course of time, some unique treaty rules have emerged which apply as positive law to all signatories, a renewed emphasis on *universal sources* of IHL has become evident. In this scenario, those majority treaty provisions with CIHL (and, therefore, also natural law principles) antecedents have now come under renewed scrutiny in light of the ICRC Study on CIHL. These treaty rules, it must be submitted, are enhanced and strengthened if they are also supported by CIHL. However, it is argued that, with the leap-frogging between legal positivism and natural law, the contemporary international legal order has obscured the natural law basis of IHL (and, of course, CIHL) which the present dissertation elucidated and, if recognised and addressed, will strengthen those treaty provisions based on CIHL even further as the treaty rule will essentially reflect its historical basis. This development of the rules could be illustrated thus: MORALITY → CIHL → TREATY LAW → CIHL → MORALITY. (Hence, morality/natural law provided the impetus for CIHL, which was later subsumed in codifications, which has eventually led to a renewed scrutiny into CIHL by the ICRC, *which, in the present dissertation's view, ought to lead to a reconsideration of the foundational principles of IHL and CIHL, namely morality.*) The advantages of viewing treaty law through its antecedents are legion, including coherence, additional interpretative aids, improved normativity and more nuanced rules. This would lead to enhanced normativity where the treaty binds all the parties to a dispute. However, as was seen in Chapter 2,

non-ratification of IHL treaties is a significant concern in IHL and was one of the main reasons for the ICRC Study. It is submitted that, in these cases where CIHL applies solely to non-signatory parties, the natural law foundation of CIHL will likewise bolster this source of IHL and ensure that it reflects its historical basis as well. Furthermore, as was indicated above, morality could even directly influence CIHL determination. It is submitted, therefore, that the present dissertation significantly contributes to an enhancement of IHL treaty law and CIHL even in the light of the ICRC Study, since the present dissertation re-examines the principled basis of IHL and its sources.

The unique nature of the present dissertation must be re-emphasised. Accordingly, it is hoped that this work will constitute one of the first steps in the process to address the concern of Sassoli and Bouvier who stated that '[u]nfortunately, the question of the universal nature of international humanitarian law has prompted little scholarly deliberation, unlike the body of human rights law...'.¹² It is respectfully submitted that one of the motivations behind the ICRC Study on CIHL was to postulate *universally* applicable CIHL rules. Hence, the ICRC Study embodies an enormously important step in this process. However, by omitting a consideration of the foundational virtues of IHL, the ICRC Study missed a good opportunity to further bolster its arguments for the universality of CIHL. It is hoped that the present dissertation will provide considerations to address these issues more fully and, indeed, to entice debate regarding the theoretical underpinnings of IHL.

A similar wish was expressed, *vis-à-vis* the ICRC Study itself, by Dr Yves Sandoz in his foreword when he postulated: '*May it be read, discussed and commented upon. May it prompt renewed examination of international humanitarian law and of the means of bringing about greater compliance and of developing the law. Perhaps it could even help go beyond the subject of war and spur us to think about the value of the principles on which the law is based in order to build universal peace – the utopian imperative – in the century on which we have now embarked*'.¹³ It is submitted, likewise, that the present dissertation precisely purported to re-examine IHL and, thereby, to ensure improved compliance therewith. Furthermore, although the ICRC Study has given rise to many articles, roundtable reports and even books, it has (as far as the present author could ascertain) not been considered emphatically from a natural law theoretical point of view. All the current expositions thereon emanate essentially from legal positivist approaches. This dissertation, therefore, provides the 'other' side of the theoretical debate, although it must be

¹² Sassoli and Bouvier 2006:86.

¹³ 2005:xvii-xviii.

indicated that the debates function on different levels. Accordingly, whereas all the literature on the ICRC Study (as far as could be determined) pertains to direct criticisms against the methodological approach and/or the postulated black-letter rules thereof, none have approached the subject from a reconsideration of the natural law virtues inherent to IHL. In this regard the present dissertation is unique. Furthermore, by approaching the ICRC Study from this axiomatic point of view, the present dissertation hopefully '*could even help go beyond the subject of war and spur us to think about the value of the principles on which the law is based in order to build universal peace – the utopian imperative*'. It is respectfully submitted that the present dissertation is a response to precisely this wish. In turn, the present dissertation could also contribute to a renewed interest and debate into these principles inherent to IHL. The importance and unique nature of the present dissertation is, therefore, apparent.

It seems appropriate to mention the statement of Tzvetan Todorov, namely: 'For evil to come into being, the actions of a few are not sufficient; it is also necessary that the vast majority stand aside, indifferent; of such behavior, as we know well, we are all of us capable'.¹⁴ If states and armed opposition groups are continuously allowed to circumvent or escape their duties under IHL through political, economic or whatever interest then it would seem inevitable that evil will occur. It is submitted that the ICRC Study significantly contributes to postulating a standard which applies to all parties in international and non-international armed conflicts. It is further opined that through the present dissertation this effort is enhanced by turning to an axiomatic perspective on IHL, namely natural law as embodied by various principles such as humanity and the protection of human dignity. Accordingly, it is hoped, that this axiomatic jurisprudential approach to IHL, when the ICRC Study and the present dissertation are viewed together, will ensure greater interest and deliberation to prevent the suffering and atrocities which are endemic to warfare.

It seems appropriate to conclude by supporting the words of Henry Dunant, which although they have already influenced IHL to a large extent, needs to do so still: '*...in an age when we hear so much of progress and civilization, is it not a matter of urgency,...., to press forward in a human and truly civilized spirit the attempt to prevent, or at least to alleviate, the horrors of war?*'¹⁵

¹⁴ Todorov 1996:139.

¹⁵ Dunant 1986:127.

APPENDIX - ICRC STUDY ON CUSTOMARY INTERNATIONAL HUMANITARIAN LAW LIST OF PROPOSED RULES¹

The Principle of Distinction

Distinction between Civilians and Combatants

Rule 1. The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians. [IAC/NIAC]²

Rule 2. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited. [IAC/NIAC]³

Rule 3. All members of the armed forces of a party to the conflict are combatants, except medical and religious personnel. [IAC]

Rule 4. The armed forces of a party to the conflict consist of all organized armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates. [IAC]

Rule 5. Civilians are persons who are not members of the armed forces. The civilian population comprises all persons who are civilians. [IAC/NIAC]

Rule 6. Civilians are protected against attack, unless and for such time as they take a direct part in hostilities. [IAC/NIAC]⁴

Distinction between Civilian Objects and Military Objectives

Rule 7. The parties to the conflict must at all times distinguish between civilian objects and military objectives. Attacks may only be directed against military objectives. Attacks must not be directed against civilian objects. [IAC/NIAC]

Rule 8. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose partial or total destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage. [IAC/NIAC]

Rule 9. Civilian objects are all objects that are not military objectives. [IAC/NIAC]

Rule 10. Civilian objects are protected against attack, unless and for such time as they are military objectives. [IAC/NIAC]⁵

Indiscriminate Attacks

Rule 11. Indiscriminate attacks are prohibited. [IAC/NIAC]

Rule 12. Indiscriminate attacks are those:

(a) which are not directed at a specific military objective;

¹ These black-letter rules emanate, of course, from Henckaerts and Doswald-Beck 2005:1-621. A list of these rules was also reproduced as an annex in Henckaerts 2005b:198-212.

² The comparisons between the substantive rules of the classical international law jurists and the proposed rules of the ICRC Study, which are footnoted throughout the appendix, were done by the present author. See also section 2.2 above. Hence, for proposed rule 1 compare Gentili 1933:251-252, 260 and 262, De Victoria 1917:171 and 178-179, Ayala 1912:33 and 44-45, De Vattel 1916:280 and 282-283, Wolff 1934:409-411 and Textor 1916:187-188 *vis-à-vis* the inviolability of women, children and the elderly in war. See also Suarez 1944:840 and 843-848, Grotius 1925:733-737, De Vattel 1916:283 and 318 as well as Rousseau 2007:31. Contrast Rachel 1916:186 and Van Bynkershoek 1930:16.

³ Compare Gentili 1933:319 and Wolff 1934:429.

⁴ Compare Gentili 1933:252, 260 and 262, De Victoria 1917:179, Grotius 1925:733-737 and Zouche 1911:180.

⁵ Compare Suarez 1944:845.

(b) which employ a method or means of combat which cannot be directed at a specific military objective; or

(c) which employ a method or means of combat the effects of which cannot be limited as required by international humanitarian law; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction. [IAC/NIAC]

Rule 13. Attacks by bombardment by any method or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects are prohibited. [IAC/NIAC]

Proportionality in Attack

Rule 14. Launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited. [IAC/NIAC]⁶

Precautions in Attack⁷

Rule 15. In the conduct of military operations, constant care must be taken to spare the civilian population, civilians and civilian objects. All feasible precautions must be taken to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects. [IAC/NIAC]

Rule 16. Each party to the conflict must do everything feasible to verify that targets are military objectives. [IAC/NIAC]

Rule 17. Each party to the conflict must take all feasible precautions in the choice of means and methods of warfare with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects. [IAC/NIAC]

Rule 18. Each party to the conflict must do everything feasible to assess whether the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated. [IAC/NIAC]

Rule 19. Each party to the conflict must do everything feasible to cancel or suspend an attack if it becomes apparent that the target is not a military objective or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated. [IAC/NIAC]

Rule 20. Each party to the conflict must give effective advance warning of attacks which may affect the civilian population, unless circumstances do not permit. [IAC/NIAC]

Rule 21. When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected must be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects. [IAC/arguably NIAC]⁸

Precautions against the Effects of Attacks

Rule 22. The parties to the conflict must take all feasible precautions to protect the civilian population and civilian objects under their control against the effects of attacks. [IAC/NIAC]

⁶ Compare De Victoria 1917:179, Belli 1936:131, Suarez 1944:845-848, Ayala 1912:108, Grotius 1925:600-601, De Vattel 1916:280, Wolff 1934:427, Textor 1916:186 and 191 as well as Rousseau 2007:31.

⁷ See generally Rousseau 2007:31.

⁸ Compare Ayala 1912:33.

Rule 23. Each party to the conflict must, to the extent feasible, avoid locating military objectives within or near densely populated areas. [IAC/arguably NIAC]

Rule 24. Each party to the conflict must, to the extent feasible, remove civilian persons and objects under its control from the vicinity of military objectives. [IAC/arguably NIAC]

Specifically Protected Persons and Objects

Medical and Religious Personnel and Objects

Rule 25. Medical personnel exclusively assigned to medical duties must be respected and protected in all circumstances. They lose their protection if they commit, outside their humanitarian function, acts harmful to the enemy. [IAC/NIAC]

Rule 26. Punishing a person for performing medical duties compatible with medical ethics or compelling a person engaged in medical activities to perform acts contrary to medical ethics is prohibited. [IAC/NIAC]

Rule 27. Religious personnel exclusively assigned to religious duties must be respected and protected in all circumstances. They lose their protection if they commit, outside their humanitarian function, acts harmful to the enemy. [IAC/NIAC]⁹

Rule 28. Medical units exclusively assigned to medical purposes must be respected and protected in all circumstances. They lose their protection if they are being used, outside their humanitarian function, to commit acts harmful to the enemy. [IAC/NIAC]

Rule 29. Medical transports assigned exclusively to medical transportation must be respected and protected in all circumstances. They lose their protection if they are being used, outside their humanitarian function, to commit acts harmful to the enemy. [IAC/NIAC]

Rule 30. Attacks directed against medical and religious personnel and objects displaying the distinctive emblems of the Geneva Conventions in conformity with international law are prohibited. [IAC/NIAC]

Humanitarian Relief Personnel and Objects

Rule 31. Humanitarian relief personnel must be respected and protected. [IAC/NIAC]

Rule 32. Objects used for humanitarian relief operations must be respected and protected. [IAC/NIAC]

Personnel and Objects Involved in a Peacekeeping Mission

Rule 33. Directing an attack against personnel and objects involved in a peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians and civilian objects under international humanitarian law, is prohibited. [IAC/NIAC]

Journalists

Rule 34. Civilian journalists engaged in professional missions in areas of armed conflict must be respected and protected as long as they are not taking a direct part in hostilities. [IAC/NIAC]

Protected Zones

⁹ Compare Gentili 1933:261, De Victoria 1917:179, Belli 1936:16-17 and 81, Suarez 1944:845, Ayala 1912:45 and Zouche 1911:181.

Rule 35. Directing an attack against a zone established to shelter the wounded, the sick and civilians from the effects of hostilities is prohibited. [IAC/NIAC]

Rule 36. Directing an attack against a demilitarized zone agreed upon between the parties to the conflict is prohibited. [IAC/NIAC]

Rule 37. Directing an attack against a non-defended locality is prohibited. [IAC/NIAC]

Cultural Property¹⁰

Rule 38. Each party to the conflict must respect cultural property:

A. Special care must be taken in military operations to avoid damage to buildings dedicated to religion, art, science, education or charitable purposes and historic monuments unless they are military objectives.

B. Property of great importance to the cultural heritage of every people must not be the object of attack unless imperatively required by military necessity. [IAC/NIAC]

Rule 39. The use of property of great importance to the cultural heritage of every people for purposes which are likely to expose it to destruction or damage is prohibited, unless imperatively required by military necessity. [IAC/NIAC]

Rule 40. Each party to the conflict must protect cultural property:

A. All seizure of or destruction or wilful damage done to institutions dedicated to religion, charity, education, the arts and sciences, historic monuments and works of art and science is prohibited.

B. Any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, property of great importance to the cultural heritage of every people is prohibited. [IAC/NIAC]

Rule 41. The occupying power must prevent the illicit export of cultural property from occupied territory and must return illicitly exported property to the competent authorities of the occupied territory. [IAC]

Works and Installations Containing Dangerous Forces

Rule 42. Particular care must be taken if works and installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations, and other installations located at or in their vicinity are attacked, in order to avoid the release of dangerous forces and consequent severe losses among the civilian population. [IAC/NIAC]

The Natural Environment

Rule 43. The general principles on the conduct of hostilities apply to the natural environment:

A. No part of the natural environment may be attacked, unless it is a military objective.

B. Destruction of any part of the natural environment is prohibited, unless required by imperative military necessity.

C. Launching an attack against a military objective which may be expected to cause incidental damage to the environment which would be excessive in relation to the concrete and direct military advantage anticipated is prohibited. [IAC/NIAC]

Rule 44. Methods and means of warfare must be employed with due regard to the protection and preservation of the natural environment. In the conduct of military operations, all feasible precautions must be taken to avoid, and in any event to minimize, incidental damage to the environment. Lack of scientific certainty as to the effects on the environment of certain military operations does not absolve a party to the conflict from taking such precautions. [IAC/arguably]

¹⁰ Compare Gentili 1933:270, Suarez 1944:845, Grotius 1925:751-753, De Vattel 1916:293-295, Zouche 1911:56 and 182, Wolff 1934:429 and Textor 1916:156, 191-192 and 306. Contrast Rachel 1916:186, but compare Rachel, *ibid* at 212.

NIAC]

Rule 45. The use of methods or means of warfare that are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment is prohibited. Destruction of the natural environment may not be used as a weapon. [IAC/arguably NIAC]

Specific Methods of Warfare

Denial of Quarter

Rule 46. Ordering that no quarter will be given, threatening an adversary therewith or conducting hostilities on this basis is prohibited. [IAC/NIAC]¹¹

Rule 47. Attacking persons who are recognized as *hors de combat* is prohibited. A person *hors de combat* is:

- (a) anyone who is in the power of an adverse party;
- (b) anyone who is defenceless because of unconsciousness, shipwreck, wounds or sickness; or
- (c) anyone who clearly expresses an intention to surrender; provided he or she abstains from any hostile act and does not attempt to escape. [IAC/NIAC]¹²

Rule 48. Making persons parachuting from an aircraft in distress the object of attack during their descent is prohibited. [IAC/NIAC]

Destruction and Seizure of Property

Rule 49. The parties to the conflict may seize military equipment belonging to an adverse party as war booty. [IAC]¹³

Rule 50. The destruction or seizure of the property of an adversary is prohibited, unless required by imperative military necessity. [IAC/NIAC]¹⁴

Rule 51. In occupied territory:

- (a) movable public property that can be used for military operations may be confiscated;
- (b) immovable public property must be administered according to the rule of usufruct; and
- (c) private property must be respected and may not be confiscated; except where destruction or seizure of such property is required by imperative military necessity. [IAC]¹⁵

Rule 52. Pillage is prohibited. [IAC/NIAC]¹⁶

Starvation and Access to Humanitarian Relief

Rule 53. The use of starvation of the civilian population as a method of warfare is prohibited. [IAC/NIAC]¹⁷

Rule 54. Attacking, destroying, removing or rendering useless objects indispensable to the survival

¹¹ Compare Da Legnano 1917:254 and De Vattel 1916:280.

¹² Compare Da Legnano 1917:254 and 274, De Victoria 1917:182-183, Suarez 1944:850, Grotius 1925:737-740, De Vattel 1916:280 and 284, Zouche 1911:55, Wolff 1934:409-412, Textor 1916:187-189 and 303 as well as Rousseau 2007:31. See also generally Gentili 1933:209-210, 216, 223, 285, 322-325 and 327. Contrast Rachel 1916:186 and Van Bynkershoek 1930:16.

¹³ Compare De Victoria 1917:180, Suarez 1944:840, Ayala 1912:36-39, De Vattel 1916:292, Gentili 1933:315, Wolff 1934:439-440, Textor 1916:197-198, Van Bynkershoek 1930:31 and Pufendorf 1934:1311.

¹⁴ Compare Belli 1936:131.

¹⁵ Compare De Victoria 1917:180.

¹⁶ Compare De Victoria 1917:185, Belli 1936:131, De Vattel 1916:292, Wolff 1934:438-439 and Pufendorf 1934:1311. Contrast and compare Rachel 1916:186 and 212 respectively.

¹⁷ Contrast Wolff 1934:451.

of the civilian population is prohibited. [IAC/NIAC]¹⁸

Rule 55. The parties to the conflict must allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need, which is impartial in character and conducted without any adverse distinction, subject to their right of control. [IAC/NIAC]

Rule 56. The parties to the conflict must ensure the freedom of movement of authorized humanitarian relief personnel essential to the exercise of their functions. Only in case of imperative military necessity may their movements be temporarily restricted. [IAC/NIAC]

Deception

Rule 57. Ruses of war are not prohibited as long as they do not infringe a rule of international humanitarian law. [IAC/NIAC]¹⁹

Rule 58. The improper use of the white flag of truce is prohibited. [IAC/NIAC]

Rule 59. The improper use of the distinctive emblems of the Geneva Conventions is prohibited. [IAC/NIAC]

Rule 60. The use of the United Nations emblem and uniform is prohibited, except as authorized by the organization. [IAC/NIAC]

Rule 61. The improper use of other internationally recognized emblems is prohibited. [IAC/NIAC]

Rule 62. Improper use of the flags or military emblems, insignia or uniforms of the adversary is prohibited. [IAC/arguably NIAC]

Rule 63. Use of the flags or military emblems, insignia or uniforms of neutral or other States not party to the conflict is prohibited. [IAC/arguably NIAC]

Rule 64. Concluding an agreement to suspend combat with the intention of attacking by surprise the enemy relying on that agreement is prohibited. [IAC/NIAC]

Rule 65. Killing, injuring or capturing an adversary by resort to perfidy is prohibited. [IAC/NIAC]²⁰

Communication with the Enemy

Rule 66. Commanders may enter into non-hostile contact through any means of communication. Such contact must be based on good faith. [IAC/NIAC]

Rule 67. *Parlementaires* are inviolable. [IAC/NIAC]

Rule 68. Commanders may take the necessary precautions to prevent the presence of a *parlementaire* from being prejudicial. [IAC/NIAC]

Rule 69. *Parlementaires* taking advantage of their privileged position to commit an act contrary to international law and detrimental to the adversary lose their inviolability. [IAC/NIAC]

Weapons

General Principles on the Use of Weapons

Rule 70. The use of means and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering is prohibited. [IAC/NIAC]²¹

¹⁸ Compare De Vattel 1916:292-293 and Gentili 1933:275.

¹⁹ Compare Da Legnano 1917:271, Gentili 1933:142-143 and 148, Belli 1936:88-89, Suarez 1944:852, Ayala 1912:84-87, Grotius 1925:605-622 and 662, De Vattel 1916:298, Zouche 1911:172-173, Wolff 1934:442-443, Textor 1916:160 and 186, Rachel 1916:186, Van Bynkershoek 1930:16-17 as well as Pufendorf 1934:1297 and 1308.

²⁰ Compare De Vattel 1916:298, Rachel 1916:186, Van Bynkershoek 1930:16-17 and Pufendorf 1934:1297.

²¹ Compare Gentili 1933:155-159, Grotius 1925:652-653, De Vattel 1916:280 and 289, Zouche 1911:174 and Wolff 1934:450-451.

Rule 71. The use of weapons which are by nature indiscriminate is prohibited. [IAC/NIAC]²²

Poison

Rule 72. The use of poison or poisoned weapons is prohibited. [IAC/NIAC]²³

Biological Weapons

Rule 73. The use of biological weapons is prohibited. [IAC/NIAC]

Chemical Weapons

Rule 74. The use of chemical weapons is prohibited. [IAC/NIAC]

Rule 75. The use of riot-control agents as a method of warfare is prohibited. [IAC/NIAC]

Rule 76. The use of herbicides as a method of warfare is prohibited if they:

- (a) are of a nature to be prohibited chemical weapons;
- (b) are of a nature to be prohibited biological weapons;
- (c) are aimed at vegetation that is not a military objective;
- (d) would cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which may be expected to be excessive in relation to the concrete and direct military advantage anticipated; or
- (e) would cause widespread, long-term and severe damage to the natural environment. [IAC/NIAC]

Expanding Bullets

Rule 77. The use of bullets which expand or flatten easily in the human body is prohibited. [IAC/NIAC]

Exploding Bullets

Rule 78. The anti-personnel use of bullets which explode within the human body is prohibited. [IAC/NIAC]

Weapons Primarily Injuring by Non-detectable Fragments

Rule 79. The use of weapons the primary effect of which is to injure by fragments which are not detectable by X-rays in the human body is prohibited. [IAC/NIAC]

Booby-traps

Rule 80. The use of booby-traps which are in any way attached to or associated with objects or persons entitled to special protection under international humanitarian law or with objects that are likely to attract civilians is prohibited. [IAC/NIAC]

Landmines

²² Compare Gentili 1933:155-159, Grotius 1925:652-653, De Vattel 1916:280-289, Zouche 1911:174, Wolff 1934:450-451 and Rachel 1916:186 regarding poisoned springs.

²³ Compare Gentili 1933:155-159, Belli 1936:89, Grotius 1925:651-653, De Vattel 1916:289, Zouche 1911:174, Textor 1916:160 and 186-187 as well as Rachel 1916:186, 210 and 212. Contrast Wolff 1934:450 and Van Bynkershoek 1930:16.

Rule 81. When landmines are used, particular care must be taken to minimize their indiscriminate effects. [IAC/NIAC]

Rule 82. A party to the conflict using landmines must record their placement, as far as possible. [IAC/arguably NIAC]

Rule 83. At the end of active hostilities, a party to the conflict which has used landmines must remove or otherwise render them harmless to civilians, or facilitate their removal. [IAC/NIAC]

Incendiary Weapons

Rule 84. If incendiary weapons are used, particular care must be taken to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects. [IAC/NIAC]

Rule 85. The anti-personnel use of incendiary weapons is prohibited, unless it is not feasible to use a less harmful weapon to render a person *hors de combat*. [IAC/NIAC]

Blinding Laser Weapons

Rule 86. The use of laser weapons that are specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision is prohibited. [IAC/NIAC]

Treatment of Civilians and Persons Hors de Combat

Fundamental Guarantees²⁴

Rule 87. Civilians and persons *hors de combat* must be treated humanely. [IAC/NIAC]²⁵

Rule 88. Adverse distinction in the application of international humanitarian law based on race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria is prohibited. [IAC/NIAC]²⁶

Rule 89. Murder is prohibited. [IAC/NIAC]²⁷

Rule 90. Torture, cruel or inhuman treatment and outrages upon personal dignity, in particular humiliating and degrading treatment, are prohibited. [IAC/NIAC]²⁸

Rule 91. Corporal punishment is prohibited. [IAC/NIAC]²⁹

Rule 92. Mutilation, medical or scientific experiments or any other medical procedure not indicated by the state of health of the person concerned and not consistent with generally accepted medical standards are prohibited. [IAC/NIAC]³⁰

²⁴ See generally Rousseau 2007:31.

²⁵ Compare Gentili 1933:209-210, 216, 223, 285, 322-325 and 327, De Victoria 1917:182-183, Suarez 1944:850, Grotius 1925:733-740, De Vattel 1916:280-284, Zouche 1911:55, Wolff 1934:409-412 as well as Textor 1916:187-189 and 303. See also Gentili, *ibid* at 257, regarding outrages on the honour of women. Contrast Rachel 1916:186 and Van Bynkershoek 1930:16.

²⁶ Compare Gentili 1933:274 and 333.

²⁷ Compare Gentili 1933:171, De Victoria 1917:182-183, Suarez 1944:850, Grotius 1925:737-739, De Vattel 1916:280-284, Zouche 1911:55, Wolff 1934:409-412 as well as Textor 1916:187-188, 191 and 303. Contrast Rachel 1916:186 and Van Bynkershoek 1930:16.

²⁸ Compare Gentili 1933:285, De Victoria 1917:182-183, Belli 1936:85-86 and 186-187, Grotius 1925:763-764, De Vattel 1916:280-284 and Wolff 1934:409-411. See also Gentili, *ibid* at 257, regarding outrages on the honour of women.

²⁹ Compare Gentili 1933:285.

³⁰ Compare Gentili 1933:285.

- Rule 93.** Rape and other forms of sexual violence are prohibited. [IAC/NIAC]³¹
- Rule 94.** Slavery and the slave trade in all their forms are prohibited. [IAC/NIAC]
- Rule 95.** Uncompensated or abusive forced labour is prohibited. [IAC/NIAC]
- Rule 96.** The taking of hostages is prohibited. [IAC/NIAC]³²
- Rule 97.** The use of human shields is prohibited. [IAC/NIAC]
- Rule 98.** Enforced disappearance is prohibited. [IAC/NIAC]
- Rule 99.** Arbitrary deprivation of liberty is prohibited. [IAC/NIAC]
- Rule 100.** No one may be convicted or sentenced, except pursuant to a fair trial affording all essential judicial guarantees. [IAC/NIAC]
- Rule 101.** No one may be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time it was committed; nor may a heavier penalty be imposed than that which was applicable at the time the criminal offence was committed. [IAC/NIAC]
- Rule 102.** No one may be convicted of an offence except on the basis of individual criminal responsibility. [IAC/NIAC]
- Rule 103.** Collective punishments are prohibited. [IAC/NIAC]
- Rule 104.** The convictions and religious practices of civilians and persons *hors de combat* must be respected. [IAC/NIAC]
- Rule 105.** Family life must be respected as far as possible. [IAC/NIAC]

Combatants and Prisoner-of-War Status

- Rule 106.** Combatants must distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. If they fail to do so, they do not have the right to prisoner-of-war status. [IAC]
- Rule 107.** Combatants who are captured while engaged in espionage do not have the right to prisoner-of-war status. They may not be convicted or sentenced without previous trial. [IAC]
- Rule 108.** Mercenaries, as defined in Additional Protocol I, do not have the right to combatant or prisoner-of-war status. They may not be convicted or sentenced without previous trial. [IAC]

The Wounded, Sick and Shipwrecked

- Rule 109.** Whenever circumstances permit, and particularly after an engagement, each party to the conflict must, without delay, take all possible measures to search for, collect and evacuate the wounded, sick and shipwrecked without adverse distinction. [IAC/NIAC]
- Rule 110.** The wounded, sick and shipwrecked must receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition. No distinction may be made among them founded on any grounds other than medical ones. [IAC/NIAC]
- Rule 111.** Each party to the conflict must take all possible measures to protect the wounded, sick and shipwrecked against ill-treatment and against pillage of their personal property. [IAC/NIAC]

The Dead

- Rule 112.** Whenever circumstances permit, and particularly after an engagement, each party to the conflict must, without delay, take all possible measures to search for, collect and evacuate the dead

³¹ Compare Gentili 1933:257 and 285, Grotius 1925:656-657, Zouche 1911:180-181, Wolff 1934:449, Textor 1916:190, 303 and 306 as well as Van Bynkershoek 1930:29.

³² Compare Ayala 1912:33.

without adverse distinction. [IAC/NIAC]³³

Rule 113. Each party to the conflict must take all possible measures to prevent the dead from being despoiled. Mutilation of dead bodies is prohibited. [IAC/NIAC]³⁴

Rule 114. Parties to the conflict must endeavour to facilitate the return of the remains of the deceased upon request of the party to which they belong or upon the request of their next of kin. They must return their personal effects to them. [IAC]³⁵

Rule 115. The dead must be disposed of in a respectful manner and their graves respected and properly maintained. [IAC/NIAC]³⁶

Rule 116. With a view to the identification of the dead, each party to the conflict must record all available information prior to disposal and mark the location of the graves. [IAC/NIAC]

Missing Persons

Rule 117. Each party to the conflict must take all feasible measures to account for persons reported missing as a result of armed conflict and must provide their family members with any information it has on their fate. [IAC/NIAC]

Persons Deprived of Their Liberty

Rule 118. Persons deprived of their liberty must be provided with adequate food, water, clothing, shelter and medical attention. [IAC/NIAC]

Rule 119. Women who are deprived of their liberty must be held in quarters separate from those of men, except where families are accommodated as family units, and must be under the immediate supervision of women. [IAC/NIAC]

Rule 120. Children who are deprived of their liberty must be held in quarters separate from those of adults, except where families are accommodated as family units. [IAC/NIAC]

Rule 121. Persons deprived of their liberty must be held in premises which are removed from the combat zone and which safeguard their health and hygiene. [IAC/NIAC]

Rule 122. Pillage of the personal belongings of persons deprived of their liberty is prohibited. [IAC/NIAC]

Rule 123. The personal details of persons deprived of their liberty must be recorded. [IAC/NIAC]

Rule 124.

A. In international armed conflicts, the ICRC must be granted regular access to all persons deprived of their liberty in order to verify the conditions of their detention and to restore contacts between those persons and their families. [IAC]

B. In non-international armed conflicts, the ICRC may offer its services to the parties to the conflict with a view to visiting all persons deprived of their liberty for reasons related to the conflict in order to verify the conditions of their detention and to restore contacts between those persons and their families. [NIAC]

Rule 125. Persons deprived of their liberty must be allowed to correspond with their families, subject to reasonable conditions relating to frequency and the need for censorship by the authorities. [IAC/NIAC]

Rule 126. Civilian internees and persons deprived of their liberty in connection with a non-

³³ Compare, generally, Gentili 1933:278-280, De Vattel 1916:322, Zouche 1911:56, Textor 1916:151-152 and 157 as well as Van Bynkershoek 1930:29.

³⁴ Compare Gentili 1933:278-280, Wolff 1934:429, Textor 1916:151-152 and 157, Rachel 1916:186, Van Bynkershoek 1930:29 and Pufendorf 1934:229.

³⁵ Compare Van Bynkershoek 1930:29.

³⁶ Compare, generally, Gentili 1933:278-280, Grotius 1925:450-461 and 662, De Vattel 1916:322, Zouche 1911:56, Textor 1916:151-152 and 157, Van Bynkershoek 1930:29 and Pufendorf 1934:229.

international armed conflict must be allowed to receive visitors, especially near relatives, to the degree practicable.

Rule 127. The personal convictions and religious practices of persons deprived of their liberty must be respected. [IAC/NIAC]

Rule 128.

A. Prisoners of war must be released and repatriated without delay after the cessation of active hostilities. [IAC]

B. Civilian internees must be released as soon as the reasons which necessitated internment no longer exist, but at the latest as soon as possible after the close of active hostilities. [IAC]

C. Persons deprived of their liberty in relation to a non-international armed conflict must be released as soon as the reasons for the deprivation of their liberty cease to exist. [NIAC]

The persons referred to may continue to be deprived of their liberty if penal proceedings are pending against them or if they are serving a sentence lawfully imposed.

Displacement and Displaced Persons

Rule 129.

A. Parties to an international armed conflict may not deport or forcibly transfer the civilian population of an occupied territory, in whole or in part, unless the security of the civilians involved or imperative military reasons so demand. [IAC]

B. Parties to a non-international armed conflict may not order the displacement of the civilian population, in whole or in part, for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand. [NIAC]

Rule 130. States may not deport or transfer parts of their own civilian population into a territory they occupy. [IAC]

Rule 131. In case of displacement, all possible measures must be taken in order that the civilians concerned are received under satisfactory conditions of shelter, hygiene, health, safety and nutrition and that members of the same family are not separated. [IAC/NIAC]

Rule 132. Displaced persons have a right to voluntary return in safety to their homes or places of habitual residence as soon as the reasons for their displacement cease to exist. [IAC/NIAC]

Rule 133. The property rights of displaced persons must be respected. [IAC/NIAC]

Other Persons Afforded Specific Protection³⁷

Rule 134. The specific protection, health and assistance needs of women affected by armed conflict must be respected. [IAC/NIAC]

Rule 135. Children affected by armed conflict are entitled to special respect and protection. [IAC/NIAC]

Rule 136. Children must not be recruited into armed forces or armed groups. [IAC/NIAC]³⁸

Rule 137. Children must not be allowed to take part in hostilities. [IAC/NIAC]³⁹

Rule 138. The elderly, disabled and infirm affected by armed conflict are entitled to special respect and protection. [IAC/NIAC]⁴⁰

Implementation

³⁷ Compare Gentili 1933:251-252, 260 and 262, De Victoria 1917:179, Suarez 1944:843-848, Ayala 1912:33 and 44-45, De Vattel 1916:238, Wolff 1934:409-411 and Textor 1916:187-188. Contrast Rachel 1916:186.

³⁸ Compare Belli 1936:15 and Wolff 1934:387.

³⁹ Compare Belli 1936:15 and Wolff 1934:387.

⁴⁰ Compare Belli 1936:15 and Wolff 1934:387.

Compliance with International Humanitarian Law

Rule 139. Each party to the conflict must respect and ensure respect for international humanitarian law by its armed forces and other persons or groups acting in fact on its instructions, or under its direction or control. [IAC/NIAC]

Rule 140. The obligation to respect and ensure respect for international humanitarian law does not depend on reciprocity. [IAC/NIAC]

Rule 141. Each State must make legal advisers available, when necessary, to advise military commanders at the appropriate level on the application of international humanitarian law. [IAC/NIAC]

Rule 142. States and parties to the conflict must provide instruction in international humanitarian law to their armed forces. [IAC/NIAC]

Rule 143. States must encourage the teaching of international humanitarian law to the civilian population. [IAC/NIAC]

Enforcement of International Humanitarian Law

Rule 144. States may not encourage violations of international humanitarian law by parties to an armed conflict. They must exert their influence, to the degree possible, to stop violations of international humanitarian law. [IAC/NIAC]

Rule 145. Where not prohibited by international law, belligerent reprisals are subject to stringent conditions. [IAC]

Rule 146. Belligerent reprisals against persons protected by the Geneva Conventions are prohibited. [IAC]

Rule 147. Reprisals against objects protected under the Geneva Conventions and Hague Convention for the Protection of Cultural Property are prohibited. [IAC]

Rule 148. Parties to non-international armed conflicts do not have the right to resort to belligerent reprisals. Other countermeasures against persons who do not or who have ceased to take a direct part in hostilities are prohibited. [NIAC]

Responsibility and Reparation

Rule 149. A State is responsible for violations of international humanitarian law attributable to it, including:

- (a) violations committed by its organs, including its armed forces;
- (b) violations committed by persons or entities it empowered to exercise elements of governmental authority;
- (c) violations committed by persons or groups acting in fact on its instructions, or under its direction or control; and
- (d) violations committed by private persons or groups which it acknowledges and adopts as its own conduct. [IAC/NIAC]

Rule 150. A State responsible for violations of international humanitarian law is required to make full reparation for the loss or injury caused. [IAC/NIAC]

Individual Responsibility

Rule 151. Individuals are criminally responsible for war crimes they commit. [IAC/NIAC]⁴¹

Rule 152. Commanders and other superiors are criminally responsible for war crimes committed

⁴¹ Compare De Victoria 1917:173, Belli 1936:63-64, Suarez 1944:832-833, Gentili 1933:126 and De Vattel 1916:303.

pursuant to their orders. [IAC/NIAC]

Rule 153. Commanders and other superiors are criminally responsible for war crimes committed by their subordinates if they knew, or had reason to know, that the subordinates were about to commit or were committing such crimes and did not take all necessary and reasonable measures in their power to prevent their commission, or if such crimes had been committed, to punish the persons responsible. [IAC/NIAC]⁴²

Rule 154. Every combatant has a duty to disobey a manifestly unlawful order. [IAC/NIAC]⁴³

Rule 155. Obeying a superior order does not relieve a subordinate of criminal responsibility if the subordinate knew that the act ordered was unlawful or should have known because of the manifestly unlawful nature of the act ordered. [IAC/NIAC]⁴⁴

War Crimes

Rule 156. Serious violations of international humanitarian law constitute war crimes. [IAC/NIAC]

Rule 157. States have the right to vest universal jurisdiction in their national courts over war crimes. [IAC/NIAC]

Rule 158. States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects. [IAC/NIAC]

Rule 159. At the end of hostilities, the authorities in power must endeavour to grant the broadest possible amnesty to persons who have participated in a non-international armed conflict, or those deprived of their liberty for reasons related to the armed conflict, with the exception of persons suspected of, accused of or sentenced for war crimes. [NIAC]

Rule 160. Statutes of limitation may not apply to war crimes. [IAC/NIAC]

Rule 161. States must make every effort to cooperate, to the extent possible, with each other in order to facilitate the investigation of war crimes and the prosecution of the suspects. [IAC/NIAC]

⁴² Possibly compare Pufendorf 1934:1304.

⁴³ Compare De Victoria 1917:173, Belli 1936:63-64, Suarez 1944:832-833, Gentili 1933:126 and De Vattel 1916:303.

⁴⁴ Compare De Victoria 1917:173, Belli 1936:63-64, Suarez 1944:832-833 and Gentili 1933:126.

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ABSTRACT

International humanitarian law (IHL) strives to improve and protect human dignity during the most tumultuous periods known to mankind. As such, every endeavour to strengthen and enhance the functioning of this branch of law must be pursued and supported. The ICRC Study on Customary International Humanitarian Law (CIHL) was precisely such an endeavour. This Study found that very many IHL rules have been subsumed by CIHL, thus applying irrespective of treaty ratification, and that the rules applicable in international armed conflicts were converging with those applicable in non-international armed conflicts. However, this Study and its attendant literature have refrained from returning to a theoretical reconsideration of the normative foundation of IHL and, by extension, CIHL. The present dissertation aims to fill this theoretical *lacuna* and, in the process, to re-establish natural law principles and, in particular, considerations of humanity, as the *raison d'être* of and motivating factor for IHL. Accordingly, the dissertation pursues the natural law principle of humanity through its practical and theoretical development, before investigating its possible application through the Martens clause, norms of *ius cogens* and obligations *erga omnes*. Since the objective is to elucidate the essential foundation of IHL to better comprehend its customary source, the interconnectedness between IHL, CIHL and natural law principles, like humanity, is emphasised. In the process, the dissertation also enters the debate regarding the necessary methodological approach for CIHL ascertainment and postulates a normative, transcendental approach in this regard. Subsequently, the ICRC Study on CIHL is evaluated through the natural law paradigm established in the dissertation, which seemingly has not yet occurred in international legal literature.

OPSOMMING

Internasionale Humanitêre reg strewende daarna om menswaardigheid te verbeter en te beskerm tydens die onstuimigste tye bekend aan die mens. As sodanig, moet elke onderneming om die werking van hierdie vertakking van die reg te versterk en te verhef ondersoek en ondersteun word. Die Internasionale Komitee van die Rooi Kruis (IKRK) se Studie oor Internasionale Humanitêre Gewoontereg (IHG) was juis só 'n onderneming. Die Studie het gevind dat baie Internasionale Humanitêre regreëls opgeneem is deur IHG, en dus toepassing vind ongeag of die ooreenstemmende verdrae geratifiseer was, asook dat die reëls wat toepassing vind in internasionale

gewapende konflikte nader beweeg het aan die reels wat toepassing vind in nie-internasionale gewapende konflikte. Hierdie Studie en die gepaardgaande literatuur het egter nagelaat om na 'n teoretiese heroorweging van die normatiewe grondslag van Internasionale Humanitêre reg en, per implikasie, IHG terug te keer. Die huidige verhandeling beoog om hierdie teoretiese gaping te vul en sodoende natuurregsbeginsels en, veral, oorwegings van menslikheid (*humanity*) te hervestig as die grondliggende beginsel en motiverende factor van Internasionale Humanitêre reg. Die verhandeling ondersoek die natuurregsbeginsel van menslikheid deur die praktiese en teoretiese ontwikkeling daarvan, voordat die moontlike toepassing daarvan met behulp van die Martens klousule, norme van *ius cogens* en verpligtinge *erga omnes* ondersoek word. Aangesien die doel is om die essensiële grondslag van Internasionale Humanitêre reg te ondersoek ten einde die gewoonteregtelike bron daarvan beter te verstaan, word die interafhanklikheid van Internasionale Humanitêre reg, IHG en natuurregsbeginsels, soos menslikheid, deurgaans beklemtoon. Sodoende betree die verhandeling die debat rakende die gepaste metode om IHG vas te stel en opper 'n normatiewe, transendentale benadering tot dien effekte. Hierna word die IKRK se Studie ondersoek in die lig van die natuurreg paradigma wat in die verhandeling voorgehou is, wat oënskynlik nog nie in internasionale regsliteratuur gebeur het nie.

KEY WORDS

International humanitarian law (IHL)

Humanity

Customary international law (CIL)

Customary international humanitarian law (CIHL)

ICRC Study on Customary International Humanitarian Law

Lex ferenda

Martens clause

Natural law

Obligations *erga omnes*

Opinio iuris

Usus (state practice)

Ius cogens

Ius in bello

International Court of Justice

International Criminal Tribunal for the Former Yugoslavia (ICTY)

International human rights

International law

Legal positivism