

THE UNIVERSALITY OF IHL – SURMOUNTING THE LAST BASTION OF THE PACIFIC

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In a special edition of the VUWLR on the 60th anniversary of the four Geneva Conventions of 1949, it is timely to reflect on the achievements that have come about in the Pacific region, and why this is a cause for celebration. Nonetheless, there are other major international humanitarian law (IHL) instruments developed in the last 60 years which are yet to achieve universal ratification. In the Pacific, in particular, it is often difficult to demonstrate how IHL is relevant. This article addresses the challenges that the Pacific region poses in terms of IHL ratification and discusses how IHL instruments are indeed pertinent to the Pacific context, focusing on the three Additional Protocols to the Geneva Conventions, the Convention on the Prohibition of Anti-Personnel Mines and the Rome Statute of the International Criminal Court. It concludes that in the Pacific these challenges should be seen as opportunities to address historical and current problems associated with war and that, by the next major anniversary, the Pacific might be, if not leading the way, at least not lagging behind.

I THE GENEVA CONVENTIONS IN THE PACIFIC

On 12 August 2009, the Geneva Conventions on the protection of victims of armed conflict turned 60. The horrors of World War II prompted the international community to substantially revise the existing three Geneva Conventions and a fourth convention was added dealing with the protection of civilians in armed conflict. Over the last 60 years, these four Conventions have become the bedrock of modern international humanitarian law (IHL),¹ supplemented over time by

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1 Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (opened for signature 12 August 1949, entered into force 21 October 1950) [Convention I]; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (opened for signature 12 August 1949, entered into force 21 October 1950) [Convention II]; Convention (III) relative to the Treatment of Prisoners of War (opened for signature 12 August 1949, entered into force 21 October 1950) [Convention III]; Convention (IV) relative to the Protection of Civilian Persons in Time of War (opened for signature 12 August 1949, entered into force 21 October 1950) [Convention IV].

the now three Additional Protocols to the Geneva Conventions,² weapons treaties such as the recent Cluster Munitions Convention³ and the Convention on the Prohibition of Anti-Personnel Mines (Anti-Personnel Mine Ban Convention),⁴ and international criminal law treaties, such as the Rome Statute of the International Criminal Court (Rome Statute)⁵ which draws considerably on the "grave breaches" provisions of the Geneva Conventions and Additional Protocol I and prohibits other serious violations of the Conventions.

Since 2006, the Geneva Conventions have been internationally binding on all States in the world. On 27 June 2006, the four Geneva Conventions of 1949 achieved universal acceptance. It was Nauru, a small, but close Pacific neighbour of New Zealand, which led the Geneva Conventions to universality on this date. Nauru was the 193rd State to become a party to these fundamental multilateral IHL treaties.⁶ Sixty years after they were adopted on 12 August 1949, the Geneva Conventions are among the few universally ratified treaties in the world.⁷ The United Nations (UN) Charter, for example, has 192 parties. Interestingly, the Cook Islands, also in the Pacific, is one of the two parties to the Geneva Conventions which are not parties to the UN Charter; the other is the Holy See.⁸

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- 2 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (opened for signature 8 June 1977, entered into force 7 December 1978) [Additional Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (opened for signature 8 June 1977, entered into force 7 December 1978) [Additional Protocol II]; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III) (opened for signature 8 December 2005, entered into force 14 January 2007).
 - 3 Convention on Cluster Munitions (opened for signature 3 December 2008, entered into force 1 August 2010).
 - 4 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (opened for signature 18 September 1997, entered into force 1 March 1999) [Anti-Personnel Mine Ban Convention].
 - 5 Rome Statute of the International Criminal Court (opened for signature 17 July 1998, entered into force 1 July 2002) [Rome Statute].
 - 6 Montenegro succeeded to the Geneva Conventions on its secession from Serbia in August 2006, bringing the total to 194 State parties.
 - 7 The Vienna Convention on the Protection of the Ozone Layer (opened for signature 22 March 1985, entered into force 22 September 1988) and its Montreal Protocol on Substances that Deplete the Ozone Layer (opened for signature 16 September 1987, entered into force 1 January 1989, amended in 1990 and 1992), for example, also have been universally ratified.
 - 8 Niue, a non-United Nations member, is also a party to the Geneva Conventions through New Zealand's ratification of the Geneva Conventions in 1959: see note at the bottom of "State Parties to the Geneva Conventions of 12 August 1949" <www.icrc.org>.

The International Committee of the Red Cross (ICRC), which had its origins on the battlefield in Italy in 1859 (and subsequently in conference halls in Geneva),⁹ derives its modern international mandate to protect and assist victims of both international and non-international armed conflict from the Geneva Conventions¹⁰ and their two 1977 Additional Protocols¹¹ supplemented by Statutes of the International Red Cross and Red Crescent Movement, adopted by all State parties to the Geneva Conventions.¹² With the universality of the Geneva Conventions, not only is the mandate of the ICRC accepted by all States, but so also are the fundamental principles of IHL of which the ICRC is the mandated guardian.

The ICRC will not rest on its laurels after the achievement of the universality of the Geneva Conventions.¹³ There are many other IHL treaties that are yet to reach universal status, such as those relating to international criminal law, weapons and non-international armed conflict. In many contexts of armed conflict and violence around the world today, questions are being raised as to the relevance of the Geneva Conventions and other IHL treaties to new types of, and actors in, conflicts.¹⁴

In the Pacific, we face a different challenge of relevance. Despite the achievement of universality of the Geneva Conventions, the fact that it was Nauru, with a population of less than 13,000 and no military, that made the Conventions universal is cause for reflection. Does IHL really matter to States with no military capacity, experiencing few armed conflicts and not producing any weapons? The delay in becoming a party to the Geneva Conventions by many States in the Pacific suggests that that the latter might not perceive IHL as particularly relevant in their context.

While the achievement of the universal nature of the Geneva Conventions is a cause for celebration for the ICRC, non-observance of IHL continues. Therefore, this milestone simply remains a global benchmark against which we must measure implementation. This article discusses why achieving universality of the Geneva Conventions and the major IHL instruments developed in the last 60 years is important. It then turns to the challenges that face IHL in the Pacific region and

9 See Henry Dunant *A Memory of Solferino* (International Committee of the Red Cross (ICRC), Geneva, 1862, reprinted 1986).

10 Convention I, Convention II and Convention III, above n 1, common arts 3, 9 and 10; Convention IV, above n 1, arts 10-11.

11 Additional Protocol I and Additional Protocol II, above n 2.

12 Statutes of the International Red Cross and Red Crescent Movement (adopted by the 25th International Conference of the Red Cross in 1986, amended in 1995 and 2006) <www.icrc.org>.

13 Address by Jakob Kellenberger, President of the ICRC "Sixty years of the Geneva Conventions: learning from the past to better face the future" (Ceremony to celebrate the 60th anniversary of the Geneva Conventions, Geneva, 12 August 2009).

14 See for example the arguments of the United States Administration in *Hamdan v Rumsfeld* (2006) 548 US 557 at 565.

how IHL instruments can be made relevant in the Pacific, focusing on the two 1977 Additional Protocols to the Geneva Conventions, the Anti-Personnel Mine Ban Convention and the Rome Statute. The challenges of implementation are dealt with briefly, but it is beyond the scope of this article to address the different ways in which the treaties dealt with can be implemented into domestic law.

II THE VALUE OF UNIVERSAL RECOGNITION OF IHL

It took more than 55 years to attain universal recognition of the Geneva Conventions, but now achieved, it means that the basic and fundamental instruments relating to international and (to a certain extent) non-international armed conflict are now accepted by every country in the world. All persons not directly participating in hostilities now have equal protection and, to a more limited degree, rights in international armed conflicts around the world. There is also an argument to be made that most of the protections in the Geneva Conventions relating to international armed conflict equally apply in non-international armed conflict.¹⁵ Each government worldwide has agreed that there are limits to wars, that wars have to be regulated, and that the Geneva Conventions provide a good basis on which to regulate them. It is noteworthy that four treaties that severely constrain States in how they conduct themselves in armed conflict, thus restricting a fundamental exercise of their sovereignty, are accepted by all. Possibly, it is because commencing an armed conflict is already limited under the UN Charter, to which most are party; in effect, war is already seen as the last resort in diplomatic relations.¹⁶ In this regard, IHL does not limit States in their right to go to war; it merely limits their behaviour when already engaged in war. States recognise that wars generally cause a great deal of suffering; they, therefore, recognise that it is preferable that any suffering be limited to those engaged in the combat. This is where IHL applies.

IHL applies to all parties to the conflict, because it is only they who have the capacity to limit the effects of war on the battlefield. These parties must ensure that all civilians are protected from the effects of the armed conflict as far as military necessity and proportionality allow, which include permitting the ICRC to assist and provide protection to the victims of the armed conflict. It is essential, therefore, that IHL treaties attain universal recognition, as this is a vital step towards ensuring that all parties to the conflict fulfil the obligations laid down in them. Only when all States have pledged compliance with all the instruments that comprise the core of IHL will it be possible to ensure at least minimum protection for all victims of armed conflict.

15 See for example ICRC "Interpretive Guidance on Direct Participation in Hostilities under International Humanitarian Law: Adopted by the Assembly of the International Committee of the Red Cross on 26 February 2009" (2008) 872 IRRC 991 at 997. See also Jean-Marie Henckaerts and Louise Doswald-Beck (eds) *Customary International Humanitarian Law* (Cambridge University Press and ICRC, Cambridge, 2005) vol 1.

16 Charter of the United Nations, art 2(4) and ch VII.

Strengthening IHL has three main benefits. First, States will have strict obligations to adhere to IHL in the conduct of the armed conflict, in the production and use of weapons and in ensuring access to victims of the conflict. Second, if the parties to the conflict do not adhere to IHL, the relevant individuals can be criminally prosecuted domestically or internationally for war crimes committed during the conflict. Third, States which are not necessarily themselves affected by a given conflict can demonstrate support for the application of IHL in conflicts occurring around the world by signing up to the treaties. However, these three arguments need to have direct relevance to the State that is adhering to the IHL treaties, particularly where there are limited armies and conflicts, such as in the Pacific, and a realistic approach must be taken to persuade governments of the benefits of universality of IHL treaties.

III THE CHALLENGES OF THE PACIFIC REGION AND ENSURING CONTINUED RELEVANCE

In the Pacific, the ICRC maintains a Regional Delegation, based in Suva, Fiji, with an office in Australia and mission in Papua New Guinea,¹⁷ and engages with Pacific governments on, among other things, the ratification and implementation of IHL. The ICRC perceives recognition of IHL in all regions, including the Pacific, as relevant in the prevention work of the ICRC, under the final part of its mission statement: "[i]t also endeavours to prevent suffering by promoting and strengthening international humanitarian law and universal humanitarian principles".¹⁸ Achieving recognition of the Geneva Conventions in the Pacific region, by the last few States to hold out on accession, was the main task of the then legal adviser to the ICRC Regional Delegation in the Pacific. In 2006, with Nauru as the last State not to be a party, she discussed the issue with the Nauru government, which also engaged in dialogue with other governments, as to the benefit of becoming a party to the Geneva Conventions.

Of course, small island States such as those in the Pacific face a range of domestic and international problems which make it difficult for them to adhere to international treaties. Many international treaties impose heavy reporting requirements, which small States have difficulty meeting. They also require monetary contributions or attendance at international meetings, which put a strain on the budgets of these States. To be a party to the Additional Protocols does not cost anything (unless States make a declaration under Article 90 of Additional Protocol I supporting the International Fact-Finding Commission, in which case the cost for the least developed nations in the Pacific is negligible),¹⁹ but the Rome Statute does include costs related to the Court's budget and

17 The Regional Delegation covers Australia, Fiji, Kiribati, Marshall Islands, Federated States of Micronesia, Nauru, New Zealand, Palau, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu, Vanuatu and autonomous States, territories and colonies of the Pacific: see ICRC "The ICRC in Fiji" <www.icrc.org>.

18 ICRC "The ICRC's Mission Statement" (2008) <www.icrc.org>.

19 Additional Protocol I, above n 2, art 90. See also Federal Department of Foreign Affairs, Switzerland "The International Humanitarian Fact-Finding Commission" <www.eda.admin.ch>.

includes yearly meetings of State parties.²⁰ The Anti-Personnel Mine Ban Convention also has regular meetings and reporting requirements.²¹ The governments of the Pacific, and their public services, are often small and understaffed. One individual may have to cover a wide range of portfolios from water management, to climate change, to charities. There are very few lawyers and legal drafters within government who have the time to deal exhaustively with the complexities of the full range of international treaties and transfer them to domestic law. The ICRC's Advisory Service²² (as well as non-governmental organisations working on particular weapons treaties) can assist politicians and public servants in understanding IHL treaties, drawing up accession documents and drafting legislation to implement the treaties domestically. The idea is not substitution – any drafting assistance is done in close collaboration with the government and in accordance with existing legislation and styles; rather, it is to take some of the workload off overworked staff. The UN Development Programme also provides assistance to developing States to attend UN and related meetings.

Once they are aware that the burden of accession and implementation is not great, often the ICRC finds it is more a challenge of persuading the bureaucrats or politicians of the relevance of IHL and of the benefits of becoming a party to IHL treaties – ultimately it will be the government, Cabinet and Parliament who have to decide whether it is in the State's best interests to become a party. However, this challenge is met by awareness that there remains a need in the Pacific for adherence to IHL treaties, even if there is currently no active armed conflict in the region.

Many countries in the Pacific have benefited from the UN and its and others' peace building efforts in the last 60 years. The Pacific region saw enormous suffering and destruction during World War II. Some parts continue to see riots, violence, unrest and, even occasionally, conflict. However, in general, the Pacific lives up to its name. In only a few contexts in the last ten years has the level of violence risen to the level of intensity that would distinguish an armed conflict from a situation of internal disturbance.²³ Therefore, under the definitions in jurisprudence and customary international law,²⁴ IHL has only occasionally been applicable in its modern form in the Pacific. Nonetheless, over the last ten years, there have been some situations of violence or unrest and conflict in the Pacific. Some Pacific States also send peacekeeping troops overseas or contribute troops to forces in Iraq and Afghanistan. IHL, therefore, has more relevance than one might think at first glance in the Pacific. Such situations are particularly relevant when considering the Additional Protocols to the

20 Rome Statute, above n 5, arts 112 (assembly of States parties), 115 and 117 (assessed contributions).

21 Anti-Personnel Mine Ban Convention, above n 4, arts 7 (reporting) and 11 (meeting of State parties).

22 ICRC "Advisory Service on international humanitarian law" <www.icrc.org>.

23 *Prosecutor v Duško Tadić (Judgment)* (7 May 1997) IT-94-1-T (Trial Chamber, ICTY) at [562].

24 See Additional Protocol II, above n 2, art 1(2); see also *Prosecutor v Fatmir Limaj et al (Judgment)* (30 November 2005) IT-03-66-T (Trial Chamber, ICTY) at [84].

Geneva Conventions. Similar and additional arguments apply to the Rome Statute and the Anti-Personnel Mine Ban Convention.

A The 1977 Additional Protocols to the Geneva Conventions

The ICRC considers the Geneva Conventions and their Additional Protocols of 1977 as the cornerstones of IHL and promotes acceptance and implementation of these treaties as the first priority in its legal work.²⁵ The two 1977 Additional Protocols strengthen and expand the range of protections for civilians from the effects of armed conflict and limit further the legitimate conduct of combatants during hostilities. Additional Protocol II specifically provides for the respect for IHL in non-international armed conflicts between a State's armed forces and dissident armed forces²⁶ and, to a certain extent, expands the protections under common Article 3 of the Geneva Conventions which provides for limited protection in all non-international armed conflicts.²⁷

The universal nature of the Geneva Conventions and the wide acceptance of the Additional Protocols²⁸ demonstrate that there is strong international solidarity to address the plight of countries and people involved in armed conflict. International solidarity does not often carry weight in the Pacific, where States sometimes feel isolated by the rest of the world on issues that greatly affect them such as climate change.

While the international community may think infrequently of the region, Pacific States have become engaged on major international issues in order to highlight their concerns about climate change. Arguably, climate change poses a risk of humanitarian disaster in the Pacific. It is traditionally and legally a non-IHL related issue, but of grave concern internationally nevertheless. As other States and non-State actors struggle to come to terms with how to deal with climate change and reduce carbon emissions, Pacific States are already feeling the effects of climate change. In Kiribati, for example, coconut palms are being poisoned by too much sea water encroaching onto previously viable land. Sea water is also polluting fresh water supplies. The I-Kiribati are considering options to move to other countries in the next 50 years.

25 Additional Protocol III provides for a new emblem, the red crystal, but does not otherwise expand international humanitarian law (IHL) protections in either international or non-international armed conflicts: Additional Protocol III, above n 2, art 2.

26 Additional Protocol II, above n 2, art 1(1).

27 Convention I, Convention II, Convention III and Convention IV, above n 1, common art 3.

28 There are 170 State parties to Additional Protocol I and 165 State parties for Additional Protocol II: see ICRC "International Humanitarian Law – Treaties & Documents" <www.icrc.org>.

Climate change and its devastating effects has been increasingly linked to armed conflict around the world.²⁹ In the Pacific region, land is very important and has traditionally been a source of conflict.³⁰ As land and resources deplete in the Pacific, this could spur new conflicts, in which adherence to the Additional Protocols will become vital in ensuring that the civilian population is protected from the effects of armed conflict. Indeed, a 2007 report by International Alert, a non-governmental organisation, cited six countries in the Pacific as "States facing a high risk of political instability as a knock-on consequence of climate change".³¹ Already in the Pacific, the inhabitants of the Carteret Islands off the coast of Papua New Guinea have had to start moving from their islands to Bougainville, Papua New Guinea.³² With the move of some 2700 people from the Carteret Islands to an island already recovering from an armed conflict in the last decade and whose government is not supportive of the resettlement, there is scope for tensions, if not armed conflict, as a result of climate change.

Understandably, the major international issue for most Pacific States is climate change as an issue of international environmental and economic law.³³ Increasingly they are being heard on climate change, but for many years it was felt that the international community did not show any solidarity with small island States on the issue.³⁴ By engaging on treaties that are of international importance in one area, namely IHL, States in the Pacific can raise their profile in relation to the rest of the international community and demonstrate serious commitment to world affairs. This can produce benefits in terms of engagement on climate change, whether through being at the table when serious issues are discussed in forums such as the UN or as a bargaining tool for real engagement by other States on climate change.

The 1977 Additional Protocols become particularly important where States are already actively engaged in armed conflict or in peacekeeping missions. Around one third of Pacific States are involved in such missions currently. Australia and New Zealand are engaged in an active armed

29 The International Review of the Red Cross will dedicate its September 2010 edition to this issue: see ICRC "Future themes for the International Review of the Red Cross, December 2009 – September 2010" <www.icrc.org>.

30 ICRC *Under the Protection of the Palm: Wars of Dignity in the Pacific* (Regional Delegation in the Pacific, Suva, 2009) at 8.

31 Dan Smith and Janani Vivekananda *A Climate of Conflict: The Links between Climate Change, Peace and War* (International Alert, London, 2007) at 44.

32 Adam Morton "First climate refugees start move to new island home" *The Age* (Melbourne, 29 July 2009) <www.theage.com.au>.

33 Pacific Islands Forum Secretariat "Forum Communiqué" (40th Pacific Islands Forum, Cairns, 5 August 2009) at [4] and annex A.

34 See for example "Ahead of Copenhagen talks, small island nations sound alarm at UN on climate change" (25 September 2009) UN News Centre <www.un.org>.

conflict in Afghanistan and are subject to stringent IHL as implemented in their military manuals, defence orders and criminal legislation (both are parties to most IHL treaties). Tonga also has a small contingent in Iraq as part of the United States-led coalition. Fiji, Tonga and Vanuatu send peacekeepers to conflict zones around the world. Papua New Guinea is considering doing likewise. UN peacekeeping missions are subject to IHL under the UN Secretary-General's Bulletin of 1999,³⁵ including principles under the Geneva Conventions and the two 1977 Additional Protocols. Countries that send peacekeepers need to ensure that their armed forces, while acting as peacekeepers, understand and apply IHL. Therefore, armed forces must be properly trained to react correctly in accordance with IHL, even in the heat of the moment. The ICRC provides training to armed forces in some of these countries on their IHL obligations. Such countries will also need to ensure that they have adequate laws in their own legal systems to prosecute combatants and commanders who breach IHL while on peacekeeping missions. By becoming a party to the Additional Protocols and implementing them in domestic law, States will have the necessary and adequate mechanisms to prosecute those persons who violate IHL when they return home from peacekeeping or other missions.

B The Rome Statute of the International Criminal Court

Criminal accountability for grave breaches of IHL and other serious international crimes is a requirement under the Geneva Conventions, but it was not until the 1990s that the international community established several ad hoc tribunals to deal with international criminal law. Now, the Rome Statute is a treaty that provides for the international prosecution of violations of IHL (and of crimes against humanity and genocide).³⁶ In dealing with such crimes, it draws directly from the "grave breach" and other provisions in the Geneva Conventions and Additional Protocol I,³⁷ as well as from customary international humanitarian law.³⁸ Therefore, all States in the world already have an obligation to punish violations of the Geneva Conventions and to promote their adherence. The Rome Statute, which has 111 State parties, of which seven are from the Pacific,³⁹ expands upon the criminal provisions of the Geneva Conventions to ensure that crimes committed in both international and non-international armed conflict can be punished and those who commit them can be brought to justice. The International Criminal Court was established in 2002 and became operational in 2004. It is only just getting off the ground – its first trials commenced in 2009 – but

35 *Secretary-General's Bulletin: Observance by United Nations Forces of international humanitarian law* ST/SGB/1999/13 (1999).

36 Rome Statute, above n 5, art 5.

37 Convention I, above n 1, art 50; Convention II, above n 1, art 51; Convention III, above n 1, art 130; Convention IV, above n 1, art 147; Additional Protocol I, above n 2, arts 11(4), 85.

38 See Henckaerts and Doswald-Beck, above n 15, at 568 (rule 156).

39 Australia, Cook Islands, Fiji, Nauru, New Zealand, Marshall Islands and Samoa have signed and ratified or acceded. Solomon Islands has signed but not ratified.

States in the Pacific have been interested in the Rome Statute for two main reasons: assisting States facing war crimes and crimes against humanity currently and not becoming a safe haven for war criminals.

By adhering to the Rome Statute, States in the Pacific have seen the International Criminal Court as an opportunity to assist other States that are facing conflict and serious crimes. The conflicts continuing around the world, such as in the Democratic Republic of the Congo, Uganda, Sudan, Colombia and Afghanistan (conflicts which the Court is monitoring or investigating),⁴⁰ demonstrate the continuing need for international accountability for IHL violations. The Pacific has experienced its own share of IHL violations and prosecutions for such crimes from the Japanese trials after World War II to the violence and subsequent trials in Solomon Islands in the last decade. The governments in the Pacific can understand the need to see justice done for war crimes committed around the world on the basis of their own experiences. By becoming a party to the Rome Statute, they lend their support for ending abuses of IHL and prosecuting those who have committed them – the kind of abuses that have occurred to a lesser or greater extent in their own region in the last 60 years.

Along with having the ability to assist other States in support of war crimes trials, Pacific States want to be able to prosecute or extradite those coming to their shores if those persons have committed serious offences. They do not want to become safe havens for war criminals. Although, or precisely because, Pacific islands often appear remote, with small governments and little interest in far away conflicts, there is a possibility of persons on the run from prosecution elsewhere ending up on a Pacific island.⁴¹ The State where they end up will want the ability to prosecute them, if they are suspected war criminals, or extradite them to the State where they are wanted or to the International Criminal Court, if they have committed offences in a situation which the Court is investigating. By becoming a party to and implementing the Rome Statute in domestic law, States have the opportunity to prosecute persons who have committed war crimes, crimes against humanity or genocide in a State party to the Rome Statute or who are nationals of a State party or to decide to exercise universal jurisdiction over persons no matter where they come from or where the crime was committed. In Apia in 2008, the ICRC and Samoa's Attorney-General hosted a workshop on the Rome Statute at which representatives from most Pacific countries developed a Model Law implementing the Rome Statute for the Pacific based on the Commonwealth Secretariat's Model Law.⁴² While the provisions are lengthy and delve into many aspects of other existing laws in the

40 International Criminal Court "ICC Prosecutor confirms situation in Georgia under analysis" (Press Release, 20 August 2008).

41 In a recent non-IHL related case, a wanted murder suspect from Australia was eventually found in Tonga after a seven-month search when he overstayed his visa: Les Kennedy and Dylan Welch "One of state's most wanted men held in Tonga" *Sydney Morning Herald* (Sydney, 1 October 2009) <www.smh.com.au>.

42 Model Law to Implement the Rome Statute of the International Criminal Court and Report on the Commonwealth Expert Group on Implementing Legislation for the Rome Statute of the International

various countries, such as extradition, prisoner transfer, human rights and constitutional issues, the Model Law can be adapted quite easily to different Pacific States and assist them in dealing with suspected war criminals and in interactions with the International Criminal Court.

C The Convention on the Prohibition of Anti-Personnel Landmines

Pacific States have been particularly keen to join up to the weapons treaties. For example, seven Pacific States recently signed the Cluster Munitions Convention, and they have a relatively good rate of implementation through the Model Law provided by the ICRC.⁴³ The IHL weapons treaties, including the Anti-Personnel Mine Ban Convention, derive their mandate and legitimacy originally from Article 51(4) of Additional Protocol I, which prohibits indiscriminate attacks, such as "those which employ a method or means of combat which cannot be directed at a specific military objective ... and consequently ... are of a nature to strike ... civilians ... without distinction".⁴⁴ Similarly, Article 35 of Additional Protocol I sets out basic rules to limit the methods and means of warfare, including weapons "of a nature to cause superfluous injury or unnecessary suffering". This is also a principle of customary international law.⁴⁵ Under customary international law, landmines are only to be used where their effect will not be indiscriminate.⁴⁶ The legitimacy of the Anti-Personnel Mine Ban Convention and the prohibition on landmines is evident in the high number of adherents to that treaty. Only four Pacific States are not party to the Anti-Personnel Mine Ban Convention⁴⁷ and 156 States are parties globally.

Similar to the argument in relation to the Rome Statute being a haven for war criminals, Pacific States do not want to be transit points for shipments of dangerous weapons. The importance of this Convention is recognised in Pacific States for two main reasons. As islands with large expanses of water between them, there is always the risk that shipments of weapons could pass through their exclusive economic zones or even territorial waters. The Anti-Personnel Mine Ban Convention allows States to destroy any landmines that enter their territory and to prosecute those who may be shipping the weapons.⁴⁸

Criminal Court, Marlborough House, London, 7-9 July 2004 (Commonwealth Secretariat, London, 2005) available at <www.thecommonwealth.org>.

43 ICRC "National implementation of international humanitarian law: Model laws" <www.icrc.org>.

44 Additional Protocol I, above n 2, art 51(4)(b).

45 Henckaerts and Doswald-Beck, above n 15, at 37 (rule 11).

46 Ibid, at 280 (rule 81).

47 Tonga, Tuvalu and Federated States of Micronesia have not signed, ratified or acceded. Marshall Islands has signed but not ratified.

48 Anti-Personnel Mine Ban Convention, above n 4, art 4 (destruction) and art 9 (read in conjunction with art 1 (prosecution)).

Moreover, Pacific island States remember (and often still face) the unexploded remnants of war from World War II; bombs and landmines still lie in the backyards of some I-Kiribati, for example. Every year or so, a collection of these are removed and destroyed, but now and then the bombs explode where they are lying and cause injury. Also, more than 50 unexploded remnants of war were found in Palau in 2009 when a new road to the capitol was built. In signing IHL treaties, Pacific States not only indicate that they would like some support for the challenges they face with these remaining weapons, but also that they recognise the greater challenges faced by other countries, many of them in the Asia-Pacific region, in clearing landmines and assisting their victims. For example, in becoming a party to the Anti-Personnel Mine Ban Convention, Palau secured the assistance of a mine-clearance non-governmental organisation to meet its obligations of destruction of existing landmines under the Convention as well as the other mines found from World War II. There is also a reminder in States adhering to the Anti-Personnel Mine Ban Convention (and other weapons conventions) that such prohibited weapons should not be used in any conflict, including those which may arise in the future in the Pacific region.

IV CONCLUSION

Sixty years ago, while there was great momentum and reason to be enthusiastic about the adoption of the Geneva Conventions, it probably never occurred to the negotiating parties that one day the Conventions would achieve universality. Despite that great achievement only a few years ago in the Pacific region, there is still a long way to go to ensure universality of all the major IHL instruments that have been adopted since 1949. Treaties such as the 1977 Additional Protocols to the Geneva Conventions, the Rome Statute and the Anti-Personnel Mine Ban Convention all expand upon and reinforce the fundamental principles laid out in the Geneva Conventions. To ensure that weapons are not used indiscriminately, that civilians are accorded greater protection and that there is accountability for breaches of IHL, these treaties need wider or universal acceptance.

The challenge for the ICRC and for all State parties (including the Pacific islands) under Article 1 common to all four Geneva Conventions is to constantly monitor the relevance of the treaties and remind States that they have the responsibility to ensure that violations of IHL do not occur in the future. This challenge becomes even greater in States where there is little interest, a perceived lack of importance and more pressing international issues at stake, such as in the Pacific. Although the argument that States show international solidarity in adhering to treaties of global significance has some weight in relation to the most fundamental treaties such as the 1977 Additional Protocols, treaties that require more domestic legislation and regulation and those that get into specifics of IHL require arguments targeted to the particular situation and needs (past, present and future) in Pacific States.

IHL is relevant in all countries around the world, including in the Pacific region. The Pacific island States have the opportunity to be significant players on the international field by engaging with IHL. They have the memory of World War II fought on their territory (including physical reminders in the form of unexploded remnants of war), but also more recently the problems such as

those in Papua New Guinea and Solomon Islands, as well as the threat of conflict that climate change might bring. Everyone would like to see an end to all wars, but while they last, IHL will be constantly required to limit their effects. One way to ensure this is to achieve universality of the new fundamental IHL treaties. If the ICRC and State parties from the region can get these messages across effectively, the Pacific might not be the region of the world to lag behind. Now that States in the region are beginning to perceive the relevance of IHL, 60 years from now it may not be a Pacific state that is the last to signal IHL adherence as it was four years ago with the Geneva Conventions.

